

IMPORTANT NOTICE

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Neutral Citation Number: [2019] EWCOP 47

Case No: 12925947

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF JDO

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

Date: 22nd October 2019

Before :

Her Honour Judge Hilder

THE LONDON BOROUGH OF BARNET

Applicant

and

(1) JDO

(by his litigation friend, the Official Solicitor)

(2) OD

(3) DD

Respondents

Hearing on 10th June

Decision made on the papers after further paper submissions

Mr. Michael Paget instructed by and for the Applicant
Mr. Conrad Hallin (instructed by Leigh Day Solicitors) for the Respondent

The hearing was conducted in public subject to a transparency order made on 19th February 2019. The judgment was handed down to the parties by e-mail on 23rd October 2019. It consists of 18 pages, and has been signed and dated by the judge.
The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

I. The Issues

1. An application has been made under the streamlined procedure set out in Part 2 of Practice Direction 11A for authorisation of deprivation of liberty in the living arrangements of JDO.
2. The application has been taken out of the streamlined procedure because it is apparent that the living and care arrangements of JDO are contentious. It is now proceeding through the usual court processes for determination of a welfare dispute, with the next substantive hearing listed on 4th November 2019.
3. The Official Solicitor has raised concerns that, in issuing the application under the streamlined procedure, the Applicant demonstrated a serious breach of the duty of full and frank disclosure which is part of that procedure. This judgment sets out the court's conclusions on that issue.

II. The background facts

4. JDO is now 24 years old. The respondents OD and DD are his mother and father respectively. JDO has not lived with them since the age of 11 but they visit him and are involved in his life.
5. JDO has diagnoses of cerebral palsy, autism, learning disability and epilepsy, and his behaviour can be challenging. Since May 2017 JDO has been living and being cared for at 22TA, a supported living placement. It is a one bedroom flat of which he has exclusive occupation. His care arrangements include 8 hours a day of 1:1 support plus 8 additional hours per month of 2:1 support for family contact. He shares waking night staff with the residents of other flats in the block. Latterly, following incidents when police assistance was required, JDO also has 2:1 support when accessing the community.
6. There are ongoing proceedings in the Queen's Bench Division claiming damages for JDO on the basis of clinical negligence. The Official Solicitor acts as JDO's litigation friend in those proceedings too.

III. Court of Protection proceedings to date

7. On 12th June 2017 an order was made authorising deprivation of his liberty in JDO's living arrangements at 22TA in the standard terms of the streamlined procedure. In particular the order:
 - a. records that JDO's participation in the proceedings has been secured by the appointment of OD as his Rule 3A representative;
 - b. defines the duration of the authorisation by reference to a 12 month 'review period' and

- c. requires the Applicant to make an application to the court ‘no less than one month before the expiry of the review period’, in accordance with any Rules or Practice Directions then in effect.
8. The Applicant made an application by COPDOL11 dated 12th November 2018 [D4]. By the terms of the June 2017 order, this application was six months late and the previous authorisation of deprivation of liberty had already expired.
9. The COPDOL11 form has a box on the first page which tells the applicant to “Give any factors that ought to be brought specially to the court’s attention (the applicant being under a specific duty to make full and frank disclosure to the court of all facts and matters that might have an impact upon the court’s decision).” In that box, the Applicant has written fifteen lines of text separated into five bullet points. The fifth one says:

“The Local Authority is aware that [JDO] has separate clinical negligence proceedings in which the Official Solicitor is instructed. The Official Solicitor, who is not instructed in relation to [JDO’s] care and placement, has shared its view that, going forward, renting a flat with a private package of care might work for [JDO] with a view of a flat purchase in the future. No firm proposal has been seen and in any event none of the parties consider that this is in [JDO’s] best interests at the present time (certainly for the duration of this order) and all parties consider that the current supported living and care package remain in [JDO’s] best interests.”
10. The application is supported by the usual annexes and a statement apparently by OD dated 3rd October 2018. The statement is typed and couched in formal language, including the following provisions:

“4. I have been advised about and I am in agreement with the London Borough of Barnet making an application to the Court of Protection to authorise the deprivation of liberty in the supported housing for my son. This includes the fact that there is no less restrictive option for my son other than to continue to reside in his current accommodation...and the restrictions in place are a proportionate response to the significant risks and harms he would be subject to if he were anywhere less restrictive....

9. I can confirm that I do not consider there is a need for an oral hearing as I am in full agreement of the proposed arrangements under the Deprivation of Liberty Safeguards for my son [JDO].”
11. On 24th January 2019 the court received a letter from JDO’s parents raising concerns about the care being provided to him [J2-3]. The letter is handwritten and signed “MR [D]”. It says (reproducing DD’s own language in full):

“I fill that my son [JDO] is not happy wear he is living and we think he is not looked after propalley and me and my wife think there’s a lack of commication between the staff and us and the staff will not let [JDO] out into the community on family visits they say they are to scared to let him out when we visit him he not very tidy but dirty and his flat is not tidy toilets not clean water on the floor in which someone could fall over. And

also everytime we ring up to arrange the next visit they keep telling us they will ring us back but they never do this so we do not know what's happening on the next visit if we are staying in or going out
The staff say to us he has two to two to go out but they will still not let him out on visits [JDO] is getting very confused 1 minute they say he can go out the next minute they change they mind and say to stay in and when we try to contact social service's about this we contact the office and we get no reply on ringing us back who looking after my son [JDO].”

12. On the same day as it was received, the court staff sent a copy of DD's letter to the Applicant, with a request for a COP24 statement to be filed in response [J1].
13. On 1st February 2019 the court received a telephone call from Anna Moore of Leigh Day Solicitors, asking if the court had received an application from the Local Authority in respect of JDO, whether a hearing had been listed, and whether letters from the Official Solicitor had been put before the court. The call was followed up by a letter from Leigh Day [J4] which was received by the court on 15th February 2019.
14. Also on 15th February 2019, the court received a COP9 application from the Applicant [D29] asking for further time to submit the requested statement and that the court “consider the local authority's view that an independent person be appointed as litigation friend in this case” because “The local authority is concerned about the Official Solicitor having a potential conflict between [JDO's] best interests in the clinical negligence claim and taking a view on the level and type of care and support that he currently requires.”
15. On 19th February 2019 an order [D33] was made which effectively took the matter out of the streamlined procedure. The case was allocated to the personal welfare pathway, JDO was joined as a party and the Official Solicitor was invited to act as litigation friend for him. The matter was listed for a case management conference on 21st March.
16. The Applicant then filed a COP9 application dated 1st March 2019 [D38] asking that “an independent person, Ian Campbell” be appointed as JDO's litigation friend. The reasons for the application were set out as follows:

“The Applicant local authority has set out its view that the Official Solicitor should not be appointed as litigation friend in this matter for two reasons.
First, there is an independent person who has already set out that he is able to act in this capacity – Ian Campbell of Campbell Law Solicitors. Mr Campbell has confirmed that in principle and subject to funding, he would be able to act as litigation friend in this matter. The Official Solicitor is a litigation friend of last resort and so is not required in this matter.
Second, the local authority is concerned that the Official Solicitor may have a conflict of interest as he already acts as litigation friend for JDO in his clinical negligence claim and the level and cost of care and support JDO receives is of direct consequence to the amount of award JDO would receive in his clinical negligence case.”

17. By order made on 15th March 2019 [D42] District Judge Ellington dismissed that COP9 application and affirmed the earlier order.

18. At the hearing on 21st March, an order was made which
- a. recites the Official Solicitor's intention to make any necessary application to the Queen's Bench Division for any permission necessary to rely upon documents filed in those proceedings within the Court of Protection proceedings;
 - b. authorises the deprivation of liberty in JDO's living arrangements at 22TA on an interim basis;
 - c. directs the Applicant to provide JDO's parents with the application papers and makes provision for them to decide if they wish formally to be parties to the proceedings (and if they do not, makes provision for the Official Solicitor to share information and relevant documents with them on an ongoing basis);
 - d. directs the head of social services to file a statement explaining various matters including,
 - i. why the applicant did not comply with its agreement with the Official Solicitor to put the latter's concerns before the court when making its application;
 - ii. how a statement ostensibly by OD came into being;
 - iii. why the parents' concerns were not put before the court;
 - iv. why the applicant pursued a streamlined application rather than seeking an oral hearing;
 - e. gave directions to progress the substantive application.
19. JDO's representatives subsequently made a COP9 application to vary those directions, which was agreed by the Applicant and reflected in an order made on 10th May 2019 [D43]. The matter was listed for attended hearing before me on 10th June.
20. At the hearing on 10th June JDO's parents indicated that they wished to be parties to the proceedings, and they were joined as second and third respondents. Directions were given to progress the matter to a hearing ("which may be a final hearing") on 4th November 2019. A separate order was made for the filing of written submissions in respect of the issue of compliance with the requirements of the streamlined procedure. The timetable for the consideration of those submissions was subsequently varied by order made on 24th September 2019, because the Applicant filed its documents late.

IV. Documents considered

21. I have considered all the documents collated into the bundle for the hearing on 10th June 2019. In respect of the issue of compliance with the requirements of the streamlined procedure I have read additionally:
- a. on behalf of the Applicant, a statement by Mojo Malomo (social worker and best interests assessor) and submissions by Mr. Paget, both dated 9th September 2019; and
 - b. on behalf of JDO by his litigation friend the Official Solicitor, submissions by Mr. Hallin dated 23rd September 2019.

V. The streamlined procedure

22. The streamlined procedure for authorisation of deprivation of liberty is set out in Part 2 of Practice Direction 11A. The introductory paragraph of that part of the PD (paragraph 27) provides that:

“Reference should be made generally to the decision of the Supreme Court in *P (by his litigation friend the Official Solicitor) v. Cheshire West and Chester Council and another; P and Q (by their litigation friend the Official Solicitor) v. Surrey County Council* [2014] UKSC 19, and in relation to the procedure in these cases, to the judgments of the President of the Court of Protection in *Re X and Others (Deprivation of Liberty)* [2014] EWCOP 25 and in *Re X and Others (Deprivation of Liberty) (Number 2)* [2014] EWCOP 37.”

23. Paragraphs 28 – 31 deal with “**Making the application**”. Paragraph 29 spells out that:

“The application form and accompanying annexes and attachments are specifically designed to ensure that the applicant provides the court with essential information and evidence as to the proposed measures, on the basis of which the court may adjudicate as to the appropriateness of authorising a deprivation of liberty, and in particular to identify whether a case is suitable for consideration without an oral hearing. The use of the form and its annexes is mandatory and they must be provided fully completed and verified by the required statements of truth.”

24. Paragraph 33 of the Practice Direction sets out, in an emboldened heading, the **Applicant’s duty of full and frank disclosure**:

“The applicant has a duty of full and frank disclosure to the court of all facts and matters that may have an impact on the court’s decision whether to authorise the deprivation of liberty. The applicant should therefore scrutinise the circumstances of the case and clearly identify in the evidence in support (in Annex A to form COPDOL11) factors –

- (a) needing particular judicial scrutiny;
- (b) suggesting that the arrangements in relation to which authorisation is sought may not in fact be in the best interests of the person the application is about, or the least restrictive option;
- or
- (c) otherwise tending to indicate that the order should not be made.

Pursuant to this duty, the applicant should also identify those persons, not consulted by the applicant, who are in the same category under paragraph 39 as persons with whom the applicant has consulted. Those persons must be listed in Annex B to Form COPDOL11 together with an explanation in that Annex of why they have not been consulted.”

25. Paragraph 39 sets out the consultation required before an application is lodged with the court:

“The applicant must ensure that the following people are consulted about the intention to make the application –

- (a) Any done of a lasting power of attorney granted by the person;
 - (b) Any deputy appointed for the person by the court;
- together with, if possible, at least three people in the following categories-
- (c) Anyone named by the person the application is about as someone to be consulted on the matters raised by the application; and

- (d) Anyone engaged in caring for the person or interested in his or her welfare.”

VI. The Applicant's position

26. The Applicant's social worker has set out in her statement the reasons why she “did not expect this case to become a contentious authorisation” in the following terms:

“a. The JDO's Deprivation of Liberty (DOL) application was a renewal of the existing order which expired on 12/06/2018.

b. JDO's parents OD and DD were invited to [JDO's] DOL assessment meeting by the Social Worker/DOL's assessor on the 26/09/2018 but they were unable to attend.

c. I telephoned the mother after the meeting and she gave her reason for non-attendance. I therefore explained what happened at the meeting to her and asked if she would be willing to act in the capacity of Rule 1.2 representative for her son, to which she responded 'yes.' We agreed to meet at her house on 1st October 2018 to explain her role as Rule 1.2 representative and to present her with COP24 (witness statement). On getting to her home on the 1st October 2018, OD refused to come to the door stating that Lucy Allen-Shirtcliffe (Clinical case Manager for J.E. Jackson Limited) had informed her not to sign any form. Her husband subsequently came to the door after a long knock. I explained to DD that his wife had arranged that we meet at their home two days earlier, so I handed over the form to him and requested that they read through it and to contact me if they require further explanation.

d. I explained what had happened during my visit to the OD's home to my colleague Lydia Gyamfi-Nyame, who is JDO's allocated Social Worker and who has worked with him and his parents for 2 years. Lydia was concerned about OD's response, because according to Lydia, she is a pleasant and approachable person. Lydia decided to speak to her over the phone to explain the DOL's procedure further to her at which OD apologised and arranged to visit me at the office 3rd October 2018. Additionally, I contacted Lucy Allen-Shirtcliffe who informed me that she had informed OD not to complete the form if she is unsure of where it came from.

e. OD and DD attended our offices on 03/10/2018 at 11am to sign the COP24 (witness statement). I went through the wording of the witness statement for clarity with them; OD informed that she is aware of the form and she is best placed to represent her son. She then proceeded to sign the form in front of her DD and Lydia.

f. This DOL application was a review of the existing one (please see exhibit attached previous Court Order of June 2017) of which OD was JDO's Rule 3A Rep. There was never any doubt about her competence with regards to being Rule 1.2 representative for her son. If JDO's parents have shown any disagreement at any point during the consultation, this would have triggered a Court hearing.

g. There was consultation with JDO's litigation friend in the negligence claim prior to making the application. Reference is made to the Official Solicitor's views section 1 of the completed COPDOL11 form. There was full and frank disclosure. Arguably, however, the local authority has failed to comply with PD11A paragraph 39 by not specifically including the Official Solicitor as a consultee on Annex B. The Official Solicitor was aware of the application and so PD11A, paragraph 40 was complied with.

h. The application did reference the intentions of the Official Solicitor for future accommodation. The Official Solicitor offered no current available option for the court to consider.

i. However, the application dealt with JDO's best interests in the context of the actual available options. No available alternative would crystallise in the time period of the authorisation (it is still unclear to the local authority what the timescales involved in any personal injury settlement will be). That is why the Re X procedure was used. It continues to be in JDO's best interests to reside at [22TA].

j. Barnet DOLS team only deals with Statutory DoLS application and all social workers on the team are trained as Best Interests Assessors and are expected to attend yearly Refresher training. COPDOL applications are undertaken by trained social workers like myself."

27. Ms. Malomo goes on to explain that she has "completed over 50 assessments which have passed through the court of protection without any issues" and that she "always ensure[s] that the voice of the person to which the application relates is heard and that their family are well informed..." In this matter, she says (paragraph 7) that she:

".. consulted with [JDO's] parents, his case manager appointed by the Clinical Negligence Lead team, his deputy for property and affairs, his local authority social worker, his care provider and his Solicitor. JDO has staff from his legal team working with him at his home and there was no issue raised with his care at the placement. I proceeded with the application where there was consensus that JDO required the court order to enable the staff at his home to continue to take care of him while his Clinical Negligence claim is pursued by his legal team who are planning to provide him with alternative accommodation where they believe his care would be best provided."

28. In his written submissions Mr Paget sets out an argument that paragraph 39(d) has "apparent tensions" which mean that only persons with *immediate* concern about P fall within the categories of persons to be consulted, and from those categories it is up to the applicant to choose whom it wishes to consult:

"... People that fall within that category include 'anyone engaged in caring' which has a present-tense requirement – it appears to require that the person is currently actively providing care. It excludes people that 'care about' P and people who might in the future provide care to P but are not yet 'engaged' in doing so.

6. The second category of people that fall within paragraph 39(d) are people ‘interested in [P’s] welfare.’ This second category requires the people to be currently interested – to have the interest now – but it is not explicitly restricted to current welfare.

7. It is submitted that for the second category to be consistent with the purpose of the *Re X* process it must relate to P’s immediate welfare or near-future welfare. Any welfare concerns about the longer term fall outside of paragraph 39(d) because the *Re X* process will only result in an authorisation of a DOL for one year or less.

8. Another tension in paragraph 39(d) is that an Applicant can decide of all the people engaged in caring for P or interested in their welfare which ones to consult with. There is no priority or ranking test between all these people. The Applicant can bypass the primary carer.

(For convenience, I shall refer to this as “the Applicant’s scope of consultation argument.”)

29. Mr Paget contends that this approach is “partially ameliorated” by the duty of full and frank disclosure but asserts that the duty is a limited one:

“9. ... that requirement is subjective – what is the view of the Applicant? It does not require the Applicant to disclose different opinions when those opinions are not, in the Applicant’s view, based on fact. The Applicant only has to highlight paragraph 33(b) if it considers the DOL is not ‘in fact’ in P’s best interests.”

(For convenience, I shall refer to this as “the Applicant’s subjective view argument.”)

30. Mr. Paget then further contends that the consultation requirement of the Practice Direction should be understood as limited to the persons who offer an alternative to the applicant’s proposal:

“10. Paragraph 33 then requires the Applicant to list all people who could fall within paragraph 39. That is extremely difficult to comply with if paragraph 39(d) extends to anyone who is interested in the care of P. It would, on a literal meaning, extend to anyone, except the most insensitive person, who has met P. Does paragraph 33 require such classes of people to be listed in Annex B?

11. It is submitted that paragraphs 33 to 40 must be interpreted purposively. They are written in the context of an uncontentious DOL authorisation. Like any welfare application the Court can only, taking the decision P cannot make for themselves, consider ‘available options’ – *N v ACCG* [2017] UKSC 22, [2017] COPLR 200. In that context the requirement for full disclosure under paragraph 33 is to highlight that the current DOL may not, in fact, be in P’s best interests because there are other actual competing alternatives available. It is not a duty to disclose criticism of the current DOL when that DOL will continue to be in P’s best interests, albeit perhaps not ideal, because there are no other immediate alternatives.”

(For convenience, I shall refer to this as “the Applicant’s alternatives-only argument.”)

31. Mr. Paget accepts that:

- a. “a lot of the initial confusion in this application could have been avoided” if letters from the Official Solicitor had been annexed to the application; and
- b. the Applicant “was distracted by considering whether or not the Official Solicitor, as litigation friend to P in other proceedings, had the status of a party for the *Re X* application.”

32. The explanation of the Applicant’s approach to the commencement of these proceedings, as set out in Mr. Paget’s submissions, is essentially two-fold:

- a. There was no reason to state in the application paperwork that its proposed placement may not in fact be in JDO’s best interests “because there were no other available options at the time of the application to call that into question” (paragraph 15) and “There was no prospect that in the period of the DOL authorisation sought in the application, up to November 2019, that there was any other available option for JDO...” (paragraph 19); and
- b. The Official Solicitor was not listed in Annex B as a person to be consulted because “it did not appear to the Council that the Official Solicitor was interested in JDO’s current welfare” (paragraph 21).

VII. The Official Solicitor’s position

33. Mr Hallin has set out in his submissions (paragraph 6) a summarising chronology of concerns, which I further summarise as follows:

- a. Firstly, in 2018 as part of the clinical negligence proceedings and on the basis of information from JDO’s case managers, the Official Solicitor became concerned that his current placement was not meeting his needs.
- b. This led to a best interest meeting on 9th May 2018, at which the case managers and JDO’s parents expressed their concerns.
- c. The Official Solicitor confirmed to the Applicant the discussion of concerns in a letter dated 21st May 2018) [J10]. That letter sets out the Official Solicitor’s request that a residential college placement be considered and emphasises that “the most pressing matter is to urgently review [JDO’s] placement.” It concludes that, if the Local Authority does not consider the Official Solicitor’s suggested alternative placement to be suitable “it may be that the Court of Protection will need to resolve the matter of what would be in [JDO’s] best interests. If such a dispute arises, we would expect the Local Authority to be proactive in issuing proceedings to resolve this matter as a matter of urgency.”
- d. A placement review of sorts took place.

- e. In a further letter, dated 16th August 2019 [J29], the Official Solicitor expressed disappointment that the review “fails to consider any of the concerns raised by [JDO’s] treating team at the Round Table Meeting.” Specifically it requested that “this letter is put before the court when seeking any further authorisation of the DOL.”
 - f. On 8th October 2018, the Local Authority asked the Official Solicitor to contribute to the DOL review being undertaken. A response was sent the same day asking that the letters of 21st May and 16th August be put before the court.
34. Mr. Hallin points out that neither of the Official Solicitor’s letters were provided to the court with the COPDOL11 application.
35. Mr. Hallin asserts that that Ms. Malomo’s description of consensus is “simply incorrect”: her reference to “staff from his legal team” is reference to JDO’s case managers, and it was their concerns which led to the best interests meeting in May 2018. Failure to recognise this, Mr Hallin contends (paragraph 10(e)), suggests “a lack of insight, *even with the benefit of hindsight*, into the sort of concern that should trigger the applicant to reconsider whether the *Re X* procedure is an appropriate one to use.”
36. In respect of how the application papers were prepared, Mr Hallin points out that the statement by OD was “clearly not in her own words” and that no explanation has been offered as to the Applicant’s reaction (or lack thereof) to DD’s letter. It is acknowledged that the parents may have had fluctuating views but submitted that the failure to inform the court of concerns as requested was “likely to constitute a serious breach of the duty of full and frank disclosure.”
37. In response to Mr. Paget’s submissions, Mr. Hallin is clearly taken aback that they are seriously made:
- a. “paragraphs 38 to 40 of PD11A unquestionably required the applicant to consult [JDO’s] parents, case managers, and the Official Solicitor, all of whom expressed concerns about [JDO’s] care that meant that it was inappropriate to use the *Re X* procedure” (paragraph 11(b));
 - b. It is “not understood” how Mr. Paget’s suggestion that it is open to the applicant to “bypass the primary carer” is “thought to be appropriate or consistent with the duty to consult” under PD11A (paragraph 11(c));
 - c. To suggest that the applicant is not required to disclose different opinions when they are not in the applicant’s view “based in fact” is “to misunderstand the duty of full and frank disclosure fundamentally” (paragraph 11(e));
 - d. the Applicant’s alternatives-only argument is “wrong in law” (paragraph 11(f)). The effect of such an approach would be to limit the duty of full and frank disclosure to cases where an “immediately available” alternative has been identified. That usually being the responsibility of the Local Authority, its own inaction would mean that concerns about a placement by family members or others would not need to be drawn to the attention of the court, which “cannot be right”; and

- e. the Applicant's scope of consultation argument is "clearly wrong" and "artificially denies the relevance of P's long-term interests to his present care and living arrangements" (Paragraph 11(g)).

38. The Official Solicitor concludes that the Applicant's decision to use the streamlined procedure in this matter demonstrates "failure... to understand or act in accordance with its obligations to consult and provide full and frank disclosure..."

VIII. Discussion

39. It is important to recall the genesis of the streamlined procedure. The very first paragraph of that part of the Practice Direction which sets out the procedure (paragraph 27 of PD11A) refers to the *Re X* cases. Those cases addressed the concern of the then President with "the practical and procedural implications for the Court of Protection of what all informed opinion agrees is the large increase in caseload which will follow in consequence of the Supreme Court's decision¹" in *Cheshire West*.

40. The objective of the *Re X* cases was

"to devise, if this is feasible, a standardised, and so far as possible 'streamlined', process, compatible with all the requirements of Article 5, which will enable the Court of Protection to deal with all DoL cases in a timely but just and fair way. The process needs, if this is feasible, to distinguish between those DoL cases that can properly be dealt with on the papers, and without an oral hearing, and those that require an oral hearing²."

The striving was to envision a proportionate and efficient way for the state (in the person largely of Local Authorities like the Applicant in this matter) to meet its obligations; but practicality is clearly to be the servant of compliance with obligations, and not the other way round.

41. Article 5 of the European Convention on Human Rights is concerned with the right to liberty and security. In so far as is material to present considerations, it provides as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

....

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

....

¹ *Re X and others (deprivation of liberty)* [2014] EWCOP 25 at paragraph 1

² *Re X and others (deprivation of liberty)* [2014] EWCOP 25 at paragraph 5

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

42. The guidelines set out in the two *Re X* judgments were duly implemented in a new ‘streamlined’ procedure which was set out in a Practice Direction (then PD10AA) and commenced on 17th November 2014.

43. Some seven months later, on 16th June 2015 the Court of Appeal decision in *Re X (Court of Protection Procedure)* [2015] EWCA Civ 599 was handed down. In strongly worded (albeit technically obiter) comments, Black LJ identified (at paragraph 100) “problem[s]” with “the President’s scheme”:

“First, it is heavily dependent upon P conveying a wish to be joined in the proceedings or opposition to the arrangements proposed for him, or someone else who has his interests at heart taking these points on his behalf. Secondly, **it depends entirely on the reliability and completeness of the information transmitted to the court by those charged with the task.** In many cases, this will be the very person/organisation seeking authorisation for P to be deprived of his liberty and the possibility of a conflict of interest is clear.” (emphasis added)

That second (emboldened) concern encapsulates why the Official Solicitor has raised the concerns she has in this matter; and why I consider it appropriate that the Applicant’s arguments are addressed in this judgment.

44. The streamlined procedure was conceived and implemented with full acknowledgment of its dependence on the conduct of the party who makes the application – as demonstrated by the express inclusion of the duty of full and frank disclosure in the Practice Direction. This duty is foundational to ensuring the ‘reliability and completeness’ of information put before the court, and therefore foundational to compliance with Article 5. It must be understood as such by any person or public body who avails themselves of this procedure.

45. The duty of full and frank disclosure is a serious and onerous obligation that applies to litigants and their legal advisers alike. As far as I am aware, this duty has not previously been the subject of judicial scrutiny in the context of deprivation of liberty authorisations but in other contexts the applicable principles are well settled. They were summarised by Ralph Gibson LJ in *Brink’s Mat Ltd v. Elcombe* [1998] 1 WLR 1350 at 1356, and more recently set out by Popplewell J in *Fundo Soberano de Angola & Ors v. Jose Filomen dos Santos & Ors* [2018] EWHC 2199 (Comm) as follows:

“(1) The duty of the applicant is to make ‘a full and fair disclosure of all the material facts:’ see *Rex v. Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac* [1917] 1 KB 486, 514, per Scrutton LJ.

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be determined by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy MR at p504...

(3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an *Anton Pillar* order in *Columbia Picture Industries Inc v. Robinson* [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade LJ in *Bank Mellat v. Nikpour* [29185] FSR 87, 92 – 93.

(5) If material non-disclosure is established the court will be ‘astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure...is deprived of any advantage he may have derived by that breach of duty:’ see per Donaldson LJ in *Bank Mellat v. Nikpour* at p91...

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it ‘is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:’ per Lord Denning MR in *Bank Mellat v. Nikpour* [1985] FSR 87.90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms

‘when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant...a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed’ per Glidewell LJ in *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc...*”

46. Paragraph 33 of PD11A reflects these principles in simpler terms. In particular:

- it specifies that the duty extends to “all facts and matters that may have an impact on the court’s decision whether to authorise the deprivation of liberty”;
- it directs the applicant to “scrutinise the circumstances of the case” and “clearly identify” factors needing particular judicial scrutiny or suggestive that proposed arrangements may not be in P’s best interests or the least restrictive option or otherwise indicative that the order should not be made; and
- it specifically includes a requirement to explain why persons of a relevant category have not been consulted.

47. Mr. Paget has made reference to the decision of the Supreme Court in *N v. ACCG* [2017] UKSC 22 as authority for the proposition that the requirement for full disclosure is limited to circumstances where there are “other actual competing alternatives available.” I acknowledge the clear statement in that case that the Court of Protection “can only choose between ‘available options’” (paragraph 35) when making best interests decisions but I find nothing in the decision which justifies Mr. Paget’s proposition. If anything, the recognition of the “creative” possibility of proceedings (also at paragraph 35 of the judgment) goes against it. In my view, cases which considered authorisations of deprivation of liberty (albeit not by the streamlined procedure) offer more insight into the approach to be adopted to the duty of full and frank disclosure:

- a. in *Re Briggs (Incapacitated Person)* [2017] EWCA Civ 1169 at paragraphs 94 – 95 King LJ was clear that

“... Proper consideration of those cases by the assessor in compliance with the guidance in the DOLS Code, requires far more of an extensive consideration of the relevant circumstances than that which is suggested by Mr Nicholls, namely simply ensuring a care plan and needs assessment is in place without further consideration as to the content.

95. Contact, for example, is an issue capable of going to the heart of whether being detained is in a person's best interests; it may be that in an ideal world P's best interests would be served by a deprivation of liberty in the form of her living in a care home properly looked after, where the appropriate medication regime will be adhered to and P will have a proper balanced diet. Desirable as that may be, and such a regime may well provide the optimum care outcome for P, but it may also be the case that unless, regular contact can be facilitated to a particular family member, the distress and confusion caused to P would be such that it would be no longer in her best interests to be detained, and that what might amount to sub optimum physical care would ultimately be preferable to no, or insufficient contact....”

- b. in *CB v. Medway Council* [2019] EWCOP 5 at paragraph 33, Hayden J Vice-President of the Court of Protection emphasised that

“what is involved here is nothing less than CB’s liberty. Curtailing, restricting or depriving any adult of such a fundamental freedom will always require cogent evidence and **proper enquiry.**” (emphasis added)

IX. Conclusions

48. Dealing with the legal submissions first, in my judgment the Applicant's scope of consultation argument is misconceived. Paragraph 39(d) of PD11A is expressed in ordinary plain language and should be understood accordingly. The description of "anyone engaged in caring for the person" is plainly not limited to primary carers but is wide enough to include those who give care only for part of P's living arrangements, including care during contact periods; and the description of anyone "interested in his or her welfare" does not import any limitation only to concerns about "P's immediate welfare or near-future welfare." I agree with Mr. Hallin that Mr. Paget's suggestion otherwise artificially denies the obvious link between P's long-term and immediate interests. Moreover there is nothing in paragraph 39 which *limits* the consultation to three people – "if possible, *at least* three" people in categories (c) and (d) should be consulted. It would clearly not meet either the letter or the spirit of paragraph 39 for the Applicant to "decide" whom to consult in such a way as to "bypass" those most obviously within the required categories. Mr Paget's exposition of "apparent tensions" in paragraph 39(d) and how its requirements can be met in practice is, in my judgment, a strangulation of the plain language of the Practice Direction.
49. I further agree with Mr. Hallin that the Applicant's subjective view argument is a fundamental misunderstanding of the duty of full and frank disclosure. If it were to be up to the Applicant to determine whether a view which differs from its own is valid and therefore to be brought to the attention of the court or not, the duty of disclosure would be neither full nor frank. As set out in paragraph 46(2) above, it is a well-established principle of a duty of full and frank disclosure that the materiality of relevant information is to be determined by the court. If a person sensibly within the categories of person who ought to be consulted holds a view which is contrary to the Applicant's, the Applicant must make that clear in the application, irrespective of its own view of the merits of that other view. In the context of a procedure designed for non-contentious applications, such factors clearly include indications that the proposal is in fact disputed, irrespective of the applicant's view of the merits of that dispute. If explanation is needed as to why this is so, the Court of Appeal has set it out: the validity of the streamlined procedure as a mechanism for compliance with the obligations of Article 5 depends upon it.
50. The Applicant's alternatives-only argument overstates the ordinary meaning of the Practice Direction and the import of *N. v ACCG*. The suggestion of a literal meaning which requires consultation with "anyone, except the most insensitive person, who has met P" is an unattractive resort to *reductio ad absurdum* which fails to give credit to the professionalism, experience and judgment which may reasonably be expected of social workers and best interest assessors. If the duty of disclosure extended only to concerns where alternative options were already identified, inactivity on the part of person under the duty would be rewarded and opportunity for proper enquiry denied. There is no threshold for bringing a challenge to a deprivation of liberty and any applicant for authorisation under the streamlined procedure must proactively inform the court of contrary views.
51. Turning to the evidence of what actually happened in this case, I do not accept that JDO's placement, at the time of filing the COPDOL11 application in November 2018, could reasonably have been considered by the Applicant as non-contentious. The Local Authority was clearly aware at least from the best interests meeting in May 2018 that JDO's case managers and parents had significant concerns about whether the placement was meeting

JDO's needs. It was reminded in the Official Solicitor's letters of May and August, and those concerns were confirmed again by the Official Solicitor in October. If Ms. Malomo really did not expect in November 2018 that this matter would become contentious, her expectations flew in the face of the available information.

52. In so far as the Applicant explains its expectation of this application being non-contentious as because it was "a renewal of the existing order," I do not accept that such approach was either accurate in the circumstances of this case or appropriate generally to the streamlined procedure. The authorisation granted in June 2017 had expired (as Ms. Malomo recognises) so what was being sought was a new authorisation, not a renewal of an existing one. Even if a COPDOL11 application is appropriately made within the review period, the review process is not a rubber-stamping exercise. The purpose of the review is to enable a judge to make a fresh determination on up to date information. Authorisation in 2017 does not automatically lead to further authorisation in 2018. The whole purpose of the review is to scrutinise – on a proportionate basis, but scrutinise nonetheless - whether authorisation continues to be appropriate.
53. In so far as the parents' position is concerned, I am not persuaded by Ms. Malomo's statement that "There was never any doubt about [OD]'s competence with regards to being Rule 1.2 representative for her son." In my judgment, the information available to the Local Authority by November 2018 strongly indicates that there should have been doubt. Having voiced concerns at the best interests meeting, and initially refused to sign any form, if OD showed no disagreement when she met the social worker at the Local Authority offices on 3rd October, such change of position at least called for exploration, of which there is no sign in Ms. Malomo's statement. It is easy for persons in the position of OD to be overwhelmed by formality and procedures. Having listened to OD and DD at the June hearing, in my view this risk should have been apparent to the Applicant. It is incumbent on those charged with the obligation to consult them to consider this risk and take appropriate steps to ensure that genuine views are obtained and reported.
54. In my judgment, it is not appropriate for the body with consultation obligations to "present" OD (or any person in her position in the proceedings) with a pre-prepared statement. The purpose of consulting with OD is to ascertain her views, so that they can be relayed to the court. It is not to put words into her mouth, or to persuade her to adopt the Applicant's views. The contrast between the statement ostensibly made by OD and the letter written by DD is stark. There is significant distance between assisting a lay person to write their statement, and presenting them with a pre-prepared document for signing. The latter approach is highly unlikely to elicit genuine views. In this matter it amounts to a breach of the duty of full and frank disclosure.
55. In so far as the Official Solicitor's position is concerned, such as was described in the COPDOL11 form is very far from a full and frank account by the Applicant and, in my judgment, knowingly so. The Local Authority does not deny that it received the Official Solicitor's letters, and it offers no explanation for why they were not provided to the court as requested. Mr Paget accepts that "a lot of the initial confusion in this application" could have been avoided if they were. Including the letters with the application papers would not have been onerous to the Applicant. Its failure to put this information clearly before the court is a breach of its duty of full and frank disclosure.
56. I am satisfied that in fact the Applicant did recognise that the Official Solicitor was an appropriate person to consult about the application in this case – as demonstrated by the

fact that the Applicant did actually consult her (paragraph 3(g) of Ms. Malomo's statement). However, having received a response which was not to the Applicant's liking, the Applicant then failed to put the result of the consultation before the court fully or indeed at all. Such as was included in the COPDOL11 form reflects the Applicant's position, not the Official Solicitor's. Thereafter, the Applicant went to extraordinary lengths to seek to avoid the Official Solicitor's participation in proceedings, including apparently choosing an alternative solicitor for JDO.

57. In fact this COPDOL11 application never progressed through the streamlined procedure further than issue. Its removal from the streamlined procedure was most immediately due to the receipt of DD's letter, and then proactivity on the part of the JDO's own representatives, but it is also some testament to the robustness of the streamlined procedure itself. However, the period spent working out whether the application had appropriately been made represents a delay in the progress towards final judicial determination. I have no doubt that had the application in November 2018 been made on form COP1 as a disputed welfare issue, it would have been put before the Urgent Business Judge (as is usual procedure at the central registry) and would have been listed for Case Management Conference within something like 28 days of issue. Instead, its first listed hearing was not until 21st March 2019. The very real consequence of the Applicant's approach was delay and a longer period of unauthorised deprivation of JDO's liberty.

X. Next steps

58. I will consider at the next hearing on 4th November any applications which may arise from these conclusions.

HHJ Hilder

22nd October 2019