

Case number 14231863

Neutral Citation Number: [2024] EWCOP 43 (T1)

**IN THE COURT OF PROTECTION**

[Manchester Civil Justice Centre]

Date: 12<sup>th</sup> June 2024

Before :

**[District Judge Matharu  
Sitting as a nominated judge of the Court of Protection Tier 1]**

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Between :

P

(by his litigation friend, the Official Solicitor)

**Applicant**

- and -

MANCHESTER CITY COUNCIL  
and

**First  
Respondent**

GREATER MANCHESTER INTEGRATED CARE  
BOARD

and

**Second  
Respondent**

PK

and

**Third  
Respondent**

GREATER MANCHESTER MENTAL HEALTH NHS  
FOUNDATION TRUST

**Fourth  
Respondent**

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Mr Joseph O' Brien KC (instructed by **The Official Solicitor**) for the Applicant  
Helen Gardiner instructed for the First Respondent  
Ariana Kelly (instructed by **Hill Dickinson**) for the Second and Fourth Respondent  
**The Third Respondent** being unrepresented

Hearing date: [12<sup>th</sup> June 2024]

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## Approved Judgment

**[District Judge Matharu]:**

At the request of the parties, this judgment is to be published. The names of the parties will be changed to protect their anonymity. To prevent P's identification, the third respondent will not be named.

### **Introduction**

This is an ex-tempore judgment given during a Case management hearing where the Court was asked to make a closed material Order against the mother of P, with whom he lives, by the local authority, the ICB and the Foundation Trust

### **The application**

- (1) Usually, I would retire to consider matters before delivering my judgement but in light of the limitations on time, I am simply going to deal with matters now.
- (2) What I am going to do is give a decision on the application for closed material. I will quote aspects of the law and evidence before me.
- (3) Today's hearing has been listed, to deal with matters concerning [P]. [P] is a 27-year-old man with a number of issues and conditions.
- (4) I have identified who is here in court and who acts for which party but moving to what today is about, there was a previous hearing on 22 April 2024. At that hearing it was raised before me that the local authority had identified a concern that P's mother who is the third respondent should not have access to all of [P's] medical records. I directed on that occasion that if such an application was to be made, it should be done so on a formal basis by 7 May 2024, which they did.
- (5) I have a hearing bundle for that application. Wrapped up in that directions hearing of 22 April 2024 was the appointment of the capacity expert Dr Ince. Counsel for P has informed me that Dr Ince is going to attempt to meet with P later today. That very important aspect is afoot because his report is not due until August 2024.
- (6) One of the submissions or applications being made by counsel for the local authority is that I should not deal with this application for closed material

until the issue of capacity in a number of domains has been addressed. I permitted only very brief submissions on this point and made it very clear that this application would not be postponed because of its significance to the conduct of the remainder of this case.

- (7) Counsel for the local authority submitted that case management decisions require a constant overview. That is correct. Based on the fact that I would not adjourn this application, I heard the application being made by the local authority which is supported by the Trust and Integrated Care Board (“ICB”).
- (8) “It is important that I identify the gist of the application is that disclosure of health and social care records remain limited to P’s representatives. What is sought, is for medical and health records including capacity assessments and care plans to be, in some way, redacted or withheld from P’s mother with whom he lives. I will come to the mechanics of this very shortly, but that is the framework of the application sought.
- (9) The application is supported by the witness statement of the local authority social worker, the commissioning manager of the ICB and the treating consultant of the Trust. We also have a witness statement of P’s solicitor, a second witness statement of the local authority social worker and the witness statement of P’s mother who is the unrepresented third respondent. Those are matters of evidence that I have read. I also have position statements. I can confirm that I have read these. For the avoidance of doubt, counsel for P and the third respondent- P’s unrepresented mother oppose the application in its entirety.

## **The law and guidance**

10) The law that applies appears to be accepted by all of the parties; and are cited in the position statement of P and confirmed in the other position statements of the ICB, the Trust and the local authority. Briefly, that it is accepted that this is not a best interest decision but a case management one with reference to the case of **KK v LCC [2020] EWCOP 64**. What is an important consideration in all aspects is the principle of necessity. Is it necessary that I do this?

11) What counsel for P reminds the court is that the test of necessity operates as an exception rather than the rule. The rule or overlay, particularly in the Court of Protection, is of openness and transparency for parties observing and the parties to the proceedings. If necessity is to override this core principle, that it is a very high bar.

12) This court needs to recognise that having performed those checks and balances, to apply the test of necessity - perhaps calling it “a test” is narrowing it too much - but what the Judge in that case was that it must be ‘convincing and compelling and no such order should extend further than is necessary’. The test is one of strict necessity. No such order should be made unless it is imperatively demanded.

13) The Guidance of Mr Justice Hayden of 6<sup>th</sup> February 2023 is also helpful regarding “closed material from paragraph 23 onwards. Even that Guidance identifies throughout that transparency is key.

14) “It is just guidance”, as pointed out by counsel for the local authority, but it is clearly something I should have regard to.”

15) “The position statements have been very helpful. The local authority’s position statement identifies at paragraph 16 that the local authority seeks an order withholding disclosure of P’s medical and health records including capacity assessments and care plans. Counsel for the local authority provided more detail to this. The concessions made are that [the third respondent, mother of P can have access to a general outline, the broad strokes of what is going on.

(16) The commissioning manager of the ICB supports everything said by the local authority social worker.

(17) The crux of the submissions before me are this. The local authority is concerned that if it discloses P’s information against P’s wishes he will disengage further and be at risk of great harm. The ICB support this stating that it is accepted that it is an “unusual application”, and it is accepted that we do not have any concerns that the third respondent will use this material in a way adverse to P’s best interest but, having regard to the granular statements and history, P needs to feel that he can trust his professionals.

(18) They submit that he should be allowed to have confidential conversations; to do anything other than make this application would put P in a position disadvantageous to others his own age. In closing submissions, the ICB say that for me to allow full access, as the third respondent and the Official Solicitor say is appropriate, will further harm P. The position is that confidential discussions should not be disclosed, and the broad framework will be adequate for the third respondent. Those are the grounds relied upon.

(19) Counsel for P says that the disengagement has already happened; he went so far as to say that it could not get any lower. Setting out what he has provided in his position statement, he says that on behalf of P we have a principle error. The third respondent and P love each other but the third respondent is being told that she cannot have access to all that is needed to

support her son. Counsel for P says therein lies the wrong. What are the bits and pieces PK can have access to? How could this be managed? It is impractical.

- (20) The third respondent's position is that P, her son is a 27-year-old man entitled to independence. However, the reality is somewhat different to a 27-year-old man functioning independently by himself. He is locked away on his own and has nothing to do with the outside world. He needs support. She describes him as an 11- or 12-year-old and describes that obstructions such as this are being created for her and P. Her words are 'this sort of matter is putting both of them in the dark' – and she needs full knowledge. Those are very powerful words.
- (21) I turn now to the evidence. I will consider this based on the evidence in the hearing bundle for today. Counsel for the local authority says do not consider the attendance note of P's solicitor in isolation. What does the local authority social worker say? 'P should be encouraged to participate as fully as possible. I am concerned about the history of disengaging and disclosure would result in him feeling that his wishes and feelings had been ignored and damage relationships with professionals.
- (22) What does the commissioning manager at the ICB say? At paragraph 5 of her witness statement: 'P has expressed for a longitudinal period that he does not want detailed information about his treatment to be shared with his mother.'
- (23) P's treating clinician at the Trust says his last visit was in February 2024. At paragraph 5 of this statement, he says from "my own experience" P has expressed worries about [his mother's] criticism of the Multi-Disciplinary Team. He continues that his interpretation is that P wishes to have control of the information.
- (24) At paragraph 6 he says, I believe that he would consent to his mother's involvement in the MDT if he thought there would be no friction between his mother and the professionals. I do not think P believes he would come to significant harm.
- (25) I am not an expert in this case. However, I ask that could it be that P is trying to safeguard his mum from upset in her dealings with the MDT? I can only consider the evidence before me, but I do say this, I do not criticise P's mother in any way. Neither do the local authority or the ICB but they say that there will be a risk of disengagement by P if she receives the detailed records and this submission would need to be wrapped into the principle of necessity.

(26) Now I will consider the statement of P's solicitor. At page 26 of bundle, she asks if P would be content for his mother to have information about his medical appointments. P says yes. She asked if he thought his mum's ability to act as his primary carer would be impacted if she were not given information about his care, in his view he said I don't think so. P's solicitor asked if P thought there would be any risks to him, P said no. P's solicitor asked how he felt about being asked about this. P said he did not mind. P's solicitor said she understood P was content for his mum to have certain information about his prescriptions and care and support but not to receive the dates of medical appointments and asked if this was correct. P's solicitor then queried again whether P would be content for his mum to have the dates of his medical appointments. P said yes. P's solicitor explained about the local authority's application being made due to concerns of significant harm. P's solicitor asked if P agreed with these concerns, P said no.

## **The Decision**

(27) I have been asked to grant this application as a protective measure, but a protective measure as to whom? I am told it is due to a "fear of disengagement". Let's deal with the appropriate test. Is there necessity?

(28) The highest threshold is that not granting this application will place P at risk of significant harm of disengagement and further risk of grave harm. These expressions are thrown out there without any evidence in support by the applicant. He is locked away in the house without any contact, he is disengaged from his own life yet they come to court saying that he would be at even more risk were this application not granted. I am not clear where those parameters of disengagement could go from and to.

(29) I look at what the local authority had to say. At paragraph 29 of their position statement, they say the issues required to be addressed: "non-disclosure of the information is strictly necessary, for the time being". Is it? No. There is no grey area. Necessary for what? So that - they say - he won't engage further with his staff. That horse has truly bolted. The third respondent is left with her son, trying to deal with matters, yet they come to court saying this is necessary.

(30) At paragraph 29.2 of their position statement, they say that the magnitude of risk and gravity of harm are very significant. How? At paragraph 29.3 they say "whilst all parties should usually be able to test material all material before the court, this is not a case where this will

substantially adversely impact the court process”. It will. It will impede the full participation of all the parties, not least the third respondent.

(31) Having given my decision I say that this is an application which has come before the court where there is conflicting evidence, and evidence that is aged – the evidence of the treating clinician of February 2024. It was even suggested in submissions that the expert report should be redacted. The overriding objective requires openness, fairness and transparency. On the facts of this case where there is an unrepresented mother, with whom P lives, the “on the hoof” presentation of what could be done to deal with disclosure in this way is not acceptable. Non-disclosure prejudices the third respondent and P and the relationship that P has with her.

(32) As I said I am not an expert, so I am careful only to rely on the evidence presented but what P is reported to have said is perhaps just to protect his mum. I need go no further than that having applied the appropriate legal principles. There is not a shred of evidence that this would put P at risk from his mum. The local authority and the ICB come to this court relying on historic reportage.

(33) I do not accept this unworkable proposal. This case going forward will go forwards on an open and transparent basis.

### **Costs of the Application.**

(34) This hearing was listed for two hours. It is now 2.20pm and I was due to start another case at 2pm. Unfortunately, there are time constraints in judicial lists.

(35) This hearing was listed for two hours. It is now 2.20pm and I was due to start another case at 2pm. Unfortunately, there are time constraints in judicial lists.

(36) The summary is that the local authority, the ICB and the Trust were informed by the court that where costs had been reserved at a prior hearing, this court was exercising its discretion on the matter of costs of today and one of the options available to it was the making of an adverse costs order against the applicant parties.

(37) There was a succinct summary by counsel for the local authority opposing that course of action.

- (38) The issue was raised by counsel for the ICB and Trust that she needed to understand that if such order were made that it would not be directed at her clients. Counsel for the local authority took instructions and said, with regret, she would seek contribution from the ICB and Trust.
- (39) For the avoidance of doubt, the third respondent and the Official Solicitor] did not explicitly seek their costs but the costs of the application had been reserved.
- (40) Costs are decided at the conclusion of the hearing. Counsel for the ICB and Trust made the point that such an order was unexpected as costs had not been sought and she needed time to seek instructions. She asked for twenty minutes. Advocates are aware of the court's other listed commitments. The court was only able to afford fifteen minutes of the twenty that she sought. I am satisfied that she had adequate time to take instructions.
- (41) Counsel for the ICB and Trust advanced the position that there should be no costs order and no contribution to any parties' costs. That does not negate what counsel for the local authority submitted her position is, that it was a reasonable application and that it cannot be criticised for that. It was not a ruse or means to drive a wedge between the parties. Counsel for the ICB and Trust submissions were by reference to many authorities on this point. They are, by way of example, through *Manchester City Council v G and E and F* [2011] EWCA Civ 939 – paragraphs 16 and 17 – the local authorities and others who carry out their work professionally should not have reason to fear the makings of costs orders, there was no misconduct, and the local authority was doing their job properly.
- (42) There were citations proffered to me that hindsight should not be used against the party and that the standard was of misconduct or illegality. She said that the Court of Protection rule 19.5 for departure from the general rule on costs relied on illegality or misconduct, which did not apply and so no prejudice should be applied for the local authority's error. There should be a degree of latitude for a difficult case and the local authority's motivations were their concern for P.
- (43) Counsel for the Official Solicitor is not ignored. His position is that there are many cases that have been cited but he says the local authority were working in conjunction with the respondent public bodies and the court has to have regard to the Court of Protection Rules. Those should be applied because this is an inter-partes costs order. We should not lose sight of the fact that the application has been dismissed for clear reasons.
- (44) He is making it clear on his part that the application should not have been brought because what was being argued for was something that had

already happened, the disengagement of P. He says you have all these citations and authorities but just apply the rules to the facts on this case. I have had limited time to deal with the authorities, but I am aware of them.

- (45) The general COP rule at 19.3 on personal welfare applications is that there will be no order as to the costs of the proceedings. This is an application where this application had been intimated. The costs were reserved, which by its very definition means that the decision of costs is deferred to a later occasion. Today is that later occasion.
- (46) The local authority and others were wholly unsuccessful. The COP rule 19.5 regards the circumstances for departing from the general rule is if the circumstances so justify. The court will have regard to all the circumstances. In this case, the question is are the circumstances such that I am justified to depart from the general rule?
- (47) Firstly conduct – I asked Counsel for the LA and Counsel for the ICB and the Trust at the outset if the application was being pursued. They said yes. Conduct is whether a party has succeeded on part or whole of their case. Those bringing this application were wholly unsuccessful. At COP rule 19.5(2)(a) – conduct includes conduct before as well as during the proceedings.
- (48) At rule 19.5(2)(b), it is “whether it is reasonable for a party to raise, pursue or contest a particular matter”. On the grounds for bringing this application, both [respondents] accepted that it was “unusual”. What was also made as a submission was that other men of his age would not expect to have their records disclosed in this way. What other examples of conduct do we have that warrant this Judge’s discretion to disapply the general rule?
- (49) At rule 19.5(2)(c), it is stated that conduct includes the manner in which a party has made or responded to an application or a particular issue. In making this application they are faced with an unrepresented party who is having to contend with an application whereby medical records and care plans and the like should be withheld from her. This is a serious application which is contrary to the rules of transparency and openness with various witness statements. The social worker for the local authority provides a lengthy statement challenging what is being said by the Applicant.
- (50) Let’s turn to the other supporting parties. The witness statement on behalf of the ICB is eight paragraphs long – ‘P has consistently expressed over a longitudinal period that he is happy for information to be shared with his mother but does not want detailed information about his treatment shared.’ That is the best that they can do.

- (51) Let's have a look at the conduct or manner of the Trust. I am told that P's treating clinician goes out to visit him three times. I don't need to repeat my judgment but that very statement says when P is asked if he thought he would be at significant harm, the clinician said I do not think he believes that his mother's involvement can cause significant harm to him. This feeds into my decision. His mother is not causing him harm, the Trust's own witness thinks there is no likelihood of harm, yet they put this before the Court and persist. So, under rule 19.5(2)(c) the manner in which they made this application with its purported evidence is inadequate and less than clear.
- (52) And in their own words, they said the application is "unusual." Is it unusual? Looking at the authorities, in *G v E* [2010] 3385 Baker J stated that on the facts in that case that the blatant disregard for the processes of the MCA and their obligation to respect P's rights under the ECHR amounted to misconduct which justified departing from the general rules see paragraph 41. That Judge considered all aspects as must I. I am considering the rights of all the parties. It is an exercise of my discretion.
- (53) Other cases also assist the court, for example *AH v Hertfordshire Partnership NHS Foundation Trust* [2011] EWHC 3524 whereby the conclusion of Mr Justice Peter Jackson, at paragraph 69, said that his decision to make an order for costs was that there had been 'substandard practice and failure by the local authority to recognise the weakness of their own cases and the strength of the cases against them.' The submissions and manner in which this application was pursued was vague and insufficiently put. It was a prolonged failure and culminated in coming to court to use two hours of court time just for this application.
- (54) I have considered all the circumstances under rule 19.5(1). They are engaged. I then turn to rule 19.5(2) of the COP rules, conduct includes under (b) whether it is reasonable for a party to raise, pursue or contest a particular matter and (d) whether they succeeded in whole or in part in their application.
- (55) There is no doubt in my mind of the flawed arguments raised. It is not a matter of mistake or error or the benefit of hindsight. To simply say it is "unusual" does not offer a safety net from costs. This sort of application for closed material required consideration and scrutiny, which was not applied to my satisfaction.
- (56) The decision I make is that the local authority and the respondents pay those costs of the third respondent and the Official Solicitor.

(57) Very helpfully, counsel for the Official Solicitor Mr O'Brien said there need be no summary assessment today. An order would be that they are agreed or put before me before the next hearing. Is any amplification or clarification required by the parties?

(58) The costs of P should be paid by the statutory bodies equally.

**END**