



Neutral Citation Number: [2020] EWHC 1533 (Ch)

Case No: PT-2019-000909

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

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

Date: 23/06/2020

Before:

MRS JUSTICE FALK

Between:

SRICHAND PARMANAND HINDUJA
(a protected party by Vinoo Hinduja his litigation **Claimant**
friend)
- and -
(1) GOPICHAND PARMANAND HINDUJA
(2) PRAKASH PARMANAND HINDUJA
(3) ASHOK PARMANAND HINDUJA **Defendants**

Eason Rajah QC, Fenella Morris QC, Georgia Bedworth and James Kirby (instructed by
Clifford Chance LLP) for the **Claimant**
Lord Goldsmith QC, David Rees QC and Ciaran Keller (instructed by **Debevoise &**
Plimpton LLP) for the **Defendants**

Hearing date: 4 June 2020

Approved Judgment

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

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Tuesday 23 June 2020.

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MRS JUSTICE FALK

Mrs Justice Falk:

1. This is my decision on applications heard in private pursuant to an order made by Morgan J on 12 December 2019. The applications comprise an application by the First Defendant made on 6 December 2019 seeking derogations from the open justice principle (the “Privacy Application”) and an application by the Claimant seeking to regularise the position with regard to the Claimant’s litigation friend, Vinoo Hinduja (the “Regularisation Application”). I will refer to the latter as a single application but in fact there are two: an application dated 11 December 2019 and a further application dated 29 April 2020. I will also refer to the parties by the initials used by them, that is SP for the Claimant and GP, PP and AP for the First, Second and Third Defendants respectively. I will refer to Vinoo by her first name, again as she was referred to before me, without intending any disrespect.
2. The published version of this judgment includes limited redactions made for reasons of confidentiality. The redactions relate to certain other proceedings, in particular proceedings in Jersey which are being conducted in private, and are made to respect the confidentiality of those proceedings.

Background

3. The parties are brothers, SP being the eldest and the current patriarch of the family. The substantial business empire controlled by the family was originally founded by the parties’ father. Vinoo is SP’s daughter.
4. These proceedings are proceedings brought under Part 8 to determine the validity and effect of a letter dated 2 July 2014 signed by SP and the Defendants, together with a further letter apparently from SP dated 1 July 2014. The 2 July letter includes statements to the effect, among other things, that the brothers appoint each other as their executors, and that assets held in any single brother’s name belong to all four. The further letter states that GP, PP and AP are authorised to carry out all steps to implement the other letter. I will refer to the two documents together as the “July letter”.
5. In summary, SP seeks a declaration that neither document has legal effect, whether as a will, power of attorney, declaration of trust or other binding document, or alternatively that the documents are revocable and have been revoked. Additional relief is also sought, in particular an injunction restraining use of the documents and an account of the persons to whom the documents have been submitted and steps taken in reliance on them.
6. SP’s claim was brought on 7 November 2019. The Defendants initially indicated that they wished to challenge jurisdiction, and the Privacy Application was put in terms that linked it to the jurisdictional challenge. However, in their skeleton argument dated 29 May Counsel for the Defendants indicated for the first time that the Defendants no longer intended to pursue the jurisdictional challenge. [redacted] The skeleton argument also stated that GP was no longer seeking to anonymize the parties’ names in the title to the proceedings or to require hearings to be in private.
7. The Defendants’ change of position came, realistically, too late for this court to order that the hearing before me, which was in any event organised on a remote basis, should proceed in public rather than in private as previously ordered by Morgan J.

However, this judgment is being published, in accordance with the requirements of open justice, subject to the redactions indicated.

8. As a result of the Defendants' change of position the only part of the Privacy Application to survive is an application seeking an order that a person who is not a party to the proceedings may not obtain a copy of a statement of case from the court records without permission, and that any application by a non-party, whether for permission to obtain a copy of a statement of case, or to obtain a copy of any other document from the court records or communication with the court under CPR 5.4C(2), or a copy of any transcript under CPR 39.9, should be made by an application under CPR 23, a copy of which is to be served on the parties on at least three clear days' notice. However, any link between the Privacy Application and the jurisdictional challenge is removed¹, and the Defendants are seeking a permanent order.
9. The background to the Regularisation Application is that, through an oversight, SP's advisers failed to file a certificate of suitability from Vinoo under CPR 21.5 when the claim was made. Such a certificate was filed on 10 December 2019, and an application was made on 11 December seeking an order under CPR 21.3(4) giving effect to all steps taken in the proceedings before that filing was made, and confirming that Vinoo was appointed as SP's litigation friend by filing the certificate. The further application dated 29 April sought in the alternative an order under CPR 3.10(b) remedying any error of procedure, or alternatively for the appointment to be made by an order of the court under CPR 21.6. The Defendants object to both applications. Their position is that Vinoo can only be appointed under CPR 21.6, that the court does not have the requisite evidence to confirm SP's status as a protected party, and that Vinoo does not meet the conditions in CPR 21.4(3)(a) or (b).
10. Due to the substantial narrowing of the Privacy Application, the main focus of the hearing was the Regularisation Application, and I will deal with that first.

Evidence

11. The evidence before me included, for SP, six witness statements filed by Mr Jeremy Kosky, a partner at SP's solicitors Clifford Chance (the first of these being the evidence filed with the Part 8 claim, and the remainder relating to the applications before me), and for the Defendants two witness statements filed by Christopher Boyne, a partner at the Defendants' solicitors Debevoise & Plimpton. A short witness statement was also provided by Madhu Hinduja, who is SP's wife of 55 years and Vinoo's mother, which confirms that its contents are agreed by the couple's other daughter Shanu. Documentary evidence included not only the July letter but evidence relied on on behalf of SP in relation to his attitude to the July letter in 2015 and 2016.

The Regularisation Application

12. I have concluded that the court should exercise its power under CPR 21.6 to appoint Vinoo as SP's litigation friend, and order that steps taken in the litigation before that appointment should have effect, as permitted under CPR 21.3(4). My reasons are as follows.

¹ The original application is not entirely clear in this respect. The request for an order that a copy of a statement of case could not be provided without permission was clearly stated to be pending the jurisdictional challenge (as was the request for hearings to be in private). The position in relation to CPR 5.4C(2) and 39.9 did not have the same explicit statement, but the context of the jurisdictional challenge was clear.

CPR 21: general

13. CPR 21 and the associated Practice Direction deal with children and “protected parties”. A protected party is a party, or intended party, who “lacks capacity to conduct proceedings”. The meaning of “lacks capacity” is considered further below.
14. CPR 21.2(1) provides that a protected party must have a litigation friend to conduct proceedings on his behalf. Unlike the position with children, the court has no power to allow a protected party to conduct proceedings without a litigation friend.
15. CPR 21.3(4) provides that any step taken before a protected party has a litigation friend “has no effect unless the court orders otherwise”.
16. CPR 21.4 deals with who may be a litigation friend without a court order. CPR 21.4(3) provides that a person may act as a litigation friend if he:
 - “(a) can fairly and competently conduct proceedings on behalf of the child or protected party;
 - (b) has no interest adverse to that of the child or protected party; and
 - (c) where the child or protected party is a claimant, undertakes to pay any costs which the child or protected party may be ordered to pay in relation to the proceedings, subject to any right he may have to be repaid from the assets of the child or protected party.”
17. CPR 21.5 sets out the procedure for a person to become a litigation friend without a court order. Paragraph (1) provides that if the court has not appointed a litigation friend “a person who wishes to act as a litigation friend must follow the procedure set out in this rule”. Where no deputy has been appointed by the Court of Protection with authority to conduct proceedings, the procedure is governed by paragraph (3), which provides that (where the protected person is the claimant) the person “must” file a certificate of suitability “at the time when the claim is made”. Paragraph (4) deals with service, notably not requiring service on the other parties, but rather on someone acting for the protected party, such as a donee under a lasting power of attorney (see CPR 6.13).
18. CPR 21.6 provides that the court may make an order appointing a litigation friend. An application may be made either by the person who wishes to be the litigation friend or by a party, and must be supported by evidence. The court may not appoint a litigation friend under CPR 21.6 unless it is satisfied that the person to be appointed satisfies the conditions in CPR 21.4(3). CPR 21.8 requires any application under CPR 21.6 to be served in accordance with CPR 6.13.
19. Further detail about applications under CPR 21.6 is provided by paragraph 3 of Practice Direction 21, which requires any application to be made in accordance with Part 23, and that the evidence in support must satisfy the court that the litigation friend not only consents to act but meets the requirements set out in CPR 21.4(3). It is again worth noting the position regarding service. Service on other parties to the litigation (in this case, the Defendants) is not automatically required. As pointed out by Wilson LJ in *Folks v Faizey* [2006] CP Rep 30 at [30], the “respondent” on whom

an application under Part 23 must be served is the person “against whom the order is sought”. Others are served only if the court so directs.

Whether CPR 21.5 can apply in this case

20. In this case, through an oversight, a certificate of suitability was not filed until just over a month after the date of the claim. The procedure set out in CPR 21.5 was therefore not followed. CPR 21.5 is in prescriptive terms: paragraph (1) provides that the procedure set out “must” be followed. Where a litigation friend is acting for the claimant a certificate of suitability “must” be filed “at the time when the claim is made” (paragraph (3)).
21. Mr Rajah, for the Claimant, submitted that the late filing was an error of procedure that was cured when the certificate was filed, and relied on CPR 3.10. He pointed out that were this not the case then uncertainty or anomalies could arise. He suggested that the certificate could in any event only be filed when the claim exists, so it must be that some gap in time is contemplated by the rule. He pointed to the contrast with the position of litigation friends for defendants, where the certificate must only be filed when the litigation friend actually takes a step in the proceedings on the defendant’s behalf. That means that a litigation friend could be appointed without court assistance where a defendant becomes incapacitated during proceedings, but if a strict approach was taken that avenue would not be available to a claimant. He also pointed out that CPR 21.5(2), which deals with deputies appointed by the Court of Protection, also requires them to file a copy of the order conferring their power to act at the time the claim is made, when acting for a claimant, and if CPR 3.10 could not be relied on such a deputy would also need to seek a formal order under CPR 21.6.
22. I am not persuaded by these arguments. CPR 21.5 sets out the manner, indeed the only manner, in which litigation friends can be appointed without a court order. It is followed by another rule that provides for appointment to be made in the alternative by court order. In addition, the relevant context includes the fact that CPR 21.3(4) explicitly provides that any step taken before a protected party has a litigation friend has no effect unless the court orders otherwise.
23. There will generally be no difficulty in ascertaining, on a sensible basis, whether a certificate of suitability can be regarded as filed at the time the claim was made. In this case it clearly was not. Furthermore, Mr Rajah’s point about the distinction between claimants and defendants is not one that could be cured by CPR 3.10. If that point is correct it amounts to a difference in the substantive effect of the rules as between claimants and defendants, rather than a differential impact of a procedural error. The point raised about deputies appointed by the Court of Protection could no doubt be dealt with, if an issue arose, on the papers and without material expense.
24. Furthermore, it is important to have regard to what CPR 3.10 actually provides. It does not simply provide that all errors of procedure may be ignored. It states:

“Where there has been an error of procedure such as a failure to comply with a rule or practice direction –

 - (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
 - (b) the court may make an order to remedy the error.”

The operative effects of CPR 3.10 are therefore (a) to provide that an error of procedure does not automatically invalidate any step taken in the proceedings and (b) to allow the court to make an order remedying the error.

25. CPR 3.10(a) is of potential relevance in determining whether the failure to comply with CPR 21.5 has an impact on steps taken in the proceedings to date. However, in my view this general provision must, as a matter of construction of the rules, give way to the express terms of CPR 21.3(4). Effectively, that provision reverses the usual rule under CPR 3.10(a): the starting point is that steps taken before there is a litigation friend have no effect, rather than the starting point being that all steps taken are valid.
26. As a minimum, therefore, I would need to make an order under CPR 21.3(4) to the effect that steps taken before Vinoo became a litigation friend are to be treated as having effect. But in addition the question arises as to whether CPR 3.10(b) can be used to treat Vinoo as having become a litigation friend under CPR 21.5 when the certificate of suitability was filed in December, or whether the court needs to exercise its power under CPR 21.6 to appoint her now.
27. I consider that in these circumstances the sensible course is for the court to exercise its power under CPR 21.6 if it is appropriate to do so. I think that is preferable to reaching a final view on whether CPR 3.10(b) can be used to remedy the procedural error under CPR 21.5. Either approach would require a court order, because even with the benefit of CPR 3.10(b) I do not think that the requirements of CPR 21.5 can be overlooked without assistance from the court. An order would be required.
28. The substantive requirements are the same under both CPR 21.5 and 21.6, in that the individual in question must be a protected party and the litigation friend must satisfy the conditions in CPR 21.4(3). The possible differences are that under CPR 21.6 an application supported by evidence is required, and the court must positively be satisfied that those conditions are met (CPR 21.6(5)), as compared to the position under CPR 21.5 which simply requires a certificate of suitability confirming that those conditions are met. Any differences are procedural in nature. Moreover, particularly in a case such as this where there is a dispute that is before the court about whether the substantive requirements are met, any distinction is really one without a difference. Any application under CPR 3.10(b) would also in practice need to provide sufficient evidence to convince the court that the appointment was an appropriate one to make. Any dispute about whether a person is a protected party or whether the conditions in CPR 21.4(3) are met would need to be resolved whatever the procedure used for appointment. A certificate of suitability obviously cannot be conclusive in the event of a dispute, and Mr Rajah did not suggest otherwise.

The court's powers under CPR 21.6 and 21.3(4)

29. As already indicated, there are two preconditions to the exercise of the court's power under CPR 21.6, first whether SP is a protected party and secondly whether the requirements of CPR 21.4(3) are met. If these requirements are satisfied then the court has the power to appoint Vinoo as SP's litigation friend, and indeed the Defendants do not suggest that I should not exercise that power: the issues they have raised relate to SP's status and whether Vinoo complies with the conditions.
30. If I decide to exercise the court's power under CPR 21.6 then I have no doubt that it is also appropriate to make an order under CPR 21.3(4) to regularise the steps taken to date on SP's behalf: see *Masterman-Lister v Brutton* [2003] 1 WLR 1511 ("*Masterman-Lister*") at [31], where Kennedy LJ said that provided everyone has

acted in good faith and there has been no manifest disadvantage to the person found to be a protected party, he could not envisage any court refusing to regularise the position. In this case there is no indication of any prejudice to the Defendants as a result of the procedural error. It was clear from the outset that the intention was to conduct the litigation through Vinoo as SP's litigation friend. The failure to file a certificate of suitability was a procedural oversight. Again, the Defendants do not suggest that I should not make such an order if it is appropriate to appoint Vinoo as SP's litigation friend.

Is SP a protected party?

31. For CPR 21 purposes, the question of whether someone “lacks capacity” to conduct the proceedings, and is therefore a protected party, is determined using the test set out in the Mental Capacity Act 2005 (the “2005 Act”). The starting point is that mental capacity is presumed unless the contrary is established (s 1(2)). Section 2(1) provides that a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. There are therefore two elements, namely (a) an inability to make a decision in relation to the matter and (b) that the inability is the result of an impairment or disturbance of the kind described.
32. Section 2(3) makes clear that a lack of capacity cannot be established merely by reference to the age of the individual, or a condition of his or an aspect of behaviour. Section 3 provides that a person is unable to make a decision for himself if he is unable to understand the information relevant to that decision, retain it, use or weigh it as part of the process of making the decision, or communicate it. The fact that a simple explanation may be required does not mean that there is a lack of capacity. As explained in *Masterman-Lister* at [75], the key question is whether the party is capable of understanding, with the assistance of proper explanation from legal advisers and other experts as the case may require, the issues on which his consent or decision is likely to be necessary: does he have the “capacity to understand that which he needs to understand in order to pursue or defend a claim”?
33. Mr Rees, for the Defendants, submitted that the court did not have sufficient evidence to conclude that SP lacks capacity to conduct the proceedings. The information contained in the certificate of suitability did not properly address the tests in the 2005 Act, and no medical evidence was provided. SP's Article 6 rights were engaged (*Masterman-Lister* at [17]), and the court should require medical evidence to be provided.
34. In reaching the conclusion that I have that SP is a protected party, I have taken particular account of the discussion by the Court of Appeal in *Masterman-Lister* (the leading case on mental capacity in this context) and the further clarification provided in *Folks v Faizey*. In *Folks v Faizey* Pill LJ observed at [17] and [18] that he was confident that Kennedy LJ was not seeking in his judgment in *Masterman-Lister* to promote or encourage routine satellite litigation to determine capacity to litigate, and that the purpose of the application to appoint a litigation friend was to protect the position of the protected party and those advising him, rather than to create additional litigation which would have minimal effect on the main action. He referred to Chadwick LJ's comment at [66] in *Masterman-Lister* that generally the question should be determined by the party himself or those caring for him, perhaps with advice from a solicitor, without the need for enquiry by the court. At [19] he added that the respondent had in that case sought to interfere in a procedure “with which

they were only minimally concerned”, and at [20] he emphasised the significance of the overriding objective, including saving expense and the need to ensure that cases are dealt with expeditiously and fairly. In his judgment Keene LJ recognised at [24] that there needs to be evidence to support an application for an order appointing a litigation friend, but noted that it did not follow that the other party is then entitled to put in evidence disputing the basis for an order. Wilson LJ also noted at [30] that where a litigation friend is appointed under CPR 21.5 there is no facility for the defendant to object. I note that, but for a procedural error, that would have been the case here.

35. The certificate of suitability is signed by Vinoo and certified by her as correct. It states:

“My reasons for believing that the claimant is a protected party are:

My father, Srichand Parmanand Hinduja, is 84 years old.

I live with my father and elderly mother and personally care for them both on a daily basis at our home in London.

I am my father’s attorney under Lasting Powers of Attorney for Health and Welfare and Property and Financial Affairs which are registered with the Office of the Public Guardian.

My father has deteriorated in health and is no longer able to give instructions to lawyers and so he has instructed me to do so. My father does not have capacity to conduct these proceedings due to age-related disease.

As a result, with the support of my mother and sister, I am acting as my father’s litigation friend in these proceedings.”

36. I remind myself that mental capacity is assumed unless the contrary is proved, and the burden is therefore on Vinoo to establish lack of capacity. However, the evidence before me supports the conclusion that SP does currently lack capacity.
37. There is no requirement in the rules to provide medical evidence. The absence of any such requirement was commented on by Chadwick LJ in *Masterman-Lister* at [66]. There is no reference to medical evidence in CPR 21.6. The only reference to medical evidence is in paragraph 2.2 of PD 21, which applies where CPR 21.5(3) is being relied on. That requires the grounds of belief of lack of capacity to be stated and, “if” that belief is based on medical opinion, for “any relevant document” to be attached. So the Practice Direction provides that medical evidence of lack of capacity must be attached only if (a) it is the basis of the belief, and (b) exists in documentary form. It does not require a document to be created for the purpose.
38. Mr Kosky’s witness evidence confirms that Vinoo’s belief of lack of capacity is not reliant on medical opinion, although he also confirms that SP has been diagnosed with Lewy Body disease, a form of dementia.
39. I accept that there is a reference by Kennedy LJ at [29] in *Masterman-Lister*, noted by Pill LJ at [15] in *Folks v Faizey*, to medical evidence being needed “in almost every case” (echoing a comment at [17] that the district judge will “almost certainly”

require the assistance of a medical report). Keene LJ also noted the importance of evidence in ensuring that the court was not acting as a rubber stamp in *Folks v Faizey* at [24]. However, I do not think the Court of Appeal was intending to lay down any rigid principle under which medical evidence is required unless the circumstances are exceptional. The question will always depend on what the circumstances are. For example, *Folks v Faizey* was a personal injury claim where the claimant had suffered a severe head injury in a road traffic accident. The issue of capacity arose during the proceedings, the Court of Protection was involved (which would have required at least some medical evidence in any event), and there was a real dispute between medical experts about whether the claimant had capacity. The need for medical evidence was obvious. Similarly in *Masterman-Lister*, which like *Folks v Faizey* related to serious injuries following a road traffic accident, there was a real issue about capacity.

40. I was also referred to *Baker Tilly v Makar* [2013] COPLR 245, where Sir Raymond Jack indicated at [19] that medical evidence will ordinarily be required, saying that where “most unusually” it was not available the court should be most cautious. However, the factual context is highly relevant. That was not a case where a close family member was certifying lack of capacity. It was a rather extraordinary case where a judge had concluded that a litigant lacked capacity based on her behaviour in the course of the proceedings. That is not something that the court is ordinarily in a position to do: *Baker Tilly* at [8], citing Rimer LJ in *Carmarthenshire County Court v Lewis* [2010] EWCA Civ 1567 (unreported).
41. In contrast, in this case the certificate is provided by a close family member. Vinoo lives with her parents and cares for them daily. There can be no one who is in a better position to comment on whether her father has capacity to conduct the litigation. The certificate of suitability confirms that her father is no longer able to give instructions to lawyers and has asked her to do so. The fact that he may have capacity to ask her to act in the litigation does not mean that he has capacity to conduct proceedings. As explained in *Masterman-Lister* at [74] and [75], questions of capacity are issue specific.
42. I have also taken into account the witness statement provided by SP’s wife Madhu, and the fact that she confirms that Vinoo’s sister Shanu agrees with its contents. Whilst Madhu’s witness statement does not explicitly address lack of capacity it clearly proceeds on the basis that her husband lacks it. It states that she believes the action being taken is what SP would have wanted “if he was still able to deal with matters personally and conduct the litigation himself”. This is a clear indication that, like Vinoo, Madhu does not believe that SP is able to conduct the proceedings.
43. I do not accept that Vinoo is relying simply on her father’s age, which would be impermissible under s 2(3) of the 2005 Act. That is not what the certificate says. It states in terms that he is not able to give instructions to lawyers and lacks capacity to conduct the proceedings “due to” age-related disease. The reference is to disease rather than age as such: age is used as adjectivally.
44. The wording of the certificate amounts to confirmation that SP is not able to make decisions for himself in relation to the proceedings because of an impairment. The confirmation is specific to the proceedings and in my view sufficiently addresses the test in s 2(1) of the 2005 Act.
45. I also do not accept Mr Rees’ suggestion that the evidence must expressly address each of the tests in s 3 of the 2005 Act, that is SP’s ability to understand, retain and

use or weigh information, or to communicate decisions (tests which I note are, in any event, expressed in the alternative: a person lacks capacity if any one of them is not met). The certificate confirms that SP is not able to give instructions to lawyers. In the context of a clear statement that SP lacks capacity to conduct the proceedings due to disease, I think that addresses the statutory test.

46. Importantly, I have no evidence that actually contradicts either the certificate from Vinoo or Madhu Hinduja's evidence. The Defendants do not dispute that SP lacks capacity, and indeed have relied on it as a basis for seeking to take control of Hinduja Bank, an asset in SP's sole name, relying on the July letter. This is the subject of proceedings in Switzerland. In those proceedings the Defendants have positively asserted that SP lacks capacity. [redacted] Initially in these proceedings they appeared to accept that SP is a protected party, although more recent evidence from Mr Boyne states that the Defendants consider it "likely" that SP lacks capacity and do not dispute that he is very ill. They contend however that they have been prevented from seeing him for some time.
47. The only possible contrary evidence relates to the ongoing proceedings in Switzerland. SP's capacity to act in those proceedings was confirmed by medical evidence on 30 April 2018, and was asserted to continue as recently as July 2018. It has also been asserted in those proceedings by those acting for SP that SP had capacity when a disputed shareholders meeting occurred in March 2018. However, July 2018, the most recent of these dates, is nearly 2 years ago, and some 16 months before the claim was made in these proceedings in November 2019.
48. I was informed that SP has been served with, at least, the application dated 29 April and has made no objection. There is no evidence to indicate that Vinoo's statement that her father has asked her to act for him in the proceedings because he is unable to do so is anything other than accurate. Whilst an admission of incapacity said to have been made by the person alleged to lack capacity cannot of itself carry great weight (*Masterman-Lister* at [17]), if there was any real concern about SP's position then Clifford Chance, who as discussed below were originally instructed by SP himself in 2015, would have an obvious conflict of interest in taking instructions from Vinoo.
49. At first blush, the absence of medical evidence may seem surprising. Such evidence was obviously obtained in April 2018, and it might seem a simple course to accede to the Defendants' demand for it. However, quite apart from any issues created by the current pandemic and any potential distress or disturbance to SP, I am also bound to ask myself why the Defendants are insisting on it when SP's wife and daughters, who are clearly very close to him and have been entrusted with his affairs, have clearly formed the view that he lacks capacity to conduct the proceedings, and it appears otherwise to be in the Defendants' interests to argue that SP lacks capacity. I do have a concern that the Defendants' stance is not driven by a proper concern about compliance with CPR 21 or with SP's Article 6 rights, but instead may be prompted by other factors, most obviously by their evident desire to avoid or at least delay these proceedings. Whilst Mr Rees instead invited the court to draw the conclusion that the absence of the medical evidence was for tactical reasons relating to SP's position in the Swiss proceedings, I think that point is sufficiently answered by the fact that Vinoo is clearly confirming in these proceedings that SP now lacks capacity.
50. In summary, medical evidence is not required under the rules and I do not think that it is necessary, or that it would be in accordance with the overriding objective, to require

it in this case. I am sufficiently satisfied by the evidence before me that SP lacks capacity to conduct these proceedings.

CPR 21.4(3): introduction

51. In order to appoint Vinoo as SP's litigation friend, the court must be satisfied that (a) she can fairly and competently conduct proceedings on SP's behalf, and (b) she has no interest adverse to that of SP. (There is no dispute that Vinoo has provided the required undertaking to pay costs.)
52. Mr Rees submitted that the tests in CPR 21.4(3)(a) and (b) are not met. The Defendants maintain that Vinoo has her own separate financial interest in pursuing the proceedings, and that she would not be in a position to form an independent and objective judgment about the merits of the claim and SP's best interests. The correct course would be to appoint an independent professional or the Official Solicitor.

CPR 21.4(3): the tests

53. A useful starting point in the authorities is Norris J's summary in *OH v Craven* [2017] 4 WLR 25, where he said at [14]:

“I should here briefly note the role of a litigation friend in these circumstances. The issue was considered by Brightman J in *In re Whittall* [1973] 1 WLR 1027 . The context was an application under the Variation of Trusts Act 1958 in which the guardian ad litem had simply acquiesced, and the judge said the guardian: “should not be encouraged to regard himself as a mere cypher, lending his name to the application for formal purposes but devoid of all responsibilities”. Brightman J had earlier (at pp 1030–1031) described those responsibilities in the following terms. That a guardian is required to take all measures he or she sees fit for the benefit of the infant defendant, supplementing the want of capacity and judgment of the minor, his or her function being to guard or safeguard the interests of the minor who becomes his ward or protégé for the purposes of the litigation. The discharge of that duty involves the assumption by the guardian of the obligation to acquaint him or herself of the nature of the action and, *under proper legal advice*, to take all due steps to further the interests of the minor.”

54. Norris J added at [15] that the court is not there to apply a rubber stamp. It must be satisfied that orders sought are sought by “those who have been able to weigh things up and to decide freely what to do”.
55. The function of a litigation friend is therefore to “guard or safeguard”. He or she cannot disclaim all responsibility, but must instead acquaint him or herself of the nature of the action and, under proper legal advice, take steps to further the protected party's interests.
56. In *R (Raqeeb) v Barts NHS Trust* [2019] EWHC 2976 (Admin) MacDonald J considered the duties of a litigation friend and reviewed the authorities in more detail. The substantive issue in that case was a challenge to a decision by an NHS Trust to refuse permission for a child to travel to Italy for treatment, but the decision in

question related to an attempt by the Trust to terminate the appointment of the child's litigation friend XX, essentially for reasons connected with XX's religious beliefs. The Trust claimed that XX lacked the ability to take a balanced and even-handed approach in determining the child's best interests. MacDonald J refused the Trust's application.

57. At [20], MacDonald J stated that the authorities made clear that in fairly and competently conducting the proceedings, a litigation friend is required to act for the benefit of the relevant individual and to safeguard his or her interests. He went on at [23] to note the emphasis in the authorities on the central role of legal advice in the discharge of the duties of a litigation friend, but also (at [24]) the need for the litigation friend to be able to exercise some independent judgment on the legal advice received. He commented that in doing this "the litigation friend must approach the litigation with objectivity". There are further references to objectivity at [26] and [27].
58. MacDonald J also referred at [25] to the point that any solicitor acting for a child or protected party would be under an obligation to inform the court of any concern that the litigation friend was not acting properly. At [28] he referred to examples in the authorities of adverse interests that may disqualify a person from acting as a litigation friend, one being a relative with a financial interest in the outcome of the case.
59. With respect, I would suggest that some caution is required in relation to MacDonald J's comments about objectivity. It should also not be assumed that a relative with a financial interest is necessarily debarred from acting as a litigation friend.
60. The comments made about objectivity were obviously made in the context of the facts of that case. The key tests to apply are those set out in the rules. In conducting litigation fairly and competently on behalf of a protected party, it is obvious that a litigation friend must acquaint him or herself with the nature of the case and, under proper legal advice, make decisions in the protected party's best interests. Being "objective" in this context cannot mean independent or impartial vis-à-vis both parties to normal adversarial civil litigation. The litigation friend is acting *on behalf of* the protected party. Any objectivity required must relate to the litigation friend's ability to act in the protected party's best interests, and in doing so listen to and assess legal advice, and properly weigh up relevant factors in making decisions on the protected party's behalf.
61. The requirement not to have an adverse interest is closely linked to the requirement that the litigation friend can fairly and competently conduct the proceedings. Any adverse interest would obviously risk compromising the litigation friend's ability to act fairly in the protected party's best interests, or at least risk giving the appearance of doing so. For example, in *Nottinghamshire County Council v Bottomley* [2010] EWCA Civ 756 a litigation friend who was subject to a conflict of interest as between the local authority who employed her and the child she was representing was removed. Stanley Burnton LJ made the point at [19] that a litigation friend must be able to exercise some independent judgment on the advice received, and it would be unfair to expect the litigation friend to choose a form of settlement most unfavourable to her employer. He also said that the principle that justice must be seen to be done requires the litigation friend not to be seen as having a conflict.
62. Whether the existence of a financial interest on the part of the litigation friend should debar them from acting will depend on the nature of the interest, and whether it is in fact adverse or whether it otherwise prevents the litigation friend conducting the proceedings fairly and competently on the protected party's behalf. A person is not

prevented from being a litigation friend simply because they have a personal interest in the proceedings. It would, for example, be relevant if any personal interest that the litigation friend had meant that he or she could not approach the litigation in a balanced way, in the sense of not being able to weigh up legal advice and decide what should be done in the protected party's best interests. But it would be highly unlikely that a litigation friend would be unable to do so simply because he or she has an interest in the proceedings, in circumstances where that interest is aligned with that of the protected party.

63. It is also worth referring to *Davila v Davila* [2016] 4 WLUK 347, a decision of Laurence Rabinowitz QC sitting as a Deputy High Court Judge. He commented at [137(1)] that the enquiry to determine whether there was an adverse interest was directed towards the conduct and outcome of the litigation, and in most cases it would not be relevant to search outside its bounds, and at [137(2)] that the fact that the litigation friend has his own independent interest or reasons for wishing the litigation to be pursued ought not, in general, to be a sufficient reason for impeaching the appointment, because such an interest would generally run in the same direction as the protected party rather than being adverse to his interests. I agree. The judge also commented at [137(10)] that the reference to being able fairly and competently to conduct the proceedings was aimed at ensuring that the litigation friend has the skill, ability and experience to be able properly to conduct litigation of the sort in question, but that in general the court should not be required to conduct an enquiry extending far beyond that, considering unproven allegations not directly related to the matters giving rise to the litigation.

CPR 21.4(3): application to the facts

64. I have concluded that there are no good grounds to indicate that Vinoo cannot fairly and competently conduct proceedings on SP's behalf.
65. The Defendants question Vinoo's competence, relying on errors of procedure in failing to file the certificate of suitability at the right time, and an initial failure to provide a statement of truth in precisely the right form in the claim form (as well as the absence of medical evidence already discussed, which is not in fact an error of procedure). However, the errors that have been made are technical errors by Vinoo's legal advisers which do not undermine her own competence, and in my view they go nowhere near indicating that she fails to meet this requirement.
66. I am also satisfied that Vinoo can act fairly on behalf of SP and that she does not have an adverse interest. As already explained, there is no requirement for a litigation friend to be independent or impartial, provided that he or she acts properly in the role of litigation friend. As against the Defendants, SP's litigation friend will not, and indeed cannot, be impartial: he or she is conducting adversarial proceedings on behalf of the protected party. What is required is that the litigation friend acts in the protected party's best interests.
67. I take into account that SP has chosen Vinoo as one of his attorneys under lasting powers of attorney for both his property and financial affairs, and health and welfare, under powers of attorney made in June 2015². As such she has a duty to act in his best interests. The fact that she was appointed to these roles by SP is also a strong

² For property and financial affairs SP's wife Madhu was appointed first, with Vinoo as first replacement and Shanu as second. However, Madhu has disclaimed and her daughters are acting jointly and severally. In relation to the health and welfare power of attorney, Madhu and Vinoo were appointed jointly and severally.

indication that he trusted her to act in his best interests, and indeed to do so in all aspects of his life. Obviously this does not automatically qualify Vinoo to act as a litigation friend, but it is of some relevance.

68. [redacted] It is worth noting that the powers of attorney made by SP include certificates as to SP's capacity both from SP's consultant neurologist and a private client solicitor.
69. I also note that Vinoo has very experienced legal advisers, who I am satisfied are very much alive to the obligations to which Vinoo is subject. Mr Kosky specifically confirms in his evidence that Vinoo fully appreciates her obligations to act in SP's best interests, both as attorney and as litigation friend.
70. Vinoo lives with SP, and has done so for a long time, and she cares for both him and his wife. In seeking to act as SP's litigation friend she has the support of her immediate family, comprising her mother and sister. Madhu's witness statement states that she supports Vinoo's decision to issue proceedings, and that "all that she [Vinoo] has done has been in SP's best interests". It also states her belief that if SP had been able to do so he would have taken the decision Vinoo took to issue proceedings, and that he had put his trust in Vinoo (and Madhu and Shanu) to defend his interests in the event that he became unable to do so, as shown by his appointment of them as attorneys.
71. It is said on SP's behalf that if the Defendants' position on the July letter is correct then that throws SP's estate and tax planning into disarray, calls into question the validity of his wills, potentially displacing the appointment of his executors, and may also make the acts of his attorneys invalid. If any part of this is right, and I did not understand the assertion to be challenged, then proceedings that seek to determine the legal effect of the July letter, and address the uncertainty that currently exists, cannot rationally be said to be contrary to SP's interests. In principle it must be in SP's interests to have the effect of the July letter definitively determined, and these proceedings would appear to be an appropriate step for his attorney to take on his behalf. It is hard to imagine that a wholly independent person, or the Official Solicitor, could reach any view other than that the uncertainty as to the status of the July letter should be resolved. As Mr Rajah said, if it is not determined now then the effect of the July letter will have to be determined at some point. It cannot be avoided indefinitely.
72. The decision to issue proceedings in England, in the context of a document which all parties appear to agree is governed by English law, and in circumstances where both SP and GP are resident here, can also not be criticised. [redacted]
73. If SP's claim has foundation, then it would certainly be the case that it is in SP's financial interests to challenge what is being portrayed as a use of the July letter to allow seizure of control of his assets and disruption of his financial affairs. The fact that that may also advantage Vinoo (if the claim succeeds) does not mean that she has an adverse interest. In principle, action taken to preserve or defend assets said to belong to SP, which if it is successful would benefit his immediate family as well as SP, would appear to be in his interests. In other words, those interests appear to be aligned with Vinoo's.
74. The Defendants suggest that Vinoo is so financially invested in the proceedings that she is incapable of exercising objective and impartial judgment. They say that the purpose of the proceedings is to further her own litigation in Jersey [redacted] or

secure leverage for a favourable settlement. They also note that if the claim succeeds then all assets in SP's name would pass to Vinoo and her immediate family on SP's death, including the entire shareholding in Hinduja Bank. They maintain that a number of the complaints about the July letter relate to its impact on Vinoo personally rather than SP.

75. However, impartiality is not required. The litigation friend must be able to act in the protected party's best interests, and properly to weigh up relevant factors in making decisions on that party's behalf. That does not mean that only an independent outsider with no personal interest in the outcome is qualified to act.
76. In relation to the Jersey proceedings, Vinoo's interests and those of SP appear to me to be aligned. The Defendants suggest that the case Vinoo is running in Jersey is substantially different from the case she is seeking to run in England on SP's behalf. Based on what I have seen I do not accept this. The nature of the proceedings, and the precise allegations put, are different, but that does not demonstrate any adverse interest. Vinoo's case in Jersey is that the July letter is not relevant. In any event the relief being sought in these proceedings appears to me to be essentially aligned with Vinoo's objective in the Jersey proceedings [redacted].
77. Mr Rees submitted that there is no identity of interests between SP and Vinoo as testator and beneficiary respectively, because the former is entitled to change his mind. But in this case, where no one is actually suggesting that SP now has capacity and it is undoubtedly the case that SP and his immediate family remain close, any distinction is to my mind apparent and not real. I also do not accept that Vinoo is disqualified because the July letter may have had a personal impact on her, where there is no indication that that has created an adverse interest.
78. The Defendants also contend that Vinoo has shown a disregard for SP's best interests in bringing the claim, and it was not in his best interests for the proceedings to continue. The Defendants may well hold that view, but it seems to me that Vinoo and other members of SP's immediate family, whom he has chosen to appoint as his attorneys, are in a better position to judge this than the persons against whom the proceedings are being taken.
79. The Defendants refer in addition to the fact that Vinoo may be a witness in these proceedings, which they say should continue under Part 7 rather than Part 8 because they believe they will involve a substantial factual dispute. However, the fact that Vinoo might be required in due course to give evidence cannot sensibly prevent her from acting as a litigation friend. As already indicated, there is no requirement for independence and there is no basis to suggest that acting as a witness means that she cannot fairly conduct proceedings on her father's behalf, or that she has an adverse interest.
80. I also take account of the fact that there is evidence that SP himself sought to disavow the July letter. It was SP, not Vinoo, who originally instructed Clifford Chance in 2015. Mr Kosky's evidence explains that SP organised for him and one of his partners to meet the brothers on 2 May 2015, that at that stage it was thought that GP, AP and PP would agree to whatever SP proposed, but that shortly after the meeting GP and AP referred to the July letter and sought to rely on it. As a result Clifford Chance sent an email on 25 May stating that SP (and at that stage PP) did not consider themselves legally or morally bound by the July letter. A further letter from the firm dated 24 July 2015 reiterated that SP was not bound by it, and SP made the same point in a letter he sent dated 16 July 2015. It is worth noting that the powers of attorney were made

around this time, in June 2015. In these circumstances it would be rather surprising if, as his property and financial affairs attorney, Vinoo was not taking action to determine the effect of the July letter in circumstances where the Defendants are seeking to make use of it.

81. The documentary evidence also included a witness statement made by SP in July 2016 which states, among other things, that the July letter does not reflect his wishes and that the family's assets should be separated. It is accompanied by declarations as to capacity to make it by a consultant psychiatrist and a solicitor. I understand that the Defendants may challenge this witness statement. I do not need to place any reliance on it to reach my conclusions, but there is certainly nothing in it that gives me any concern about appointing Vinoo as SP's litigation friend.
82. Mr Rees pointed out that SP did not follow up what was said in 2015 with any action in relation to the July letter. He did not challenge it while he had capacity. However, Mr Rajah fairly responded that, as far as those acting for SP are aware, the Defendants did not actually make use of it until 2018, when they took steps to take control of Hinduja Bank.
83. Although the Defendants say that SP would not agree to the loss of privacy involved (and indeed one of their objections to Vinoo acting as litigation friend was her opposition to the Privacy Application, which they said was contrary to SP's interests), the evidence from SP's wife expressly disputes that. That evidence states Madhu's belief that SP would have been opposed to privacy if it meant he was unable to make clear to others that he was challenging his brothers' actions and their reliance on the July letter. The Defendants say that this evidence is not based on anything SP said and carries no weight, but it seems to me that, to the extent it is relevant at all, it must carry more weight than the Defendants' assertions. So whilst I accept Mr Boyne's evidence that GP believes that SP would be troubled by the risk of publicity, in particular as to the state of his health and the existence of the dispute between family members, it seems to me that Vinoo and other members of SP's immediate family are in a better position to judge what is in his best interests. In any event, however, speculating about what SP's position would have been as regards privacy is not determinative of whether Vinoo meets the requirements of CPR 21.4(3). Furthermore, now that the Privacy Application is largely abandoned, these matters will be aired irrespective of who acts as litigation friend.
84. Mr Rees submitted that Vinoo's reliance on what she claims SP wanted begs the outcome of the proceedings. I do not consider this to be a fair characterisation of the point. The evidence available about SP's wishes in 2015 is of some relevance to the question I need to decide, but the relevance is limited. It addresses any concern I might otherwise have that what would seem clearly to be in SP's interests, namely resolving uncertainty arising from the July letter in proceedings before the English court, might conceivably not be because of some broader considerations which SP would have regarded as being of greater significance to him.
85. A further, important, point to make is that it is the court that will ultimately decide the effect of the July letter, making its decision on the facts and law in the normal way. In the same way that in *Raqeab XX*'s religious views were not relevant to the substantive issues before the court, Vinoo's motivations will not be relevant to the decision that the court makes, and the court will in any event want to hear both sides of the argument (*Raqeab* at [36] and [41]). Furthermore, the question of SP's own subjective views or wishes (whether in July 2014 or subsequently), and the extent (if

at all) to which that question is relevant, will be matters to be determined by the trial judge on the evidence.

86. I do not accept that it is appropriate to appoint another independent professional or the Official Solicitor instead of Vinoo. That might suit the Defendants but it is not the correct course. Vinoo satisfies the conditions, and as already mentioned the Defendants accept that if she does then her appointment is appropriate. In any event there are clear benefits in terms of costs, and when account is taken of Vinoo's knowledge of SP's complex affairs and interests, in her acting rather than anyone else. Any independent appointee would be at a significant disadvantage to the Defendants in their level of knowledge and understanding of the family's affairs, and their appointment and the work needed to ensure they are properly appraised of the issues will involve delay. The appointment of Vinoo best accords with the overriding objective.

The Privacy Application

87. As already explained, the scope of the Privacy Application as now maintained is materially narrower than as originally made, although it is sought on a permanent basis. The application as narrowed relates only to access to court records under CPR 5.4C and transcripts under CPR 39.9 (see [8] above). Nonetheless, despite its narrow scope it is clear that the open justice principle is engaged. In relation to court records (and other documents before the court) this was explicitly confirmed by the Supreme Court in *Dring v Cape Intermediate Holdings Limited* [2019] 3 WLR 429 ("*Dring*"). The default position is that access should be granted.

The parties' positions

88. SP did not initially oppose the restriction on access to court documents, on the understanding that this would only be pending the outcome of the jurisdiction challenge. The application in its revised form is however opposed. Mr Rajah submitted that the Defendants were trying to reintroduce privacy by the back door, and that the significant resources available to the Defendants would enable them to launch challenges to any requests for documents, effectively re-running arguments made in favour of the Privacy Application and amounting to a serious derogation from the open justice principle. The only material issue related to the Jersey proceedings, which are currently being conducted in private, where as a matter of comity it would be appropriate for the court to make specific provision allowing redactions of details of those proceedings to the extent that that was necessary to allow privacy to be maintained. However, it was unlikely that the Jersey proceedings would need to be referred to in any detail in future in these proceedings.
89. The Defendants give a number of reasons for seeking an order restricting access to documents, being an order that they had thought that SP would not oppose. The Defendants' position is that they believe Vinoo started these proceedings to gain publicity, and had no reason to do so given the ongoing Jersey and Swiss proceedings. They say that an order is required so as not to undermine the privacy orders of the Jersey court, prejudice SP's interests as a protected party, or risk disclosure of confidential and sensitive information. Permitting access as of right would, they say, run contrary to the interests of justice.

Discussion: general

90. The first point to make is that Vinoo's alleged motive for starting these proceedings is not the point. Neither is the preference of some family members not to air their differences in public. I appreciate that elements will be sensitive and that the Defendants would prefer to keep what they regard as a private dispute between family members out of the public eye. However, the point at issue is the principle of open justice, which is a matter for the court rather than a question of the parties' motives or preferences. Transparency is no less important because of the identity of the individuals or businesses concerned. Indeed, the fact that there may be a particular public interest in the identity of those concerned may be a reason that weighs against any restrictions being imposed: compare the discussion by Lord Sumption (in the context of anonymity) in *Khuja v Times Newspapers Ltd* [2019] AC 161 at [29]. Nevertheless, the court must balance Convention rights, which of course include under Article 8 the right to respect for private and family life, as well as the right to freedom of expression under Article 10.
91. The question is whether the order sought is a derogation from the open justice principle, and if so whether a derogation is required. Any derogation that is required should only be made to the extent that it is necessary to do so.
92. Both parties referred to *Greystoke v Financial Conduct Authority* [2020] EWHC 1011, a decision of Steyn J. In that case one of the orders made by the judge was that any application made by a non-party for access to certain documents should be on notice to the parties, who should be given an opportunity to address the application at an oral hearing. She said at [42] that this part of the order was not a derogation from open justice, but served to ensure that the court would hear from the parties as well as the applicant.
93. I agree with Mr Rajah that this comment needs to be read in the context of the decision as a whole. The documents to which this part of the order applied were confidential documents in respect of which broader restrictions were being ordered on the grounds that it was necessary to do so, including relevant parts of the hearing being heard in private, reporting being prohibited, and documents not being provided to a non-party without a further order. The case is not authority for the proposition that there is no derogation from the principle of open justice where the court restricts the operation of the normal rules in CPR 5.4C in circumstances where that is not simply an adjunct to broader restrictions being imposed.
94. I should also mention briefly that one of the reasons relied on on SP's behalf in resisting the Privacy Application is that they wish it to be known that the July letter is in dispute. Although the Defendants' response to this is that there would in any event be nothing to prevent third parties being told that there is a dispute, the concern expressed by SP's team is that they are unaware of the extent to which the Defendants have sought to make use of the July letter. I understand this concern, although I have not needed to rely on it to reach the conclusions that I have.

CPR 5.4C(1) and 39.9

95. CPR 5.4C(1) provides for access, as of right, to statements of case and judgments or orders given or made in public (with irrelevant exceptions). Similarly, CPR 39.9 entitles any person to require a transcript of a public hearing to be supplied. In contrast, CPR 5.4C(2) requires permission to be obtained from the court before other documents forming part of court records are supplied. The approach taken in the rules is therefore that statements of case, judgments, orders and transcripts comprise a

minimum level of information that should, consistent with the open justice principle, normally be provided without further enquiry by the court.

96. Subject only to any necessary provision in respect of the Jersey proceedings (as to which see below), I am not satisfied that the Defendants have provided any good reason to depart from the normal rule in CPR 5.4C(1) and CPR 39.9. Thus, statements of case, judgments, orders and transcripts of public hearings should be provided without further enquiry. In reaching that conclusion I am of course aware that these proceedings are currently being conducted under Part 8, such that the only statement of case is a relatively brief claim form. If the proceedings do continue under Part 7 there would obviously be more extensive pleadings. However, whether anything in those pleadings really justified a restriction on non-parties' ability to obtain them is something that should be addressed at the time, with a specific application. If any of the content is of real concern, most obviously on the grounds of confidentiality or in relation to SP's personal position, then it is likely to be preferable to address that content specifically, with consideration being given to the use of confidential schedules or annexes.
97. As regards documents falling within CPR 5.4C(1) and CPR 39.9, specific provision can be made in respect of the Jersey proceedings on a case by case basis, to the extent required. But it may well be that nothing is needed. For example, the court should, irrespective of any order I make, be asked to go into private if it is hearing details about those proceedings which risk compromising their privacy. In that event it is already the position that any related transcript would not be made available without permission: see CPR 39.9(4). The same would of course apply in relation to any other matter that justified the court in proceeding in private. However, a blanket prohibition on non-parties having access to these documents without a court order would be disproportionate. In relation to transcripts, judgments and orders in particular it would contravene the principle that nothing should be done to discourage the publication to the wider public of fair and accurate reports of proceedings that have taken place in court: see Lord Sumption's judgment in *Khuja v Times Newspapers* at [16], referring to Lord Diplock's comment to that effect in *Attorney General v Leveller Magazine Ltd* [1979] AC 440 at 450.

CPR 5.4C(2)

98. The position in relation to other documents that may be requested under CPR 5.4C(2) is more finely balanced, because permission is in any event required from the court³. As explained in *Dring* at [45] and [46]:

“[45]... although the court has the power to allow access, the applicant has no right to be granted it (saved to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle... [T]he court has to carry out a fact-specific balancing exercise. On the one hand will be ‘the purpose of the open justice principle and the potential value of the information in question in advancing that purpose’.

³ It should be noted that the application before me, and the order sought, relates only to documents forming part of court records within CPR 5.4C(2), and not other documents that might be supplied under the court's inherent jurisdiction. The distinction is explained in *Dring*.

[46] On the other hand will be ‘any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others’. There may be very good reasons for denying access...”

99. On the face of it the requirement for an on-notice application which allows the court to hear any objections from the parties is not a material derogation from the open justice principle, and it may well also put the court in a better position to carry out the fact-specific balancing exercise referred to in *Dring* at [45]. Under CPR 5.4D the non-party must in any event make an application under Part 23 where permission is required, and although the starting point is that the application is made without notice, the court may direct that notice is provided to any affected person.
100. However, the requirement for an on-notice application does potentially place an additional obstacle, with additional cost, in the path of a non-party seeking access to documents, and I am also mindful that any process put in place might involve repeated consideration of arguments that the Defendants have not chosen to pursue in support of a broader order for privacy.
101. On balance, I consider that it is appropriate to impose a limited restriction which requires that any application for access to documents under CPR 5.4C(2) is made on notice to the parties, and permits those parties a period of three clear days⁴ in which, if so advised, they may provide written submissions to the court setting out reasons why any of the documents requested should not be provided, or should be provided on a redacted basis. The court will make its decision on the papers, unless it determines otherwise, and would of course be at liberty to seek responsive evidence from the non-party.
102. The most obvious reason for this approach relates to the need to respect the privacy of the Jersey proceedings. However, I am also mindful of the possible need for confidentiality in respect of some aspects of the parties’ (complex) business and financial affairs, and the sensitivity over SP’s personal position. I note that CPR 39.2(3), dealing with hearings in private, makes specific reference not only to confidential information but also to the interests of a protected party, as possible reasons why it may be necessary to sit in private.

Conclusions

103. In summary:
 - i) Vinoo is appointed as SP’s litigation friend under CPR 21.6;
 - ii) steps taken in the litigation prior to that appointment will have effect, as permitted under CPR 21.3(4); and
 - iii) the Privacy Application is dismissed, except in respect of applications pursuant to CPR 5.4C(2), where the procedure described in paragraph [101] above will apply.

⁴ Determined in accordance with CPR 2.8.