Neutral Citation Number: [2023] EWHC 1560 (Ch)

Cases Nos: 166 and 167 of 2015 and 21 of 2019,
E00YE350, F00YE085, BL-2019-BRS-000028

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY & COMPANIES LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 23 June 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) DR GEOFFREY WILLIAM GUY
(2) THE CHEDINGTON COURT ESTATE LIMITED
(3) CHEDINGTON EVENTS LIMITED **Applicants**

- and -

(1) MRS NIHAL MOHAMMED BRAKE
(2) RETHINK MENTAL ILLNESS T/A MENTAL HEALTH AND MONEY ADVICE (ENGLAND)
(3) DORSET HEALTHCARE UNIVERSITY NHS FOUNDATION TRUST

Respondents

- -
- -

William Day (instructed by **Stewarts Law LLP**) for the **Applicants**
The First Respondent in person
The Second and Third Respondents did not appear and were not represented

Applications dealt with on paper

- -

Approved Judgment

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

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This judgment was handed down remotely at 6 pm on 23 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

HHJ Paul Matthews :

Introduction

1. On 14 October 2022, the applicants applied by notice for an order to cancel the mental health crisis moratorium ("MHCM") into which the first respondent had been entered at about the end of August 2022, under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 ("the 2020 regulations"). These regulations were made on 17 November 2020 under section 7(2) of the Financial Claims and Guidance Act 2018, and came into force on 4 May 2021. The application notice was supported by a witness statement from Harry Spendlove (the applicants' solicitor) dated the same day, and also by his earlier witness statement of 15 September 2022. As will appear, the resolution of that application is still some way off. The present judgment is concerned only with what directions ought to be given to lead to the substantive application.

2. The application notice itself sought those directions. Originally, an oral hearing was listed for 20 January 2023 to consider them. For various reasons, I decided to convert this into a series of paper submissions followed by a written judgment, a process to which both sides agreed. At that time, I thought I would be able to deal with this aspect of the matter relatively quickly. Unfortunately, I was mistaken, and more urgent matters soon overtook me. With the benefit of hindsight, it would have been preferable if I had them asked another judge to deal either with this, or with one of the other more urgent matters. I am therefore sorry that this has taken so long to decide. However, it was common ground, at least from the beginning of this year, that, because of other litigation between the same parties (some before me), the application could not have been listed before July 2023, and the first respondent in fact asked that it not be listed until August at the earliest. So, the impact on the parties is less than it might have been.

3. The background to this litigation is long and complicated, with many different proceedings in different jurisdictions. Many judgments, at various judicial levels, now litter the pages of various series of law reports and occupy file space on legal computer databases. A very general introduction may be found in *Brake v The Chedington Court Estate Ltd* [2022] EWHC 366 (Ch), [4]-[19]. For present purposes, what matters is that the applicants (collectively called the Guy Parties, because the first applicant and his wife directly or indirectly own the second and third applicants) claim to be owed in excess of £2.3 million pounds by the first respondent and her husband in unpaid damages and costs awards as a result of the litigation so far. The present application is made in four distinct sets of proceedings: (1) insolvency proceedings under references 166 and 167 of 2015, and 21 of 2019; (2) the "cottage eviction proceedings" under reference F00YE085; (3) the "house possession proceedings" under reference E00YE350; and (4) the so-called "documents proceedings", under reference BL-2019-BRS-000028.

4. On 6 May 2021, the first respondent's husband was entered into a mental health crisis moratorium under the 2020 regs. On 25 June 2021, the now second applicant and the third applicant (but then called Axnoller Events Ltd) applied for an order cancelling his moratorium. That application was based on so-called "prejudice grounds" alone, whereas the present application is also made on "eligibility grounds". (I explain these informal terms further below.) The first application was dealt with summarily,

without detailed evidence being filed, at a remote hearing lasting half a day. On 17 August 2021, I handed down judgment refusing that application, although granting alternative relief sought: [2021] EWHC 2308 (Ch), [2021] 1 WLR 6218. Until recently, that was the only decision of which I was aware concerning such applications.

5. According to the official Insolvency Service notifications, the first respondent was entered into her moratorium on 27 August 2022 in relation to the second and third applicants, and 2 September 2022 in relation to the first applicant. The exact dates do not however matter. The assessment of the first respondent which led to the moratorium was carried out by a mental health team operated by the third respondent. The applicants applied for a review and cancellation of the moratorium under regulation 17 of the 2020 Regulations, as they were entitled to do (see [2021] EWHC 2308 (Ch), [23]-[25]). On 29 September 2022 the debt adviser administering the moratorium (the second respondent) concluded on a review that the criteria for cancellation were not met. In the meantime, the applicants had made a further application, dated 12 September 2022, under regulation 7(2)(b), to allow enforcement of certain debts caught by the moratorium to continue. On 4 November 2022, I handed down judgment allowing that application: *Brake v Guy* [2022] EWHC 2797 (Ch). But, again in the meantime, the applicants had on 14 October issued the present application.

The 2020 regulations

6. The 2020 regulations are divided into four parts. Part 1 deals with general provisions, Part 2 with the breathing space moratorium, Part 3 with the mental health crisis moratorium, Part 4 with debt respite scheme administration, and Part 5 with supplemental provisions. For present purposes the relevant provisions are, first, in Part 3 (dealing with the conditions under which a mental health crisis moratorium can exist), and then in Part 1 (dealing with how a moratorium of either kind can be reviewed and brought to an end).

7. Part 3 relevantly provides as follows:

> "28(1) A mental health crisis moratorium is a moratorium under this Part in respect of a debtor who is receiving mental health crisis treatment.
>
> (2) In these Regulations, a debtor is receiving mental health crisis treatment when the debtor—
>
> (a) has been detained in hospital for assessment under sections 2 or 4 of the Mental Health Act 1983,
>
> (b) has been detained in hospital for treatment under section 3 of that Act,
>
> (c) has been removed to a place of safety by a police constable under sections 135 or 136 of that Act,
>
> (d) has been detained in hospital for assessment or treatment under sections 35, 36, 37, 38, 45A, 47 or 48 of that Act, or

(e) is receiving any other crisis, emergency or acute care or treatment in hospital or in the community from a specialist mental health service in relation to a mental disorder of a serious nature.

(3) In this regulation 'specialist mental health service' means a mental health service provided by a crisis home treatment team, a liaison mental health team, a community mental health team or any other specialist mental health crisis service.

29(1) Any of the following persons may submit an application to a debt advice provider for a mental health crisis moratorium in relation to a debtor—

(a) the debtor,

(b) the debtor's carer,

(c) an approved mental health professional,

(d) a care co-ordinator appointed in respect of the debtor,

(e) a mental health nurse,

(f) a social worker,

(g) an independent mental health advocate appointed in respect of the debtor for the purposes of arrangements made under sections 130A(1) or 130E(1) of the Mental Health Act 1983 ,

(h) an independent mental capacity advocate appointed in respect of the debtor for the purposes of arrangements made under section 35(1) of the Mental Capacity Act 2005 ,

(i) a relevant person's representative,

(j) an approved mental capacity professional approved under paragraph 39 of Schedule AA1 to the Mental Capacity Act 2005 , or

(k) an appropriate person as specified in paragraph 42(5) of Schedule AA1 to the Mental Capacity Act 2005 .

(2) The application must include the following information—

(a) sufficient information to identify the debtor, and

(b) evidence from an approved mental health professional that the debtor is receiving mental health crisis treatment.

(3) For the purpose of paragraph (2)(b), evidence from an approved mental health professional must include the following—

(a) sufficient information to identify the debtor,

(b) the name and contact details of the approved mental health professional,

(c) the name and contact details of the debtor's nominated point of contact,

(d) a declaration by the approved mental health professional that the debtor is receiving mental health crisis treatment, and

(e) a signed statement by the approved mental health professional that the evidence is, to the best of their knowledge and belief, correct.

[…]

30(2) Having considered an application for a mental health crisis moratorium, a debt advice provider must initiate a mental health crisis moratorium on behalf of a debtor if the debt advice provider considers that—

[…]

(b) the conditions in paragraph (4) are met, and

[…]

(4) The conditions referred to in paragraph (2)(b) are that, in light of the information provided in accordance with regulation 29(2) and (4) and any other information obtained by the debt advice provider—

[…]

(b) a mental health crisis moratorium would be appropriate, and

(c) an approved mental health professional has provided evidence that the debtor is receiving mental health crisis treatment.

(5) For the purpose of paragraph (4)(b), when considering whether a mental health crisis moratorium is appropriate, the debt advice provider—

[…]

(b) may have regard to any other factor that the debt advice provider considers relevant.

[…]

34(1) Subject to paragraph (2), a debt advice provider must cancel a mental health crisis moratorium if—

(a) the debt advice provider considers that the evidence from an approved mental health professional referred to in regulation 29(2)(b) contains inaccurate, misleading or fraudulent information, or

[…]

(2) A debt advice provider is not required to cancel a mental health crisis moratorium if the debtor's personal circumstances would make the cancellation unfair or unreasonable.

[…]

(4) In order to cancel a mental health crisis moratorium, a debt advice provider must—

(a) consult the debtor prior to doing so to the extent that the debt advice provider is able to do so, and

(b) notify the Secretary of State and the debtor of the cancellation.

[…]"

8. Then the relevant provisions in Part 1 are:

"17(1) Subject to paragraph (4), a creditor who receives notification of a moratorium under these Regulations may request that the debt advice provider who initiated the moratorium or (as the case may be) the debt advice provider to whom the debtor has been referred since the start of the moratorium reviews the moratorium to determine whether it should continue or be cancelled in respect of some or all of the moratorium debts on one or both of the following grounds, namely that—

(a) the moratorium unfairly prejudices the interests of the creditor, or

(b) there has been some material irregularity in relation to any of the matters specified in paragraph (2).

(2) The matters in relation to which a creditor may request a review on the ground of material irregularity are that—

(a) the debtor did not meet the relevant eligibility criteria when the application for the moratorium was made,

(b) a moratorium debt is not a qualifying debt, or

(c) the debtor has sufficient funds to discharge or liquidate their debt as it falls due.

[…]

18(1) Having received a request for a review in accordance with regulation 17, a debt advice provider must conduct the review and carry out the steps in paragraph (4) before the end of the period of 35 days beginning with—

(a) the day on which the moratorium started, or

(b) in respect of an additional debt, the day on which the moratorium took effect in relation to the additional debt under regulation 15(7).

(2) Subject to paragraph (3), having carried out a review in response to a request from a creditor, a debt advice provider must cancel a moratorium in respect of

some or all of the moratorium debts if the debt advice provider considers that the creditor has provided sufficient evidence that—

(a) the moratorium unfairly prejudices the interests of the creditor, or

(b) there has been some material irregularity in relation to any of the matters specified in regulation 17(2).

(3) A debt advice provider is not required to cancel a moratorium under paragraph (2) in respect of a moratorium debt if the debt advice provider considers that the debtor's personal circumstances would make the cancellation unfair or unreasonable.

(4) The steps referred to in paragraph (1) are that a debt advice provider must—

(a) inform the creditor who requested a review of the outcome of the review, and

(b) if the debt advice provider considers that a moratorium should be cancelled in respect of some or all of the moratorium debts—

(i) consult the debtor to whom the moratorium relates prior to doing so to the extent that the debt advice provider is able to do so, and

(ii) if, after acting in accordance with paragraph (i), the debt advice provider remains of the view that the moratorium should be cancelled in respect of some or all of the moratorium debts, notify the Secretary of State and the debtor of the cancellation.

[…]

19(1) If a debt advice provider has carried out a review of a moratorium following a request made by a creditor under regulation 17 and the moratorium has not been cancelled under regulation 18 in respect of some or all of the moratorium debts as a result, then the creditor may make an application to the county court on one or both of the grounds in regulation 17(1).

(2) An application under this regulation must be made before the end of the period of 50 days beginning with—

(a) the day on which the moratorium started, or

(b) in respect of an additional debt, the day on which the moratorium took effect in relation to the additional debt under regulation 15(7).

(3) Where on an application under this regulation the court is satisfied as to either of the grounds in regulation 17(1), it may do either or both of the following, namely—

(a) cancel the moratorium in relation to a moratorium debt owed to the creditor who made the application to the court,

(b) cancel the moratorium in respect of any other moratorium debt."

[…]"

In this judgment, the grounds set out in regulation 17(1)(a) are referred to as the "prejudice grounds", and those set out in regulation 17(1)(b) are referred to as the "eligibility grounds" (because all the matters in regulation 17(2), to which a material irregularity may relate, are matters of eligibility for a moratorium).

Application to this case

9. Under Part 3, it is clear that on the facts of this case Mrs Brake can only be in a mental health crisis moratorium ("MHCM") if she is receiving "mental health crisis treatment": reg 28(1). This is defined in reg 28(2) in 5 sub-paragraphs. The first four refer to a person in hospital or a "place of safety", and so cannot apply to her. The only sub-paragraph which could apply to her is (e), which is that she "is receiving crisis, emergency or acute care or treatment … in the community from a specialist mental health service in relation to a mental disorder of a serious nature". The application for her entry into the MHCM must have included "evidence from an approved mental health professional that the debtor is receiving mental health crisis treatment", and that evidence must have included both a declaration by the health professional that she was receiving mental health crisis treatment, and a signed statement by the health professional that the evidence was correct to the best of his or her knowledge and belief: reg 29(2)(b), (3)(d)(e).

10. The debt advice provider was obliged to initiate the MHCM if he or she considered that, in light of the information provided, a MHCM would be appropriate, and an approved mental health professional had provided the necessary evidence that Mrs Brake was receiving mental health crisis treatment: reg 30(2)(4). However, the debt advice provider must cancel the moratorium if he or she considers that the health professional's evidence contained inaccurate, misleading or fraudulent information, *unless* Mrs Brake's personal circumstances would make that unfair or unreasonable: reg 34(1)(2).

11. Under Part 1, the applicants on being notified of Mrs Brake's moratorium were entitled to, and did, request a review by the debt advice provider to determine whether it should be cancelled, wholly or partly, on the basis (in the present case) *either* of unfair prejudice to the applicants, *or* of material irregularity in relation to her eligibility to make the application she made: reg 17(1)(2). Having carried out that review, the debt advice provider would have been obliged to cancel the moratorium, wholly or partly, if it had considered that the applicants had provided sufficient evidence of such unfair prejudice or material irregularity, *unless* it considered that Mrs Brake's personal circumstances would make that unfair or unreasonable: reg 18(2)(3); *cf* reg 34(2). But the provider did not cancel the moratorium.

12. Since the debt advice provider did not cancel the moratorium, the applicants are entitled to apply to the court for an order cancelling it, again on the basis (in the present case) *either* of unfair prejudice to the applicants (reg 17(1)(a)), *or* of material irregularity in relation to her eligibility to make the application she made (reg 17(1)(b)): reg 19(1). If the court is satisfied as to either of the grounds, it may cancel the moratorium either in relation to the applicants' debts, or to any others: reg 19(3). As I

understand the matter, the applicants pursue both grounds, unfair prejudice and material irregularity.

13. The earlier application to cancel the moratorium enjoyed by the first respondent's husband, referred to in paragraph 4 above, was brought in the High Court. At paragraphs 8 to 10 of my judgment on that application ([2021] EWHC 2308 (Ch), [2021] 1 WLR 6218) I discussed the question whether the application should be made in the High Court or the County Court. It is clear from the regulations that the County Court has jurisdiction: reg 19(1). But in the earlier case I held that it was not exclusive, and that in appropriate cases the application could be brought in the High Court. I note that, in *Kaye v Lees* [2023] EWHC 152 (KB), [32], HHJ Dight CBE, sitting as a High Court judge, took the same view. In my judgment, the same reasons apply in the present application as in my earlier decision (at [10]), to say that

> "in the present case there is good reason to leave the application in the High Court, because it is closely connected with existing High Court litigation. In circumstances where the same court centre, the same court staff and the same judge would be involved, it would be simply inefficient to require that this matter be transferred formally to the county court, for no advantage gained."

The parties' contentions

14. In summary form, the directions sought by the applicants are for:

(1) disclosure of certain categories of documents from the second and third respondents;

(2) the first respondent to file and serve her evidence in response to the application;

(3) the applicants to file and serve their reply evidence;

(4) the parties to exchange expert reports as to the first respondent's mental health, following a medical examination of the first respondent by the experts;

(5) the experts to meet and produce a joint statement identifying points of agreement and disagreement;

(6) the substantive hearing of the application to be listed with a total time estimate of two full days (which may be four half days, in order to accommodate the first respondent).

15. In summary form, the directions suggested by the first respondent are for:

(1) disclosure of certain (but more limited) categories of documents from the second and third respondents;

(2) filing and serving of *medical* evidence by the first respondent;

(3) filing and serving of *non-medical* evidence by the first respondent;

(4) the applicants to file and serve their reply evidence;

(5) the substantive hearing of the application to be listed with a total time estimate of four half days.

16. So the first main difference between the applicants and the first respondent lies in the question of disclosure from the second and third respondents. So far as concerns the positions of the second and third respondents, each has effectively taken the view that there will be no voluntary disclosure, and so there will need to be a court order. The second respondent has however expressly said that the application for disclosure order is not opposed. The third respondent, on the other hand, has said nothing either way. Neither has indicated that it wishes other directions to be made, or that it has any wish or any intention to appear at and participate in the hearing, when it is listed. In this connection, I should note that, although these are proceedings before the Business and Property Courts, and therefore CPR Practice Direction 57AD (subject to exceptions) should apply, there are no statements of case in relation to this application which would trigger the obligations under that practice direction to give disclosure *without* order. It is therefore necessary to seek a positive order for disclosure. There is also a question as to the jurisdiction for making the order.

17. A second important difference between the applicants and the first respondent is that the latter objects to a medical examination by an expert appointed on behalf of the applicants. The first respondent, indeed, says that the court has no jurisdiction to order such an examination to take place. Instead, the first respondent agrees to produce

> "medical evidence to assist the court in carrying out a balancing exercise, if necessary, in respect of her mental and physical health and the impact of the latter on the former."

The first respondent accordingly asks for directions from court as to what that evidence should be.

18. The third difference between the applicants and the first respondent concerns the need for expert nephrology evidence. The first respondent would like to adduce evidence from an expert nephrologist. The applicants oppose this. A fourth difference between them is that the first respondent would like all the medical evidence to be filed and served before the non-medical evidence, but, again, the applicants oppose this.

Disclosure

19. I deal first with the question of disclosure. The issues to be decided on this application include whether there was a "material irregularity" in relation to any of the matters in reg 17(2). Subparagraph (a) of that provision refers to the debtor not meeting "relevant eligibility criteria" at the time of entering the moratorium. So the question is whether the first respondent met the eligibility criteria at that time. Reg 28(1) refers to debtor "receiving mental health crisis treatment". As I have said, this term is elucidated by reg 28(2), broken down into five different situations, the first four of which deal with cases where the debtor has been detained in hospital or removed to a place of safety under one of various provisions of the Mental Health Act 1983. Self-evidently, these powers are concerned with serious, usually life-threatening, situations where urgent action is required.

20. The fifth is subparagraph (e). This is where the debtor is receiving "crisis, emergency or acute care or treatment … from a specialist mental health service in relation to a mental disorder of a serious nature". On its face, this appears to mean that, if the debtor is receiving treatment of the kind stipulated in relation to something which in fact is *not* a mental disorder "of a serious nature", even though the mental health professional thinks that it is, or is *not* receiving "crisis, emergency or acute care or treatment", even though the mental health professional thinks that the debtor is, then the debtor does not meet the eligibility criteria, and there will have been a material irregularity.

21. The first respondent says, however, that the court cannot go behind the medical health professional's opinion. She relies on guidance originally published in March 2021 by HM Treasury about the debt respite scheme. At paragraph 2.5 of that original guidance, it was said that

> "A 'mental disorder of a serious nature' means any mental health problem, disorder or disability of the mind that the [Approved Mental Health Professional] considers to be of a serious nature".

It was not stated in that guidance whether it was issued under statutory authority or not. Looking at the statutory text, it seems possible that it was issued under section 8(1) of the Financial Guidance and Claims Act 2018. If so, there may be a question at the substantive hearing of this application as to whether any such guidance may modify or even revoke regulations made under the Act. On the face of it, I see no such power, but of course I have heard no argument on the point.

22. That said, the immediate comment that I make on this aspect of the guidance is that it does not appear to reflect the words of the regulation. Regulation 28(2)(e) does not say "in relation to *what an approved medical health professional considers to be* a mental disorder of a serious nature", or even what he or she "*reasonably* considers" to be such a disorder. Instead it simply says "in relation to *a mental disorder of a serious nature*". In other words, on the face of it, the test is *not* what the professional thought at the time, but what the court now decides (on the evidence) what actually was the case then. Of course, the available evidence will include the opinion of the professional, formed in the particular circumstances of the case (including examination of the debtor and any tests conducted). But it appears from the regulation that that opinion will not be conclusive. My initial impression from the regulation itself is that the test appears to be an objective one and not a subjective one. But I do not have to, and do not, decide that point at this stage.

23. As it happens, however, this guidance has very recently been reissued (June 2023) and the same passage now reads rather differently. It reads as follows:

> "A 'mental disorder of a serious nature' means any mental health problem, disorder or disability of the mind which the Approved Mental Health Professional considers to be of a severity which justifies (or could justify) the individual's detention in a hospital setting or removal to a place of safety under the Mental Health Act 1983 or cases of equivalent severity where the individual's circumstances do not necessarily warrant such detention or removal (Kaye v Lees [2023] EWHC 152 (KB))."

24. This revision follows, and appears to be based on, the decision of HHJ Dight CBE in *Kaye v Lees*, referred to in the parenthesis at the end of the quotation above. In that case (where, so far as I can see, the Treasury Guidance was not cited to the court), the judge was asked to cancel a mental health crisis moratorium, on the basis both that the creditor was unfairly prejudiced and that the eligibility criteria were not met. The judge considered the relevant statutory provisions, and concluded on the law relating to the eligibility criteria as follows:

> "25. … Pausing there, it is apparent that the two conditions for the making of a mental health crisis moratorium under Regulation 28(2) (e) are that (1) the debtor is suffering from a 'mental disorder of a serious nature' and (2) in respect of that disorder the debtor is receiving 'crisis, emergency or acute' care or treatment in hospital or in the community.
>
> 26. So far as condition (1) is concerned Ms Bretherton reminds me of the framework and provisions of the Mental Health Act 1983, which was extensively amended by the Mental Health Act 2007, and submits that the Regulations have to be construed consistently with that framework and Act. I agree. In my view the specific reference to the 1983 Act in sub-paragraphs 28(2)(a) to (d) makes it plain that the Regulations insofar as they relate to mental health crisis moratoria are to be construed consistently or in accordance with the Act.
>
> 27. Further it seems to me that sub-paragraph 28(2)(e) has to be read consistently with the 4 categories of situation which precede it. In my judgment sub-paragraph (e) is a sweeping up provision which is intended to catch situations which have the same quality as those identified in sub-paragraphs (a) to (d) so far as the severity of the mental disorder is concerned but which do not fall into one of those earlier categories. The categories are not intended to provide some type of descending hierarchy. In my judgment (e) is intended to provide for an equivalent situation to those described in (a) to (d) but where the treatment can be provided without the debtor being removed or detained without their consent, which is the central feature of the powers conferred by the provisions of the Mental Health Act 1983 referred to in (a) to (d).
>
> 28. Sub-paragraphs 28(2)(a) to (d) each deal with a situation where a person is removed or detained without their consent or that of a nearest relative or against their will for assessment, treatment or protection and the nature of the mental health disorder is such that the proposed assessment, treatment or protection is for their benefit and/or for that of the public even though the person concerned may not agree. The hurdles for satisfying the conditions specified in (a) to (d) are necessarily high, directly conflicting with the individual's right to liberty and their free will. In my judgment the use of the phrase 'mental disorder of a <u>serious</u> nature [my underlining]' is a plain indication that before a mental health crisis moratorium is put in place in reliance on sub-paragraph (e) evidence is required to demonstrate that the debtor is suffering from a disorder of a severity which in other circumstances would justify overriding the free will of the debtor in detaining or removing them in their own best interests or that of the public.
>
> 29. As to condition (2) the care or treatment must be of a nature and type designed to meet a crisis or emergency or of an acute nature. There is no further statutory definition of those words so far as I am aware but I note the repeated

> reference to crisis in Regulation 28(3) which defines the type of specialist who is to be providing the treatment. In my judgment the words crisis, emergency and acute are to be read disjunctively, in the sense that they are alternatives, but consistently with each other, in that they each relate to and reflect alternative states of urgency and severity. It is obvious therefore that not all care or treatment will satisfy this second condition which requires something well beyond general or routine treatment."

25. The judge then considered the evidence, which in that case was limited. Ultimately, he held that *both* grounds (*ie* unfair prejudice and eligibility) were made out, and that he should cancel the moratorium. So far as the eligibility criteria were concerned, he held both (i) that the mental disorder was not serious, and also (ii) that the medical treatment of the debtor could not be categorised as "crisis, emergency or acute". Every case, of course, depends on its own facts. However, what seems clear from these extracts is that the judge took the same view as I have provisionally expressed above, that the test of a serious mental disorder is *objective*, and based on the evidence, rather than dependent simply on the professional's *subjective* opinion. If that is right, the words in paragraph 2.5 of the revised Treasury guidance "which *the Approved Mental Health Professional considers to be* of a severity which … " would still not be justified by the words of the regulation.

26. But, as I have said, in the present case, I do not decide that question now. Instead, I leave it over to the substantive application hearing. Nevertheless, in considering the question of what directions to give in relation to disclosure, I think I must proceed on the basis that I may hereafter decide that the objective test is the correct one. If I do not do so, the disclosure exercise may turn out to have been a waste of time.

27. I should say that the first respondent also referred me to passages at paragraphs 5.10 to 5.13 of the Treasury guidance as originally published, and emphasised certain passages in paragraphs 5.10 and 5.12 (italicised here):

> "5.10. The creditor cannot request a review of this kind *on the grounds that they disagree about the individual's mental health crisis treatment. Nor can they challenge an AHMP's professional decision-making via this route*.
>
> 5.11. If the debt adviser does consider that a creditor's objection is valid, and it is necessary to cancel the MHCBS in respect of some or all of the breathing space debts, they will inform the Insolvency Service, who will notify the nominated point of contact and relevant creditors.
>
> 5.12. If the debt adviser does not cancel the MHCBS, and the creditor remains unhappy with the debt adviser's decision, the creditor can also ask a court to review whether a MHCBS should be cancelled, on the same grounds (unfair prejudice or material irregularity). *Again, the court is not considering the individual's mental health crisis treatment and cannot be asked to review an AMHP's professional decision-making via this route*.
>
> 5.13. If the court decides to cancel the MHCBS in respect of some, or all, of the breathing space debts, they will inform the Insolvency Service, who will notify the nominated point of contact and relevant creditors."

28. I note that, in the updated Treasury guidance, reissued earlier this month, paragraph 5.10 has been rewritten, and is now considerably longer, referring to the High Court decision in *Kaye v Lees*. But it also now omits the italicised words on which the first respondent particularly relied. Paragraph 5.12 begins as before, but is shorter: it ends with the word "irregularity". In other words, it too now omits the italicised words. Paragraphs 5.11 and 5.13 remain the same. Again, I do not need to make any decision based on this guidance at this stage. But it does seem to me that the Treasury is at least rowing back on its previous stated position.

Jurisdiction to order disclosure

29. The next question is the jurisdictional basis for ordering disclosure. The application notice itself sought a direction for disclosure from the second and third respondents "pursuant to CPR 31.17". This rule deals with third party disclosure, *eg* where A sues B, buts seeks disclosure from C. But this is not an application for third party disclosure. The second and third respondents have not been joined merely in order to give disclosure. (If they were, that would *prima facie* be improper: *Gould v National Provincial Bank* [1960] Ch 337, 341, 342.) They have been joined because they took part in the process which led to the decisions under challenge, and therefore have an interest in the integrity of those decisions. They will be entitled to participate in the substantive hearing of this application.

30. As I have said, Practice Direction 57AD applies to proceedings in the Business and Property Courts (which these proceedings are), though with certain exceptions. One exception is for claims under CPR Part 8, to which the ordinary disclosure rules in Part 31 may apply where appropriate. This is not a claim under Part 8, but the applicants submit that the position is analogous. There are no formal statements of case, and the claimants' main points appear from the evidence filed in support of the application (which is what happens in Part 8 claims). The first respondent has not yet filed any evidence, but the main contours of her case, and thus the issues in dispute, appear from her written submissions on what directions should be given.

31. The various relevant provisions of PD 57AD (especially rules 5, 6 and 7) are predicated on the existence of statements of case, which as I say we do not have. It would be inefficient and productive of delay to require statements of case to be prepared when they are not otherwise necessary, and would conflict with the expressed intention of the delegated legislator in providing that applications to cancel a moratorium should be capable of being brought by ordinary application notice in form N244: CPR PD 70B, paragraph 2.

CPR Part 31

32. In these circumstances, it seems to me that I should apply the rules contained in CPR Part 31 rather than those in PD 57AD. Rule 31.12 provides:

> "(1) The court may make an order for specific disclosure or specific inspection.
>
> (2) An order for specific disclosure is an order that a party must do one or more of the following things –
>
> (a) disclose documents or classes of documents specified in the order;

(b) carry out a search to the extent stated in the order;

(c) disclose any documents located as a result of that search.

(3) An order for specific inspection is an order that a party permit inspection of a document referred to in rule 31.3(2)."

33. There are precedents for relying on CPR rule 31.12 as the basis for ordering disclosure in relation to single points or applications in wider proceedings. In *Rigg v Associated Newspapers Ltd* [2002] EWHC 702 (QB), Gray J held, in a defamation case, that rule 31.12 could be used to order disclosure of a journalist's notes at an early stage of proceedings, even before general disclosure would ordinarily arise. And, in *Vava v Anglo American South Africa Ltd* [2012] EWHC 1969 (QB), Silber J ordered limited disclosure under rule 31.12 in the context of an early jurisdictional challenge, to enable that preliminary issue to be determined justly. I respectfully agree with both decisions, and see no reason why that rule should not also apply here, to the determination of the issues raised by this application.

34. Where disclosure is ordered under Part 31, rule 31.22 applies:

"(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree.

(2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

(3) An application for such an order may be made –

(a) by a party; or

(b) by any person to whom the document belongs.

[…]."

35. The applicants and the first respondent will be very familiar with this rule, based on the pre-existing so-called "implied undertaking" treated as given whenever discovery was ordered under the previous court rules, the Rules of the Supreme Court 1965: see *eg Home Office v Harman* [1983] 1 AC 280, HL. In a recent decision in another part of this sprawling litigation, *Chedington Events Ltd v Brake* [2022] EWHC 2880 (Ch), I refused permission to the Guy Parties to use in those proceedings a single document disclosed by the first respondent and her husband in compliance with a worldwide freezing order in other proceedings, and to which the implied undertaking attached.

36. After discussing the relevant authorities, I said:

> "40. First of all, I am satisfied that, in principle, even though this case arises in the context of an undertaking contained in a freezing order, rather than the ordinary process of disclosure under CPR Part 31, the *policy* of the law is in principle the same. … Where a party is compelled by law to supply information to another party as part of the legal process, this information may only be used by the recipient for the purposes for which it was compelled to be supplied, and not for any wider purpose …
>
> […]
>
> 44. So, I start with from the position that there is a strong public interest in preserving the confidentiality of documents and information extorted by compulsion for certain purposes during litigation, and that a heavy burden lies on the party seeking permission to rely on that document or information for other purposes. In this connection I respectfully agree with the comment of Hildyard J in *ACL Netherlands BV* that
>
> > '34. The most common public policy interest relied on as overriding the public interest in preserving confidentiality and privacy expressed by the rules is the public interest in the investigation and/or prosecution of serious fraud or criminal offences.'
>
> To that I would only add that, for myself, I would include in "criminal offences" the investigation and prosecution of contempts of court occasioned by breaches of court orders even in civil cases. … "

37. As set out above, the rule is that a party receiving a document by way of compulsory disclosure may "use the document only for the purpose of the proceedings in which it is disclosed": rule 31.22(1). That means, for example, that it cannot be shown to anyone who does not need to see it for the purposes of the litigation. Counsel and solicitors will usually need to see such documents, in order to decide whether and if so what use should be made of them in the litigation. Often the client(s) will need to do so too, in order to understand the advice of the lawyers and to make informed decisions in relation to the litigation. But if any of these classes of persons does not need to see a particular document for the purposes of the litigation, then their reading such document is outside the permission given for its use. Breach of the rule may amount to contempt of court, punishable by fine or imprisonment. It can therefore be seen that the protection given to documents and information disclosed by compulsion in English law is both wide-ranging and powerful.

Practice Direction 57AD

38. If I were wrong about rule 31.12, and I should nevertheless apply the provisions of PD 57AD, then the relevant provisions would be those in paragraphs 6 and 8:

> **"6.1** A party wishing to seek disclosure of documents in addition to, or as an alternative to, Initial Disclosure must request Extended Disclosure. No application notice is required. However, the parties will be expected to have

completed the Disclosure Review Document pursuant to paragraph 7 and following below.

6.2 Save where otherwise provided, Extended Disclosure involves using Disclosure Models (see paragraph 8 below) in respect of Issues for Disclosure which have been identified (see paragraph 7 below).

6.3 The court will only make an order for Extended Disclosure that is search-based (ie Models C, D and/or E) where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure.

6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—

(1) the nature and complexity of the issues in the proceedings;

(2) the importance of the case, including any non-monetary relief sought;

(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

(4) the number of documents involved;

(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

(6) the financial position of each party; and

(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

6.5 A request for search-based Extended Disclosure (ie Models C, D and/or E) must specify which of the Disclosure Models listed in paragraph 8 below is proposed for each Issue for Disclosure defined in paragraph 7 below. It is for the party requesting Extended Disclosure to show that what is sought is appropriate, reasonable and proportionate (as defined in paragraph 6.4).

6.6 The objective of relating Disclosure Models to Issues for Disclosure is to limit the searches required and the volume of documents to be disclosed. Issues for Disclosure may be grouped. Disclosure Models should not be used in a way that increases cost through undue complexity.

6.7 It is important that the parties consider what types of documents and sources of documents there are or may be, including what documents another party is likely to have, in order that throughout a realistic approach may be taken to disclosure.

[…]

> **8.1** Extended Disclosure may take the form of one or more of the Disclosure Models set out below.
>
> […]
>
> **Model D: Narrow** search**-based disclosure, with or without Narrative Documents**
>
> (1) Under Model D, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure.
>
> (2) Each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D disclosure has been ordered. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document."

39. These provisions are more complex and more precisely tailored to the circumstances of the case than the provision for specific disclosure under rule 31.12. In my judgment, if PD 57AD applied to the circumstances of this case, then, for the reasons to be given later, I consider that the court should make an order for Extended Disclosure, and that the appropriate model would be Model D, as set out above.

Inherent jurisdiction

40. Alternatively, say the applicants, the court retains an inherent or residual jurisdiction to order disclosure of documents relevant to issues in the case. In *Tombstone Ltd v Raja* [2008] EWCA Civ 1444 (not a disclosure case), the Court of Appeal considered the inherent jurisdiction of the court generally. Mummery LJ (giving the judgment of the court, which included Dyson and Maurice Kay LJJ) said:

> "74. The relationship between the inherent powers of the court to control proceedings and the Rules of the Supreme Court was considered by Sir Jack Jacob in his Hamlyn lecture 'The inherent jurisdiction of the court': Current Legal Problems 1970 p 23, 50-51. He said that the powers of the court under its inherent jurisdiction 'are complementary to its powers under Rules of Court; one set of powers supplements and reinforces the other … where the usefulness of the powers under the Rules ends, the usefulness of the powers under inherent jurisdiction begins.' In an illuminating article entitled 'The inherent jurisdiction to regulate civil proceedings' [1997] LQR 120, the late Professor Martin Dockray said at p 128 that the Rules of the Supreme Court may limit the inherent powers of the court where there is a conflict between them. Thus 'the inherent jurisdiction may supplement but cannot be used to lay down procedure which is contrary to or inconsistent with a valid Rule of the Supreme Court'. In our judgment, this last statement was correct in law, being supported by the authorities cited in the article which included *Moore v Assignment Courier Ltd* [1977] 1 WLR 644F-645B and *Langley v North West Water Authority* [1991] 1 WLR 697, 709D.
>
> […]

> 76. The position pre-CPR, therefore, was that the inherent powers of the court could not be invoked to do something which was inconsistent with a rule. Thus, if a rule gave a wide discretion to the court to decide whether or not to make a particular order, the court could not exercise its inherent powers to make such an order *ex debito justitiae* as if it had no discretion, or a discretion which could only be exercised one way in accordance with the rules.
>
> 77. The same position has obtained since the introduction of the CPR. The CPR are a 'new procedural code with the overriding objective of enabling the court to deal with cases justly' (rule 1.1(1)). There is no doubt that the court continues to have the inherent jurisdiction to regulate the conduct of civil litigation: see section 19(2)(b) of the Supreme Court Act 1981. The existence of the inherent jurisdiction is also implicitly acknowledged by CPR 3.1(1) which provides that the list of powers in that rule 'is in addition to … any powers it may otherwise have'.
>
> 78. In our judgment, therefore, where the subject-matter of an application is governed by rules in the CPR, it should be dealt with by the court in accordance with the rules and not by exercising the court's inherent jurisdiction. There is no point in exercising the court's inherent jurisdiction if that would involve adopting the same approach and would lead to the same result as an application of the rules. And it would be wrong to exercise the inherent jurisdiction of the court to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules."

41. In *Patisserie Holdings UK PLC v Grant Thornton UK LLP* [2022] Bus LR 1, which *was* a disclosure case, Moulder J said:

> "37. The third basis for the jurisdiction of the court [to order disclosure] is under CPR 3.1(2)(m). It was accepted for the defendant that the court has an inherent jurisdiction to make an order to disclose documents but submitted that such power should not be exercised in a way that cuts across the Practice Direction. I accept that submission which seems to me to be in accord with dicta in the authorities…"

I respectfully agree. I add only that the same protection is given in relation to confidential information required to be disclosed under the inherent jurisdiction of the court as under Part 31: see the quotations from *Chedington Events Ltd v Brake* [2022] EWHC 2880 (Ch), above.

42. Finally on disclosure jurisdiction, I mention a point made by the first respondent in a further reply submission dated 2 February 2023 (which I have read *de bene esse*). She first refers to the error of the applicants in referring in their application notice to CPR rule 31.17 as the jurisdictional basis for the application. She then says that, when she made an application for specific disclosure in another part of this litigation in August 2021, I refused it, "because [she] made it under the wrong part of the CPR". She submits that what is sauce for the goose is sauce for the gander.

43. Unfortunately, she has misremembered what happened in August 2021. The mistake was one shared by everyone, including me, and it was that disclosure should be governed by CPR Part 31, when it should have been under CPR PD 57AD. Her

application failed because in my judgment (i) it was not reasonable or proportionate to make an order for the further extensive disclosure sought less than five weeks from trial, (ii) the disclosure was not necessary, and (iii) she could not show a failure to comply with an existing order. Thus, the tests laid down in the applicable provisions of PD 57AD were not met: see [2021] EWHC 2250 (Ch), [18]-[20].

Confidential information

44. It is trite law that confidential information is protected from unauthorised disclosure in English law, with certain exceptions: see *eg Campbell v MGN Ltd* [2004] 2 AC 457. That includes medical information about a patient: *W, X, Y, Z v Secretary of State for Health* [2016] 1 WLR 698, [39], CA. One exception relates to the order of a competent court. As is apparent from the foregoing discussion of the protection of confidential information, I make clear that, absent express statutory provision to the contrary, the powers of the court to order disclosure of information do *not* exclude documents and information merely because they are *confidential*. The court's order takes into account, but in the exercise of discretion ultimately overrides, duties of confidentiality, including medical confidentiality: see *eg Science Research Council v Nassé* [1980] AC 1028, 1065.

The European Convention on Human Rights

45. The first respondent submits however that the applicants' submissions in support of their application have not taken into account her rights under Article 8 of the European Convention on Human Rights, imported into UK domestic law by virtue of the Human Rights Act 1998. I therefore turn to consider these.

Convention text

46. Article 8 is headed "Right to respect for private and family life", and provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Caselaw

47. There have been a considerable number of decisions on this article. One of the earlier decisions of the European Court of Human Rights was that in *Z v Finland* (1997) 25 EHRR 371, relied on by the first respondent. In that case, the complainant's husband, who was HIV positive, was charged with a number of serious offences, and convicted of some of them. One aspect of these offences depended on whether the husband knew of his status. In connection with this issue, the authorities obtained copies of the complainant's own medical records without her knowledge and consent. She

complained that this breached her Article 8 rights. The court held that there had indeed been an interference with her rights. The question was whether that was justified under Article 8(2). The court held that the state of the domestic law satisfied the need for the disclosure to be "in accordance with the law" and (except in two small respects, irrelevant to the present case) pursued the legitimate aims of the "prevention of ... crime" and the "protection of the rights and freedoms of others".

48. In relation to the question whether the disclosure was "necessary in a democratic society", the court said this:

> "94. In determining whether the impugned measures were 'necessary in a democratic society', the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify them were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued.
>
> 95. In this connection, the Court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention (art. 8). Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.
>
> Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community …
>
> The domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention (art. 8) …
>
> 97. At the same time, the Court accepts that the interests of a patient and the community as a whole in protecting the confidentiality of medical data may be outweighed by the interest in investigation and prosecution of crime and in the publicity of court proceedings … where such interests are shown to be of even greater importance.
>
> 98. It must be borne in mind in the context of the investigative measures in issue that it is not for the Court to substitute its views for those of the national authorities as to the relevance of evidence used in the judicial proceedings … "

49. The court concluded that:

> "103. … The interference with the applicant's private and family life which the contested orders entailed was thus subjected to important limitations and was accompanied by effective and adequate safeguards against abuse …
>
> […]

> 105. In the light of the foregoing, the Court finds that the various orders requiring the applicant's medical advisers to give evidence were supported by relevant and sufficient reasons which corresponded to an overriding requirement in the interest of the legitimate aims pursued. It is also satisfied that there was a reasonable relationship of proportionality between those measures and aims. Accordingly, there has been no violation of Article 8 (art. 8) on this point.
>
> […]
>
> 110. … the Court considers that the seizure of the applicant's medical records and their inclusion in the investigation file were supported by relevant and sufficient reasons, the weight of which was such as to override the applicant's interest in the information in question not being communicated. It is satisfied that the measures were proportionate to the legitimate aims pursued and, accordingly, finds no violation of Article 8 (art. 8) on this point either."

50. On two other, more minor matters, the court found a breach of the complainant's Article 8 rights. These were the duration of the order to maintain the medical data confidential (which was limited to ten years) and the disclosure of the applicant's identity and HIV infection in the text of the Court of Appeal's judgment made available to the press. Neither of those is relevant here.

51. Next, there is the well-known decision in *MS v Sweden* (1999) 28 EHRR 313. A Swedish citizen sought to claim compensation from the state under an industrial injury insurance scheme for injury allegedly arising from a fall at work. Compensation was denied, on the basis that the injury had not in fact been caused by the fall. She then discovered that the administering office had obtained her medical records from her doctors without her knowledge or consent, for the purpose of determining her claim. She accordingly complained of a breach of her Article 8 rights (amongst others). The Article 8 claim was unanimously rejected. The Court however first concluded, first, (at [31]) that the complainant had not waived her Article 8 right by seeking compensation, and, second, (at [35]) that there had been an interference with the Article 8(1) right.

52. The Court then turned to the defences in Article 8(2), and said:

> "36. The applicant submitted that the disclosure of her medical records by the clinic had exceeded the Office's request. Whilst the Office had only asked for medical records relating to the time of her back injury, allegedly sustained at work on 9 October 1981, the clinic had produced records covering a period up to February 1986. …
>
> 37. However, in the Courts' view the terms of the above provision suggest that the decisive factor in determining the scope of the imparting authority's duty to provide information is the relevance of the information rather than the precise wording of the request. The Court is satisfied that the interference had a legal basis and was foreseeable; in other words, that it was 'in accordance with the law'.
>
> 38. The object of the disclosure was to enable the Office to determine whether the conditions for granting the applicant compensation for industrial injury had been

> met. The communication of the data was potentially decisive for the allocation of public funds to deserving claimants. It could thus be regarded as having pursued the aim of protecting the economic well being of the country. Indeed this was not disputed before the Court. On the other hand, the Court does not consider it necessary to examine the second aim invoked by the Government, namely protection of the 'rights ... of others'.
>
> […]
>
> 41. The Court reiterates that the protection of personal data, particularly medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. The domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.
>
> […]
>
> 44. Having regard to the foregoing, the Court considers that there were relevant and sufficient reasons for the communication of the applicant's medical records by the clinic to the Office and that the measure was not disproportionate to the legitimate aim pursued. Accordingly, it concludes that there has been no violation of the applicant's right to respect for private life, as guaranteed by Article 8 of the Convention."

53. In *Cantabrica Coach Holdings Ltd v Vehicle Inspectorate* [2000] EWHC 315 (Admin), the appellant company, a coach operator, was convicted of the offence of failing to hand over tachograph charts to the respondent regulator. The appellant had offered the regulator inspection of the charts at the appellant's offices. [46]. After dealing with arguments on domestic legislation, Butterfield J (with whom Kennedy LJ agreed) briefly considered human rights arguments. He said:

> "45. As a final alternative Mr Phillips relies on the provisions of Article 8 of the European Convention on Human Rights and argues that a power to require the appellants to hand over records without first inspecting them to see if there was good reason for requiring them to be handed over would be an interference with the appellant's right to privacy that was greater than necessary. However, this argument, which first must surmount the hurdle of whether a limited liability company has a right to privacy of the sort invoked here, is emasculated as soon as the appellant abandons the proposition that prior inspection is required before the documents can be handed over. It was pursued but faintly before us, and in my judgement has no substance.
>
> 46. Accepting for the purpose of the argument the proposition that Article 8 and the right to respect for private life could apply to a limited liability company operating a transport business, as to which I express no opinion, the interference here would plainly be justified under paragraph 2 of Article 8 if it was 'in

> accordance with the law' and 'necessary in a democratic society in the interests of … public safety.' Both those conditions are fulfilled. The requirement to hand over the tachograph sheets has a basis in domestic and indeed European Community law. It is necessary in a democratic society in the interests of public safety for the protection of passengers and road-users who may be endangered by breaches of the obligations that the records are designed to prevent. As to the question of proportionality, there is nothing to suggest that the powers here conferred on the inspectorate could be characterised by shortcomings 'so serious that the execution of the order can, in the circumstances of the case, be regarded as disproportionate to the legitimate aim pursued': see *Chappell* ECHR 30th March 1989, where the Court was considering the use of an Anton Pillar [sic] order obtained against the claimant."

54. Another case relied on by the first respondent was *A health authority v X* [2002] 2 All ER 780. There, a local authority involved in a Children Act public law case reported facts which had emerged in the case to the area health authority. That health authority applied for the production of specified medical records, with a view to possible disciplinary proceedings. The judge made the order sought, subject to express conditions of confidentiality. The health authority appealed against some of the conditions. The Court of Appeal dismissed the appeal. Part of the argument that the express conditions were not needed involved reference to the rights conferred by Article 8 of the Convention and to the decisions in *MS v Sweden* and *Z v Finland*. But it also covered the domestic law of confidence, the Data Protection Act, as well as certain other domestic materials.

55. Thorpe LJ (with whom Laws LJ and Harrison J agreed, looked at the domestic rather than European legislation, and concluded:

> "[22] In my opinion Cazalet J was right to claim the power to attach conditions to an order directing the release of case papers in Children Act proceedings to a third party. Without that power the court would be left with a crude choice between directing or refusing release. Striking a balance between competing public interests, often across the interface of distinct justice systems, requires much more sophisticated powers. In my opinion Munby J was correct in law to claim that power and equally correct to proceed to a discretionary exercise of that power having regard to the relevant facts and circumstances in so far as they were revealed to him.
>
> […]
>
> [24] Accordingly in my judgment this appeal can and should be decided within those parameters. I would not want this judgment to be construed or used as laying down any general propositions beyond the context of Children Act proceedings and their aftermath."

In my judgment, that last statement shows that this authority tells us nothing about the scope or impact of Article 8.

56. In *Re General Dental Council* [2011] EWHC 3011 (Admin), the Council sought to use the records of a number of dental patients for the purposes of professional disciplinary proceedings against a particular dentist, against whom allegations had

been made of professional misconduct and impairment of fitness to practise. Most of the patients refused their consent, and some did not respond. One question was whether it was necessary for the Council to apply for a court order at all before using those records. As in the *Cantabrica* case, most of the discussion by the court was of the domestic legislation. But the judge, Sales J, also discussed the impact of Article 8, and in particular the decision in *MS v Sweden*.

57. Following this discussion, the judge concluded:

> "57. In my judgment, similar reasoning is applicable to the proposed disclosure within the GDC (from registrar to Investigating Committee to Practice Committee) in this case:
>
> i) The proposed disclosure pursues legitimate objectives specified in Article 8(2), as being 'in the interests of … public safety', 'for the protection of health and morals' and 'for the protection of the rights and freedoms of others' … The investigation of the allegations against Dr Al-Naher regarding his fitness to practise is necessary to ensure that public confidence in the dental profession is maintained, so that people will not be deterred from seeking dental or other medical treatment when they need it …
>
> ii) The proposed disclosure is 'in accordance with the law', since it will be made pursuant to the clear statutory regime in the 1984 Act. The provisions of that Act provide a proper legal basis for the disclosure and are accessible and foreseeable in their effect;
>
> iii) The proposed disclosure of the patient records also satisfies the requirement of being 'necessary in a democratic society'. It is proportionate to the important public interest which is being promoted by the professional proceedings against Dr Al-Naher and is subject to appropriate safeguards in that regard. The proposed disclosure is within a comparatively small circle of people. As explained above, the GDC, the Investigating Committee and its members and any Practice Committee and its members who receive the patient records at issue will all be subject to obligations of confidentiality in relation to those records, such that they may only use and disclose them for the purposes of carrying out the necessary investigation into the allegations that Dr Al-Naher's fitness to practise is impaired … Care will be taken to ensure that any other persons involved in a hearing before a Practice Committee will understand that they are subject to similar obligations of confidentiality. Care will also be taken to ensure that private information regarding the health of identified individuals will not be circulated more widely than is necessary nor released unnecessarily into the public domain;
>
> iv) In my view, these features of the legal regime offer sufficient safeguards with respect to the protection of the fourteen patients' interests so that the present case is covered by the judgment in *MS v Sweden*. …
>
> v) Civil sanctions may also be available personally under the DPA against persons who are given copies of the patient records, including in particular members of the GDC's committees, if they make improper use or disclosure of the data contained in those records. … The DPA thus provides additional safeguards;

> vi) The conclusion that there are adequate safeguards to ensure that the patient records are only used for proper purposes and that there is no disclosure beyond what is necessary for those purposes is also reinforced when one bears in mind the high professional standing of GDC committee members and the steps taken by the GDC to ensure that they have a good understanding of the importance of maintaining confidentiality. It is further supported by the procedure which the GDC has followed in this case in giving notice to the patients of what it proposed to do …
>
> vii) In view of the strength of the public interest in allowing disclosure of the patient records for the GDC's investigation and the safeguards which are in place to ensure that the records are only used for that purpose, which make the case closely similar to *MS v Sweden*, Article 8 cannot be taken to impose an obligation on the GDC to obtain an order of the court before arranging for the onward disclosure of the patient records to the Investigating Committee and then to a Practice Committee … "

58. Finally, in *Edwards-Moss v HMRC* [2016] UKFTT 147 (TC), the executors of a deceased appealed against a determination that the estate was liable for inheritance tax on the basis of a pre-death transfer which HMRC said was a transfer at an undervalue. On that appeal, HMRC sought an order for disclosure of the deceased's medical records on the basis that the deceased's knowledge (or otherwise) of her life expectancy was relevant to the question whether the consideration agreed for the transfer represented the real value at the time. Again, the bulk of the decision was taken up with a consideration of the domestic legislation, but the tribunal also briefly considered the impact of Article 8.

59. As to this, Judge Barbara Mosedale said:

> "46. I asked whether a deceased person has a right to privacy: both parties thought that she did and I agree that persons have the right in general to expect their medical records will remain confidential even after their death. I also accept that the deceased family have a right to a private life and therefore have some expectations that their deceased mother's medical records will remain confidential.
>
> 47. But those rights must be balanced against the public interest in the collection of the right amount of tax. Having decided that the question of whether there was a transfer of value by the deceased 17 days before her death when she sold the farm in return for the benefit of an annuity is an issue in this appeal, it follows that her medical condition and in particular what she knew about her medical condition may be critical to determine whether the sale was at an undervalue. There is a public interest in the full facts being known in order that the Tribunal is more likely to reach the right conclusion on whether there is tax liability on the executors in respect of the transfer of the farm."

Assessment

60. Taking into account all these materials, as well as the written arguments with which I was presented, my assessment of the position is this. First of all, the respondents, and especially the first respondent, were all able properly to participate in the procedure

leading to this decision. Second, the right itself is not a right *to private and family life*, but a right *to respect for* private and family life. It is far from absolute, being subject to the matters provided for in paragraph 2 of Article 8. Thirdly, in this context, "private and family life" refers not only to private *communications* (whether oral, electronic or documentary) but also to private *information* (again, in whatever form).

61. Subject to paragraph 2 of Article 8, an order of the court for the disclosure of first respondent's medical records and other personal medical information to the applicants would constitute an interference with the Article 8 right. (However, there is nothing in Article 8 itself, the decisions in *MS v Sweden* and *Z v Finland*, or the English cases on Article 8, that requires that a court order be obtained before disclosure is made. Indeed, the decision of Sales J in *Re General Dental Council* says the opposite. The need for a court order arises, if at all – as it does here – from the domestic law.) I therefore turn to the matters set out in paragraph 2 of Article 8.

62. In my judgment, an order made by the court for such disclosure under CPR Part 31 or under the inherent jurisdiction of the court would be "in accordance with the law" because the basis for such an order would be the application of existing and known rules, which are foreseeable in their effect. It would also be "necessary in a democratic society". This is, first, because it is proportionate to the public interest promoted by the legal procedures for the recovery of debts in general, and to the further public interest promoted by regulation 19(1) of the 2020 regulations, in restricting a debt moratorium provided for under those regulations to those cases where the legislated criteria are properly satisfied. But, second, it satisfies that test because it is subject to appropriate safeguards, both in restricting the *scope* of the disclosure to that which is properly relevant to the issue, and in imposing obligations of confidentiality (with appropriately serious sanction for breach) on those who receive the disclosed information. This means that no more is disclosed than is necessary, and that it can only be used for the limited purpose for which it was ordered to be disclosed.

63. Lastly, there is the question of legitimate aims. In my judgment, such an order is justified in the interests of the economic well-being of the country, because, if unpaid debts are not subject to enforcement procedures, credit will be restricted, or simply not given, and the country's economy will suffer. It is also justified in the interests of the protection of the rights and freedoms of others, by enforcing the rights of creditors against debtors, such rights being "possessions" within Article 1 of Protocol 1 to the Convention.

Order sought

64. The applicants seek an order in the terms set out in the application notice, and which I have already summarised. This deals with the issues between the parties concerning eligibility criteria. Those issues are, first, whether the first respondent at the material time was suffering from a mental disorder of a serious nature, and, second, whether she was receiving care or treatment which was "crisis, emergency or acute" care or treatment. That means focussing on what symptoms the first respondent presented with, the referral of the first respondent to an appropriate mental health professional, her assessment by that professional, the diagnosis by the professional, the seriousness of the disorder, the treatment prescribed or recommended, and the treatment actually received.

65. The question is whether the court should make an order under CPR rule 31.12, or failing that under PD 57 AD, para 6, or failing that the inherent jurisdiction of the court. Here the critical issues raised by the applicants are limited. They relate to the serious nature of the mental disorder presented by the first respondent and the treatment which she has been receiving. I have no doubt that documents do exist in the hands of the second and third respondents which are of probative value and will affect the resolution of those issues one way or the other. It is unlikely that there will be very many of them.

66. The moratorium was entered into at the end of August 2022. There will have been one or two consultations with the GP, a referral to the specialist and the AMHP, and then treatment prescribed and received. On the other hand, the relevant documents cannot be listed or generically described. A consideration of patient files (*ie* a search) will be necessary in order to resolve these issues fairly. The costs of this exercise are unlikely to be significant. In my judgment, a disclosure order would be an appropriate and proportionate means to lead to the just determination of the dispute between the parties.

67. Accordingly, my decision is that disclosure must be given to the applicants and the first respondent by the second and third respondents of all documents (including documents in paper or in electronic form) in their respective control (whether created by them or by third parties) which are likely either (i) to support, or (ii) adversely to affect, the present application in relation to any of the following issues:

    (1) the symptoms of mental disorder complained of by the first respondent;

    (2) the referral of the first respondent to the mental health team of the third respondent;

    (3) the assessment(s) of the first respondent;

    (4) the diagnosis or diagnoses of mental disorder of the first respondent;

    (5) the seriousness of such disorder;

    (6) the treatment(s) recommended or prescribed by medical professionals in respect of such disorder, including the plans for such treatment(s);

    (7) the treatment(s) actually received by the first respondent in respect of such disorder.

68. Documents falling within the above categories are not excluded merely because they are or amount to (a) correspondence between the second respondent and the Bridport Community Health Team relating to this moratorium, or (b) documents recording communications between the first respondent and the second and/or third respondents and/or any third parties (including notes of meetings and telephone conversations) relating to the moratorium. If they fall within the above categories, whether they are held by the first, second, or third respondent, they must be disclosed. For the further avoidance of doubt, they include the Evidence of Mental Health Crisis Treatment Form submitted in respect of the first respondent.

Medical examination of the first respondent

69. As I have said, the applicants seek, and the first respondent resists, an order that the first respondent consent to be examined by an expert appointed by the applicants. The first respondent, indeed, submits that there is no jurisdiction in the court so to order. Both sides refer to a work for which I am jointly responsible together with Mr Hodge Malek QC, namely *Disclosure*, 5th edition, 2017.

70. That work relevantly provides as follows (footnotes omitted):

> "23.24. However, there is still no general power for the court to order a medical examination in a case where the condition of a party is in issue. Nevertheless, the common law has found a way, in its inherent jurisdiction to stay proceedings for good cause. Thus, where a defendant in a personal injuries case in light of further evidence sought a further medical examination of the plaintiff, but the plaintiff refused to submit voluntarily, the Court of Appeal ordered a stay of the proceedings until the examination was completed. The reason is that a claimant who sues for damages for personal injury must afford the defendant a reasonable opportunity to have him medically examined. By choosing to sue he forgoes his right to protest at the invasion of his privacy which a medical examination involves. This reasoning does not apply to defendants, yet in at least one case the court has held that it could strike out the defence of a defendant who unreasonably refused to submit to a medical examination when his memory was in issue. … "

71. The "one case" referred to in the last sentence was *Lacey v Harrison* [1993] PIQR 10, a decision of Judge Dobry QC, sitting as a High Court judge. In that case, the plaintiff sued the defendant in respect of injuries sustained in a road traffic accident. The plaintiff said the accident was caused by the defendant. The defendant said it was caused by a third party, who could not be traced (the plaintiff said there was no evidence of third party involvement). The plaintiff contended that the defendant suffered from memory loss, and could not remember. She applied for an "unless order" for the defendant to submit to a medical examination, or else the defence would be struck out. The district judge refused to make the order, and the plaintiff appealed. The appeal was allowed.

72. On the appeal, the judge said this:

> " … in the present case the point is whether it is just and reasonable to strike out a defence if the conduct of the defendant is such as to prevent the just determination of the cause. This view does not conclude the matter because the difference between staying an action and striking out the defence is a fundamental one. Yet the judgment of Widgery LJ, as he then was, in *Edmeades* [*v Thames Board Mills Ltd* [1969] 2 QB 67, CA] at p. 72 may well extend this rule for striking out. Widgery LJ said:
>
> > 'I can see the objections that would be raised if it were sought to give the court power to make a direct order for medical examination with, presumably, power to commit the plaintiff for contempt if he refused. But none of these objections, to my mind, arise where it is sought to give the plaintiff a right to elect between not going on with his action, or submitting himself to medical examination, especially where his refusal to be examined is based on no reason and will result in the defendants being unable to

> prepare their defence, and will thus result in the court being unable to do justice towards the defendants.'
>
> I have come to the conclusion that striking out the defence unless the defendant submits to a medical examination is comparable to the stay granted in the *Edmeades* case. It is appreciated that an order to strike out a defence is draconian. The burden of proof in respect of an order to stay proceedings and an order to strike out is different. The nature of the two orders is different. Nevertheless, when one deals with an Unless Order the ruling consideration is whether the defendant in refusing a reasonable request prevents the just determination of the cause. In very exceptional circumstances such as the present this is the situation which has occurred, and in my judgment the appeal should be allowed."

73. The first respondent says that this case is distinguishable because exceptional:

> "the defendant in not agreeing to submit to a medical examination of any sort was preventing the court from deciding whether he did or did not remember the facts that would in turn establish where the liability lay in that case. It was a case that was closely related to a personal injury claim where parties do submit to medical examination. The present case could not be further factually from the Lacey case … "

74. I agree that the judge says that the case is exceptional. But he also says that the test in making an unless order is "whether the defendant in refusing a reasonable request prevents the just determination of the cause". So, the judge is saying that there is jurisdiction to make the order, provided that it is appropriate to do so. But the question whether it is appropriate to do so is quite different from the question whether there is jurisdiction. In my respectful judgment, the judge in *Lacey v Harrison* was right to hold that the court has *jurisdiction* to make an unless order against a defendant who refuses to submit to a suitable medical examination (or any other reasonable test) which would lead or at least contribute to the just determination of the case.

75. But I note that, unlike in *Lacey v Harrison*, the applicants in this case are not asking (yet) for an unless order. They ask simply for a direction that the first respondent submit to a medical examination, but that, if she refuses, then for liberty to apply for an appropriate sanction. This might be an unless order, or it might be an order that the court draw adverse inferences from the refusal. An order of the latter kind was what I made in the case of *Re Birtles deceased* [2019] Ch 85, which concerned a DNA test for the purpose of proving parentage in an inheritance dispute. At this stage the applicants leave open the question of sanction for non-compliance.

76. I should just add that, in my judgment, the present case is actually stronger than *Lacey v Harrison*. That was the case of the defendant to a claim being required to submit to a medical examination as the price of being allowed to defend. The present is a case where the first respondent unilaterally obtained a debt moratorium (without the applicants' having any opportunity to contest it), and now the applicants are seeking to set it aside. Conceptually, therefore, the applicants are defending the first respondent's claim to a moratorium. The prime actor is the first respondent. This is therefore closer to the standard case of a claimant who wishes to obtain certain relief,

and who may be required, as the price of obtaining that relief, to submit to an appropriate examination. In my judgment, the court has ample jurisdiction to make the order sought.

77. The next question accordingly is whether in fact it should do so in this case. The first respondent says:

> "I have never refused to be medically examined. I do not however agree to be medically examined by a doctor appointed by a creditor who does not know me; has never treated me; and frankly would have very little to add anything to the evidence that my own treating team of doctors could bring to the court."

78. In my judgment, the mere fact that the examining expert has never treated the litigant is of little or no weight. In cases where expert medical evidence is needed, it would be unusual for the expert to have previously treated the patient. I accept that, if it could be said there and then that the expert could add nothing to the existing evidence, then there would be little point in ordering an examination to be made. But, absent special circumstances, that is something which the court cannot know in advance of the examination's taking place. And, in the present case, it may be that the court decides at the substantive hearing that the test to be applied in relation to the eligibility criteria is an objective one, and then the evidence which will be relevant will be evidence as to (i) whether the first respondent is indeed suffering from a mental disorder which is serious, and (ii) whether the treatment she is receiving satisfies the statutory criteria.

79. The first respondent says that the evidence from an examination would add nothing to the evidence of her own doctors. But I have never heard it said previously that, because the medical evidence to be adduced by one party to litigation will cover the matter in question, therefore another party is simply not allowed to adduce evidence on the same point. Taken to its logical conclusion, that would mean that, if the claimant in a running-down case gave evidence of what had happened, the defendant could not. In my opinion, that is not the law for factual evidence, and I see no reason why expert evidence should be different, except in a case where the court appoints a single joint expert (which is not this case).

80. In support of her position, the first respondent cites the decision of Aikens J (as he then was) in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2006] EWHC 2755, for the proposition that expert evidence, even if useful in a case, "may not be admitted if there is already sufficient expert evidence in the case". But that was a case where one party sought to put in a number of expert reports on supposedly different topics of expertise, and the other party objected that two of the reports in fact covered the same ground. The judge agreed with the objection. He said:

> "80. It is wrong in principle for there to be two different experts providing a report on the same topic unless there is a very good reason for needing two experts."

I respectfully agree, in the context of that case, where the two experts *were for the same party*. But that is not this case.

81. The first respondent further prays in aid the effect of CPR Part 35, concerning the regulation of expert evidence. She points out that a party applying for permission to

call expert evidence must provide an estimate of the cost, identifying the field of expertise and the issues to be addressed, and the identity of the expert "where practicable": CPR rule 35.4(2). The second of these has been done, and the third was originally complied with, although the expert identified has now had to withdraw, and the applicants are seeking to identify another. The words "where practicable" show that this is not an absolute requirement. It will be sufficient if the applicants are directed to identify their expert once the replacement has been appointed.

82. The failure to give an estimate of cost is not necessarily fatal to the application. There used to be a distinction drawn between "mandatory" language, which had to be complied with in order for the transaction in question to be valid, and merely "directory" language, which did not. But that was abandoned many years ago. In *Elim Court RTM Company Ltd v Avon* Freeholds Ltd [2018] QB 571, Lewison LJ (with whom Arden LJ and Proudman J agreed) said:

> "49. I do not think that it can be seriously questioned that the courts have moved away from classifying statutory requirements as either 'mandatory' or 'directory.' As Etherton C observed in *Natt v Osman* [2014] EWCA Civ 1520; [2015] 1 WLR 1536 at [25]:
>
> > 'That approach is now regarded as unsatisfactory since the characterisation of the statutory provisions as either mandatory or directory really does no more than state a conclusion as to the consequence of non-compliance rather than assist in determining what consequence the legislature intended.'
>
> 50. *Natt v Osman* is the most recent authoritative consideration of the applicable principles. It is binding on us for what it decided. In analysing the cases Etherton C drew a distinction between two broad categories at [28]:
>
> > '(1) those cases in which the decision of a public body is challenged, often involving administrative or public law and judicial review, or which concern procedural requirements for challenging a decision whether by litigation or some other process, and (2) those cases in which the statute confers a property or similar right on a private person and the issue is whether non-compliance with the statutory requirement precludes that person from acquiring the right in question.'
>
> 51. In the first category, substantial compliance could be good enough. But in the second category he said at [31]:
>
> > 'The Court of Appeal cases show a consistent approach in relation to statutory requirements to serve a notice as part of the process for a private person to acquire or resist the acquisition of property or similar rights conferred by the statute. In none of them has the court adopted the approach of "substantial compliance" as in the first category of cases. The court has interpreted the notice to see whether it actually complies with the strict requirements of the statute; if it does not, then the court has, as a matter of statutory interpretation, held the notice to be wholly valid or wholly invalid.'
>
> 52. The outcome in such cases does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the

> actual prejudice caused by non-compliance on the particular facts of the case: see [32]. The intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole: see [33]. Where the notice or the information which is missing from it is of critical importance in the context of the scheme the non-compliance with the statute will generally result in the invalidity of the notice. Where, on the other hand the information missing from the statutory notice is of secondary importance or merely ancillary, the notice may be held to have been valid: see [34]. One useful pointer is whether the information required is particularised in the statute as opposed to being required by general provisions of the statute. In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance. … "

83. So I must look at the intention of the delegated legislator in enacting the rule that an estimate of cost must be given. In my judgment, this information is not of critical importance in the court's decision whether to permit expert evidence to be given. It is "nice to have" rather than essential. The requirement appears in secondary rather than primary legislation. In a case (which is this one) where there has been uncertainty about the volume and detail of documents to be considered, and there are no costs budgets to complete, it would not be sensible to attribute to the delegated legislator the intention to prevent the court from giving permission for expert evidence unless an estimate of the cost of the evidence were first provided. Accordingly, I hold that the failure in the present case to provide the estimate does not invalidate the application.

84. In addition to that, CPR rule 3.10 provides, on the facts here, that the failure to comply with rule 35.4(2) by not providing an estimate of costs does not invalidate the application for permission unless the court so orders. I see no need so to order. Again, it will be sufficient to direct the applicants to provide an estimate of costs once the replacement expert has been appointed and the quantity of relevant material identified.

85. More substantially, the first respondent points to CPR rule 35.1:

> "Expert evidence shall be restricted to that which is reasonably necessary for the disposal of the proceedings."

She says that the applicants cannot show that the expert evidence they seek to obtain and adduce satisfies this test. I do not agree. First of all, as Warren J made clear in *British Airways plc v Spencer* [2015] EWHC 2477 (Ch), [64], that requirement is satisfied if expert evidence is reasonably required to resolve *any issue in the proceedings*. It is not necessary to show that it is reasonably required for *all the issues*. Secondly, the test is what is "reasonably required". If the court could not decide the issue *without* that evidence, it is reasonably required. But it does not follow that, if the court *could* decide the issue without such evidence, that evidence is *not* reasonably required. If the evidence would nevertheless be of assistance to the court, then the question is "whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings": see *British Airways plc v Spencer* [2015] EWHC 2477 (Ch), [68].

86. The burden is on for the applicants to show that rule 35.1 is satisfied. This involves a consideration of the issues and the evidence. The issues to which the evidence would go are the serious nature of the mental disorder presented by the first respondent and the "crisis *etc*" nature of the treatment which she has been receiving. In my judgment, the evidence produced by the examination is more likely than not to be useful to the court, one way or the other. Exactly how useful depends of course on what is found or not found. But either way it will add to the court's store of knowledge concerning the facts in dispute, and both inform and assist its determination.

87. The other evidence that will be available will consist of the documents disclosed by the second and third respondents, and any evidence adduced by the first respondent from her treatment team. The English civil justice system operates on an accusatorial basis, in which each party obtains and adduces its own evidence, the acceptance of which each party urges upon the court. This helps to make judicial decisions both just and robust. On the facts of this case, I am satisfied that the evidence of an appropriate medical witness expert in mental disorders and their treatment called by the applicants is "reasonably necessary to resolve the proceedings".

88. The first respondent in her written submission dated 27 January 2023 and in a further reply submission dated 2 February 2023 (which as I said earlier I read *de bene esse*), says that the question of the medical evidence in this case should be handled in the same way as for an adjournment application. By this she means that it is dealt with "by getting an accurate historical and up to date medical report prepared by" the party's medical team. I agree that applications for adjournments on medical grounds should be dealt with on medical evidence obtained for the purpose, almost invariably in the form of a medical report (often contained in a letter).

89. But, with respect, this submission is comparing chalk with cheese. Applications for an adjournment because the litigant (or a witness) is ill at the time of a particular hearing are quite different from litigation which itself concerns medical issues and must be resolved by reference to medical evidence. In the former case the medical matters are interstitial at best, and need to be resolved relatively quickly and informally (and therefore Part 35 is not strictly applied). However, in the latter case the medical matters are the real substance of the litigation, and need to be resolved by way of trial on evidence properly adduced, and (as the first respondent has herself argued on this application), by adherence to CPR Part 35. In my judgment, there is nothing in this point.

90. I turn therefore to the question of the exercise of the court's discretion, whether to direct that a medical examination take place, I bear in mind certain matters. One is that the examination required will not be an intrusive or intimate one, and will not involve the taking of blood or tissue from the first respondent. There will be no invasion of her bodily integrity. It will not involve any pain or risk to her. Nor will it require her to be away from home for any length of time, and certainly not overnight. Secondly, I accept that it is for the applicants to show that the expert evidence to be tendered will be of assistance to the court, but (as is the case in civil litigation) this is done on the balance of probabilities.

91. Thirdly, the information obtained from the examination will be confidential and held and dealt with in accordance with CPR rule 31.22 or the so-called "implied undertaking", already discussed. It will remain confidential, and cannot be disclosed

to persons who have no need to see it for the purposes of this litigation, or used for other purposes. Fourthly, the first respondent has not been able to put forward any convincing reason why she should not submit to the examination. My overall assessment of the position is accordingly that the interests of justice require that she do so.

Nephrology evidence

92. As already summarised above, the first respondent would like to adduce evidence from an expert nephrologist. The applicants oppose this. The first respondent's many and serious health problems include end-stage renal failure. She had a kidney transplant some years ago, but treatment for subsequent cancer has led to reduced functionality from the transplanted kidney, and it seems likely that, assuming a suitable donor, a further transplant will be carried out in the near future. The claimants say that the first respondent's renal failure is not an issue in these proceedings, and therefore any expert nephrology evidence would be irrelevant. The first respondent, on the other hand, says it is highly relevant, because kidney failure has certain chemical effects on the brain, and she attributes her mental health crisis in large part to that failure.

93. I understand the first respondent's point of view, but on this submission I am with the applicants. The *fact* of the first respondent's renal failure is not questioned in these proceedings. What is in issue is whether she is suffering from a mental disorder of a serious nature, and also whether the treatment she is receiving for that disorder is of a "crisis *etc*" nature. Neither of those two matters is within the expertise of a nephrologist. Both are within the expertise of a psychiatrist. A psychiatrist will be well aware of the possibility of chemical imbalances in the brain causing mental disorder (which enables him or her to prescribe other chemicals in order to treat such disorder), and if necessary will be well able to say (if it be the case) that the disorder for which the first respondent is being treated is a product, direct or indirect, of her renal failure. But, for the purposes of resolving the present application, it is not necessary for me to decide what is the *cause* of the first respondent's mental disorder. It is for me to decide whether it is of a serious nature, and also whether the treatment she is receiving for it is of a certain type.

Order of evidence

94. Lastly, there is a question as to whether the medical evidence and the non-medical evidence should be filed and served in a particular order. As I have already mentioned, the first respondent would like all the medical evidence to be filed and served before the non-medical evidence. The applicants, however, oppose this. It is not clear from her submissions why the first respondent asks for this different treatment. As the applicants say, the usual order is for the factual evidence to be dealt with first, and then for expert evidence to follow. This means that the experts have the benefit of seeing the factual evidence, and are not obliged to make more assumptions that are necessary. I propose to take the usual course on this point.

Hearing and directions

95. As I said earlier, it was common ground between the parties that the hearing of this application could not take place before July 2023 at the earliest. It will require two

full days, or four half days, of court time. The applicants do not oppose the latter format, in order to accommodate the first respondent's health problems. I agree that that is the preferable option, and will list the substantive hearing accordingly. The first opportunity to list this hearing before me for four consecutive days occurs in the week commencing 31 July 2023. The next opportunity occurs in the week commencing 25 September 2023. There are five weeks for preparation before the first of those dates and 12 weeks before the second of them. In my judgment, the first of these will entail too short a timetable. Even if everything could be squeezed in, it would leave little or no room for manoeuvre if experts are unavailable on particular days or if applications need to be made urgently under liberty to apply. 12 weeks is more realistic. It avoids the holiday season and gives longer for compliance with the directions.

96. In the circumstances, and taking into account what I have said so far in this judgment, I give the following directions:

(1) The Application shall be listed for a final hearing with a 2-day time estimate (heard over four consecutive ½ days) commencing 25 September 2023.

(2) By 4 pm on 7 July 2023, disclosure shall be given by list (a) to the applicants and the first respondent by the second and third respondents, and (b) by the first respondent to the applicants, of all documents (including documents in paper or in electronic form) in their respective control (whether created by them or by third parties) which are likely either (a) to support, or (b) adversely to affect, the present application in relation to any of the following issues:

(i) the symptoms of mental disorder complained of by the first respondent;

(ii) the referral of the first respondent to the mental health team of the third respondent;

(iii) the assessment(s) of the first respondent;

(iv) the diagnosis or diagnoses of mental disorder of the first respondent;

(v) the seriousness of such disorder;

(vi) the treatment(s) recommended or prescribed by medical professionals in respect of such disorder, including the plans for such treatment(s);

(vii) the treatment(s) actually received by the first respondent in respect of such disorder.

For the avoidance of any doubt, documents falling within the above categories are not excluded merely because they are or amount to (a) correspondence between the second respondent and the Bridport Community Health Team relating to this moratorium, or (b) documents recording communications between the first respondent and the second and/or third respondents and/or any third parties (including notes of meetings and telephone conversations) relating to the moratorium. For the further avoidance of doubt, those documents include the Evidence of Mental Health Crisis Treatment Form submitted in respect of the first respondent.

(3) By 4 pm on 14 July 2023, the several respondents shall produce for inspection to the applicants, and the second and third respondents shall severally produce for inspection to the first respondent, such of the originals of the documents so listed for which privilege has not been claimed, as the inspecting party shall by 4 pm on 12 July 2023 have requested in writing to inspect, and shall by 4 pm on 19 July 2023 provide (at the inspecting party's expense) photocopies of such of the original documents as shall have been requested in writing by 4 pm on 17 July 2023.

(4) The first respondent shall file and serve any evidence in response to the Application by 4 pm on 4 August 2023.

(5) The applicants are to file and serve evidence in reply to evidence served by the first respondent by 4 pm on 25 August 2023.

(6) The parties have permission to rely on the expert evidence in the field of mental health crisis diagnosis, management and treatment in order to address the following issues:

i) Whether the first respondent was suffering from a mental disorder of a serious nature and/or mental health crisis at the time the Moratorium was entered into; and

ii) In the event that the first respondent was suffering from a mental disorder of a serious nature and/or mental health crisis at the time the Moratorium was entered into whether that has continued since the Moratorium and over what period(s) of time.

iii) Whether the treatment of the first respondent was crisis, acute or emergency treatment.

(7) (i) The parties shall notify each other and the court of the identity of their respective expert so soon as appointed.

(ii) The parties shall notify each other and the court of the estimate of costs of their respective expert within 7 days after appointment.

(iii) If so requested by 4 pm on 21 July 2023 by the applicants in writing, the first respondent shall attend a consultation/consultations with the applicants' and/or the first respondent's expert by 25 August 2023.

(8) The parties are to file and serve any expert reports by 4 pm on 13 September 2023.

(9) The parties' experts shall hold a discussion by 1 September 2023 for the purpose of:

a) Identifying and further narrowing the issues, if any, remaining between them; and

b) Where possible reaching agreement on those issues.

(10) By 8 September 2023 the experts shall prepare and file a statement for the Court showing:

i) The issue(s) on which they are agreed; and

ii) The issue(s) on which they disagree and a summary of their reasons for disagreeing.

(11) Paragraphs 9 and 10 above shall not apply if by the first respondent does not serve any expert reports.

(12) Any application to cross-examine a witness and/or expert at the hearing of the Application is to be made by 4 pm on 18 September 2023, and shall be determined on paper.

(13) The parties are to file skeleton arguments by 4 pm on 21 September 2023.

(14) Costs in the application.

(15) Liberty to apply.

97. I should be grateful for a draft order to give effect to this judgment.