Neutral Citation Number: [2019] EWCA Civ 679

Case No: A3//2017/0971/A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
MRS JUSTICE ROSE
HC/2017/000250

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2019

Before :

PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE SHARP
and
LORD JUSTICE HENDERSON

- -

Between :

MN	**Appellant**
- and -	
OP and ors	**Respondent**

- -
- -

Robert Pearce QC and Sophia Rogers (instructed by **Hunters Law LLP**) for the **Appellant**
Matthew Slater (instructed by **Mishcon de Reya LLP**) for the **2nd Respondent**
Susannah Meadway (instructed by **Hunters Solicitors**) for the **11th to 13th Respondent**
Francis Barlow QC (instructed by **Hunters Solicitors**) for the **14th to 16th Respondent**
Piers Feltham (instructed by **Hunters Solicitors)** by written submissions, **for the 1st and the 3rd to the 10th Respondents**
Guy Vassall-Adams QC (instructed by **Media in-house (BBC)**) for the **1st intervener**
Claire Van Overdijk (instructed by **Government Legal Department**) **Advocate to the Court**

Hearing date: 17th July 2018

- -

Approved Judgment

Lady Justice Sharp:

Introduction

1. This an appeal against the order of Rose J on 2 March 2017, with her permission, by which she dismissed the claimant's application for what amounted to an anonymity order, restricting the naming of the parties and access to the court file relating to the claim, and restricting the publication of certain information relating to it. The application for anonymity was ancillary to the claim, which was an application for the approval of an arrangement varying a trust under the Variation of Trusts Act 1958 (the 1958 Act).

2. The central issue in this appeal is whether anonymity should be the norm in applications made under the 1958 Act, as it is for approval hearings, following the guidance given by the Court of Appeal in relation to such hearings in *X v Dartford and Gravesham NHS Trust* [2015] EWCA Civ. 96; [2015] 1 WLR 3647. The judge declined to apply the approach in *Gravesham's* case, holding that there were material differences between approval hearings on the one hand, and applications under the 1958 Act on the other. The appellant and the respondents to this appeal (the parties) contend she was wrong to reach that conclusion, and that her further decision that a derogation from the principle of open justice was not necessary on the facts, was also wrong. The media organisations[1] however, who intervene with the permission of the court, submit the judge's conclusions were correct, both as a matter of principle and on the facts.

3. We have been assisted by the Advocate to the Court, Ms Claire Overdijk, who has provided us with a balanced and careful assessment of the material issues.

Gravesham's case

4. Under the Civil Procedure Rules (CPR) rule 21.10 the court's approval must be obtained in respect of any compromise of a claim made in High Court proceedings by or on behalf of a child or protected party. A child means a person under 18: CPR 21.1(2)(b). A protected party is a party or intended party who lacks capacity within the meaning of the Mental Capacity Act 2005 (the 2005 Act) to conduct the proceedings: CPR rule 21.1(2)(c)(d). [2] A person under 18 can be a person who lacks capacity within the meaning of the 2005 Act: see sections 2(5), 18(2), 18(3) and 21. The purpose of the rule requiring the court's approval "is to impose an external check on the propriety of the settlement…" per Baroness Hale of Richmond, in *Dunhill v Burgin (Nos 1 and 2)* [2014] UKSC 18 at para 20.

5. *Gravesham's* case involved a six-year old claimant who had been severely injured at birth. She had a limited life expectancy, and would be a protected adult. Her claim for damages against the NHS Trust responsible for her care was brought on her behalf by her mother acting as her litigation friend. The respondent NHS trust agreed to settle her

[1] The media organisations are the BBC, ITN, Times Newspapers Ltd, Guardian News and Media Ltd, Telegraph Media Group Ltd, Associated Newspapers Ltd, News Group Newspapers Ltd, MGN Ltd and the Press Association.

[2] Section 2(1) of the 2005 Act provides that: "a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."

claim by the payment of a substantial lump sum of several million pounds together with periodical payments for care and case management, and the approval of the court for the settlement was sought. At the approval hearing, Tugendhat J approved the settlement but refused the claimant's application for an anonymity order preventing the publication of the name of the claimant and her parents and protecting their identity indefinitely. He did however prohibit disclosure of the claimant's address.[3] The Court of Appeal (Moore Bick LJ, Black LJ and Lewison LJ) held the judge had been wrong not to make the anonymity order. The Court also gave general guidance that the court should normally make an anonymity order in favour of the claimant at an approval hearing, without the need for any formal application, unless for some reason it is satisfied that it is unnecessary or inappropriate to do so: see para 34. The "default" position, in relation to approval hearings, is therefore one of anonymity.

6. The judgment of the Court was given by Moore Bick LJ. His analysis of the principles of open justice and the relevant legal framework for determining whether anonymity should be the norm for approval hearings is at paras 5 to 18. It is important to set out a summary of this analysis, though none of it is contentious; the central issue in this case being whether, by parity of reasoning, that analysis leads to the conclusions for which the parties contend.

7. The starting point is the principle of open justice, which has long been considered to be of the utmost importance: see *Scott v Scott* [1913] AC 417 where clear statements of the nature and importance of the principle can be found, in particular in the speeches of Lord Atkinson at p 463, and Lord Shaw of Dunfermline, at p 477 quoting Bentham. Nonetheless, as was recognised in *Scott v Scott*, there are occasions on which the principle of open justice must give way to the need to do justice in the instant case: see in particular, the observations of Viscount Haldane LC at p 437-8.

8. In *Scott v Scott* it was accepted that cases of wardship and cases involving protected parties provided exceptions, or apparent exceptions, to the general rule. The justification for excluding those cases was that the court was exercising a function of a kind essentially different from that involved in determining disputed causes: see in particular, the speech of Viscount Haldane LC at p 437-8; Lord Halsbury, Lord Atkinson and Lord Shaw, were of a similar opinion. Lord Shaw for example at p 482-3 referred to those cases as being dependent on the principle that the jurisdiction over wards and lunatics is exercised by judges as representing the Crown as *parens patriae*, in relation to truly private affairs, where the transactions were "*intra familiam*".

9. There may be many different cases in which the court must have regard to the need to do justice in the wider sense than merely reaching a just determination of the issue between the parties: see the authoritative analysis of the principle of open justice and the jurisdiction of the court to determine its scope, in the judgment of Lord Reed JSC in *A v British Broadcasting Corpn (Secretary of State for the Home Department intervening)* [2015] AC 588, in particular at paras 23-41. These principles are reflected in CPR Pt 39, which seeks to encapsulate the general rule of open justice and the particular cases in which it may be appropriate to depart from it. CPR rule 39(2)(1)

[3] See *JXMX (A Child) v Dartford and Gravesham NHS Trust* [2013] EWHC 3956 (QB).

provides: "The general rule is that a hearing is to be in public." Rule 39(3) then provides:

> "A hearing, or any part of it, may be in private if--…(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality; (d) a private hearing is necessary to protect the interests of any child or protected party; … (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or (g) the court considers this to be necessary, in the interests of justice."

10. In *Attorney General v Leveller Magazine Ltd* [1979] AC 440, the principles that applied to hearings in private were held to apply to the anonymisation of a witness. CPR r 39.2(4) now provides that: "(4) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness." See further *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, para 2, where Lord Neuberger of Abbotsbury PSC described the principles of open justice as "fundamental to the dispensation of justice in a modern democratic society" but said that in rare cases, a court has inherent power to receive evidence and argument at a hearing from which the public are excluded, but that such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties; and (ii) if the degree of privacy is kept to a minimum: see, for instance, *Independent News and Media Ltd v A* [2010] 1 WLR 2262, and *H v News Group Newspapers Ltd (Practice Note)* [2011] 1 WLR 1645, paras 11-12.

11. Having analysed the law as set out above, at paras 13 to 18 of *Gravesham's* case, Moore Bick LJ said this:

> 13. Much of the court's jurisdiction in relation to the welfare of children and the administration of the affairs of those who lack capacity is now governed by statute. It has become an important component of the business of the courts. In those circumstances we do not think that it is possible any longer to exclude those areas of judicial activity from the general principle of open justice on the grounds that the court is acting on behalf of the crown as parens patriae rather than exercising its ordinary judicial function of deciding disputes. The court's role nowadays includes determining disputes between public authorities and private individuals, one obvious example being proceedings brought under the Children Act 1989 for care and supervision orders. It might therefore be argued that the functions of the courts in relation to the welfare of children and adults who lack capacity are broader than the "exceptions" identified in Scott v Scott and that such cases cannot be treated as constituting a class to which the principle of open justice does not apply. Any exclusion of such proceedings from that principle therefore must be found in an overriding need to ensure that justice in the broader sense is done in the individual case.

14. In *Bank Mellat v Her Majesty's Treasury (No. 1)* Lord Neuberger spoke of what is strictly necessary to achieve justice between the parties. That might be understood in the narrow sense of reaching a correct decision on the issues which divide the parties, but his words have to be read in the context of the case before him. The court in that case was not concerned with a question of the kind that arises in this case and we do not think that he can have intended to exclude from the court's consideration the need to avoid exposing one or other of the parties to an injustice of a broader kind. Proceedings involving children and vulnerable adults will often call for a measure of privacy, not necessarily because of the inherent nature of the issues to which they give rise, but because such persons may suffer a distinct injustice if they are exposed to the publicity that may be generated if the proceedings are held in public. Moreover, a claimant who is, or will in due course grow up to be, a protected party may need protection from those who would seek to gain access to the funds that are intended to provide compensation for the injuries in respect of which they were awarded.

15. The resonance between the classes of proceedings that were recognised in Scott v Scott as justifying a departure from the principle of open justice and the wider modern categories of cases involving children and vulnerable adults is plain. It is no surprise, therefore, that recent developments in the rules governing such proceedings assume that it is necessary to protect the privacy of children and vulnerable adults involved in proceedings about their welfare or personal affairs. Thus, CPR rule 39.2(3)(d), to which we have already referred, recognises that it may be necessary for the hearing to be held in private in order to protect the interests of a child or protected party. The Family Procedure Rules 2010 go even farther, providing that proceedings to which they apply (even if contentious) are to be held in private unless the court directs otherwise (rule 27.10). Similar provision is made in the Court of Protection Rules 2007. In *Independent News and Media Ltd v A [2010] EWCA Civ 343, [2010] 1 WLR 2262* at paragraph 19 this court expressed the view that the provisions for private hearings in the Court of Protection "mirror and re-articulate one longstanding common law exception to the principle that justice must be done in open court".

16. It does not follow, however, that the protection of the interests of children and protected parties requires complete derogation from the principle of open justice. Accredited representatives of the media are normally allowed to attend private hearings in family proceedings by virtue of rule 27.11(2)(f) of the Family Procedure Rules, but reporting of the proceedings is restricted. Section 97(2) of the Children Act 1989 prohibits the publication of material which identifies, or is likely to identify, a child involved in proceedings in which any power under the Children Act 1989 or the Adoption and Children Act 2002 may be exercised. Section 12 of the Administration of Justice Act 1960 has the effect of prohibiting the publication of information relating to proceedings before a court sitting in private if those proceedings relate to the exercise of the inherent jurisdiction of the High Court with respect to

minors, are brought under the Children Act 1989 or the Adoption and Children Act 2002, or otherwise relate wholly or mainly to the maintenance or upbringing of a minor. These various provisions show how the balance has currently been struck in cases of this type between the imperative of open justice and the particular needs of children and vulnerable adults. In B & P v The United Kingdom (Appln Nos. 36337/97 and 35974/97) the European Court of Human Rights recognised that the need to protect the privacy of a child and to avoid prejudicing the interests of justice may justify holding hearings in private (see, in particular, paragraphs 38-39).

17. The identities of the parties are an integral part of civil proceedings and the principle of open justice requires that they be available to anyone who may wish to attend the proceedings or who wishes to provide or receive a report of them. Inevitably, therefore, any order which prevents or restricts publication of a party's name or other information which may enable him to be identified involves a derogation from the principle of open justice and the right to freedom of expression. Whenever the court is asked to make an order of that kind, therefore, it is necessary to consider carefully whether a derogation of any kind is strictly necessary, and if so what is the minimum required for that purpose. The approach is the same whether the question be viewed through the lens of the common law or that of the European Convention on Human Rights, in particular articles 6, 8 and 10. As to the latter, see *In re Guardian News and Media Ltd [2010] UKSC 1, [2010 2 A.C. 697* at paragraphs 43-52. In *JIH v News Group Newspapers Ltd [2011] EWCA Civ 42, [2011] 1 W.L.R. 1645* this court provided guidance on the manner in which applications for injunctions to prevent publication of private information should be approached. The case did not concern an application for approval of a settlement involving a child or protected party, but the making of an anonymity order in the context of an attempt to prevent publication of personal information. To that extent there are obvious differences between that case and the present, but in paragraph 21 of his judgment Lord Neuberger M.R. identified the following principles which are of general application and therefore of direct relevance to applications of the present kind:(i) an order for anonymity should not be made simply because the parties consent to it; (ii) the court should consider carefully whether some restriction on publication is necessary at all, and, if it is, whether adequate protection can be provided by a less extensive order than that which is sought; (iii) if the application is made on the basis that publication would infringe the rights of the party himself or members of his family under article 8 of the Convention, it must consider whether there is sufficient general, public interest in publishing a report of the proceedings which identifies the party concerned to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

18. He continued:

> "22. Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule by restricting the extent to which the proceedings can be reported, and (b) if so, the judge ensures that the restrictions on publication are fashioned so as to satisfy the need for the encroachment in a way which minimises the extent of any restrictions.""

12. Moore Bick LJ went on to approve what Tugendhat J had said in the court below, namely that the question is not simply one of balancing the demands of privacy and freedom of expression. The constitutional importance of the principle of open justice is such that true question is whether it is *necessary* for the court to grant a derogation from open justice and thus from the rights of the public at large. It follows from the fact that the test is one of necessity, that any derogation must be the minimum that is consistent with achieving the ultimate purpose of doing justice in the instant case. This is not an exercise of discretion, but involves an evaluation of the facts; and though proper deference will be accorded to the judge's evaluation, such an evaluation could be considered afresh on appeal in an appropriate case. See paras 26- 27.

13. However, although approval hearings do not lie outside the scope of the open justice principle, there is force in the argument that in the pursuit of justice, the court should be more willing to recognise the need to protect the interests of children and protected parties, including their right, and the right of their families to respect for their privacy in relation to such proceedings. Such a willingness is reflected both in the Family Procedure Rules and the Court of Protection Rules 2007; and it might be thought that approval hearings are comparable in nature. The function which the court discharges at an approval hearing is essentially one of a protective nature where the court is concerned not so much with the direct administration of justice, as with ensuring through the offices of those who act on his or her behalf, that the claimant receives proper compensation for his or her injuries. That function is comparable to the function of *parens patriae* exercised on behalf of the Crown in relation to wards of court and lunatics. The public has an interest in knowing how the function is performed, and the principle of open justice has an important part to play in this, but its nature is such that the public interest may usually be served without the need for disclosure of the claimant's identity.

14. By virtue of article 14 of the European Convention on Human Rights (the Convention) [4] children and protected parties are entitled to the same respect for their private lives as litigants of full age and capacity (who are free to settle their claims without resort to the court) subject only to the need to ensure that their interests are properly protected. In many, if not all, cases of this kind, the court will need to consider evidence of a highly personal nature relating to the claimant's injuries, current medical condition, future care

[4]Article 14 provides as follows: The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

needs and matters of a similar nature. That is an important matter that the court is bound to take into account when deciding whether anonymity is necessary in order to do justice to such a claimant, notwithstanding the public interest served by the principle of open justice. Withholding the name of the claimant mitigates to some extent the inevitable discrimination between these different classes of litigants.

15. An important aspect of justice is consistency. At one level, the answer to the question whether derogation from the principle of open justice is necessary in order to ensure that justice itself is done depends on the facts of the individual case. But it is important to ensure a reasonable measure of consistency in order prevent the administration of justice being brought into disrepute. Some or all of the issues raised in the appeal regularly confront judges dealing with such applications. Though each application should be considered individually, the court should therefore recognise that when dealing with an approval application of the kind under consideration it is dealing with what is essentially private business, albeit in open court, and should normally make an anonymity order in favour of the claimant without the need for any formal application, unless for some reason it is satisfied that it is unnecessary or inappropriate to do so. In some cases it may be possible to identify specific risks against which the claimant needs to be protected and if so, that will provide an additional reason for derogating from the principle of open justice, but it is not necessary to identify specific risks in order to establish a need for protection.

16. Moore Bick LJ said that in the instant case, the judge's focus should have been less on the specific risks of tangible harm to the claimant and her family and more on the invasion of the family's privacy that would occur if a report of the hearing that publicly identified the claimant was published. In this connection, though the evidence in support of the application may have appeared to be formulaic, it may be difficult for those concerned to articulate the effect that such invasion of privacy would be likely to have on the family's life. See para 28.

17. To ensure consistency in the lower courts, at para 35, the court gave the following procedural guidance in relation to approval hearings for courts and practitioners:

> "(i) the hearing should be listed for hearing in public under the name in which the proceedings were issued, unless by the time of the hearing an anonymity order has already been made;
>
> (ii) because the hearing will be held in open court the Press and members of the public will have a right to be present and to observe the proceedings;
>
> (iii) the Press will be free to report the proceedings, subject only to any order made by the judge restricting publication of the name and address of the claimant, his or her litigation friend (and, if different, the names and addresses of his or her parents) and restricting access by non-parties to documents in the court record other than those which have been anonymised;
>
> (iv) the judge should invite submissions from the parties and the Press before making an anonymity order;

> (v) unless satisfied after hearing argument that it is not necessary to do so, the judge should make an anonymity order for the protection of the claimant and his or her family;
>
> (vi) if the judge concludes that it is unnecessary to make an anonymity order, he should give a short judgment setting out his reasons for coming to that conclusion;
>
> (vii) the judge should normally give a brief judgment on the application (taking into account any anonymity order) explaining the circumstances giving rise to the claim and the reasons for his decision to grant or withhold approval and should make a copy available to the Press on request as soon as possible after the hearing."

The 1958 Act

18. The 1958 Act was enacted to give effect to the recommendations of the Sixth Report of the Law Reform Committee 1957 and to meet the mischief identified in *Chapman v Chapman* [1954] AC 429 on the limits of the court's inherent jurisdiction to authorise departures from the terms of a trust in cases where there are beneficiaries unable to consent by reason of their being minors or by reason of their being unborn or unascertained: see *Goulding v James* [1997] 2 All ER 239. Under the 1958 Act, the approval of the court is required for arrangements for the variation of trusts on behalf of specified classes of beneficiaries, including children, unborn persons and persons who cannot presently be identified (such as future spouses of a beneficiary). Specifically, the 1958 Act confers jurisdiction on the High Court to give such approval on behalf of any person "who by reason of infancy or other incapacity is incapable of assenting" and also on behalf of unborn and unascertained persons: see section 1(1)(a) to (d) of the 1958 Act.

19. Except for persons in the category described in section 1(1)(d) of the 1958 Act, that is, discretionary beneficiaries under protective trusts where the protective life interest has not yet terminated, before approving such an arrangement, the court has to be satisfied that the arrangement is for the benefit of persons on whose behalf the court is asked to approve it, and the court has a discretion whether to approve it or not. `Such persons include minors who do not have capacity within the meaning of section 2(1) of the 2005 Act, that is, by reason of an impairment of, or a disturbance in the functioning of the mind or brain. However, for adults who lack capacity within the meaning of section 2(1) of the 2005 Act, the question whether the arrangement is for their benefit is a matter for the decision of the Court of Protection, not the High Court: see *T v P* [2018] EWHC 685 (Ch) where Morgan J held this was the effect of section 1(3) of the 1958 Act, read with section 2(1) of the 2005 Act.

20. The effect of the court's approval under the 1958 Act is limited, as Mummery LJ pointed out in *Goulding v James* at 247E to H:

> "First, what varies the trust is not the court, but the agreement or consensus of the beneficiaries. Secondly, there is no real difference in principle in the rearrangement of the trusts between

> the case where the court is exercising its jurisdiction on behalf of the specified class under the 1958 Act and the case where the resettlement is made by virtue of the doctrine in Saunders v Vautier by all the adult beneficiaries joining together. Thirdly, the court is merely contributing on behalf of infants and unborn and unascertained persons the binding assents to the arrangement which they, unlike an adult beneficiary, cannot give. The 1958 Act has thus been viewed by the courts as a statutory extension of the consent principle embodied in the rule in Saunders v Vautier. The principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor, to subject property to the continuing trusts, powers and limitations of a will or trust instrument."

21. In *Spens v IRC* [1970] 1 WLR 1173 at 1183H-1184C Megarry J said:

> "Under the Act, the court decides so little. It is now well-settled that in approving the arrangement on behalf of infants, the unborn and so on, the court is in substance doing no more than supplying the binding consent that they cannot give…What varies the trust is not the order of the court but the agreement or consents of the beneficiaries. The court is merely concerned to consider whether the proposed arrangement will be for the benefit of those on whose behalf approval is being given…Without pleadings, without any real issue, the court is exercising a jurisdiction which at least in part is paternal and administrative…"

22. As Lord Denning MR put it in *Re Weston's Settlement Trusts* [1969] 1 Ch. 223 at 245B in "exercising its discretion, the function of the court is to protect those who cannot protect themselves." Opposition from a litigation friend or the trustees on behalf of minor or unborn beneficiaries is rare, but it is not unknown: see *Lewin on Trusts*, 19th edition, para 45-111, citing for example, *Re Holt's Settlement* [1969] 1 Ch. 100 at 121–122.

23. Applications under the 1958 Act are High Court proceedings governed by the CPR, and are thus subject to the general rule in CPR 39.2 that a hearing is to be in public. Mr Pearce QC submits, and I agree, that the conditions in CPR 39.2 (3) which permit, in certain limited circumstances, the judge to sit in private, are indicative of when a lesser form of derogation from open justice, that is, anonymity, rather than a hearing in private, may be appropriate. In addition to condition (d) which concerns children and protected parties, the parties in this case rely on conditions (c), (f) and (g): see para 9 above.

24. Applications under the 1958 Act are generally heard in open court: see *Lewin on Trusts*, 19th edition, para 45-114. The practice was settled following the decisions of Vaisey J in *Re Chapman's Settlement Trusts* and *Re Rouse's Will Trusts*, reported together as a

practice note at [1959] 1 WLR 372 at 375 where the importance of hearing such applications in open court, rather than in Chambers was stressed. Vaisey J took the view this was "necessary for uniformity of practice, and the variation of trusts is a serious matter which ought not to be dealt with behind closed doors." He went on to say: "If there is any real reason, such as the avoidance of unnecessary or undesirable publicity, an application can always be made for the case to be heard in chambers." In *Re Byng's Will Trusts* [1959] 1 WLR 375 at 381, Vaisey J said there was a rule that all applications for the variation of investment clauses (whether under section 57 of the Trustee Act 1925 or the 1958 Act) were to be heard in open court unless there was a special reason to avoid publicity.

25. The Practice Direction supplementing CPR Pt 39 is PD 39A – *Miscellaneous Provisions Relating to Hearings*, sets out a number of different types of hearings that may, in the first instance, be listed in private. This includes approval hearings involving the interests of a child and protected party: see para 1.6, of PD 39A. Applications under the 1958 Act were also included, by reference to rule 39.2(c), that is, by reference to issues of confidentiality, including of financial information, when the CPR were first introduced in 1999, but the relevant paragraph, 1.5(11), was removed from the CPR in 2003 for reasons that are obscure. It is not suggested to us, however, that this provision had any material effect on the status quo, which was, and still is that hearings in applications brought under the 1958 Act generally take place in open court.

26. In *V v T and A* [2014] EWHC 3432 (Ch); [2015] WTLR 173, the issue of privacy/anonymity for such hearings was the subject of detailed consideration. The parties successfully made applications under the 1958 Act for approval of arrangements for the benefit of minor and for future, yet unborn; beneficiaries under three trusts. However Morgan J refused their application to hold the hearing in private. The judge was not persuaded that this was necessary on the grounds originally advanced. These were that disclosure in open court of the trusts' interests in a private company, would have adverse commercial consequences for that company, and public knowledge of the value of the trust assets would create a risk as to the personal security of the adult and minor beneficiaries. As the judge pointed out at para 15, there were numerous reported cases cited in *Lewin on Trusts* (the 18th edition) where the reports give the names of the parties and the details of the case. He also said he suspected that in many applications under the 1958 Act the parties are reluctant to have their cases heard in open court, as the subject matter of the application may be regarded as a private family matter involving a discussion of the family's private financial affairs, and those matters concerned no-one but themselves. But, the judge said, that was not a sufficient justification for the hearing to be in private: see para 20.

27. However, the judge was concerned about the special position of the minor beneficiaries, and invited the parties to submit further evidence regarding their position. After an impeccable analysis of the law on open justice and reporting restrictions, in the light of that further evidence, which the judge described at para 23 as stronger than or at least as strong, as the evidence in *K v L* [2012] WTLR 153, he permitted the parties to be anonymised in order to safeguard the interests of the children: specifically, from the adverse consequences of them becoming aware, at too early an age, of the extent of their likely wealth, and to protect them from relationships and friendships with those who were inappropriately influenced by it: see paras 23 -26.

28. Morgan J also gave guidance, with the approval of the Chancellor, on the future practice for the interim listing of such cases, namely that if parties intended to apply for anonymity orders, and for the substantive hearing to be listed only with random initials, it was expected that Chancery listing would accede to that request: see para 30. This guidance was subsequently set out in the Chancery Guide (at para 24.68 of the 2016 version) and updated in a Practice Note and model order issued by the Chief Chancery Master with the approval of the Chancellor, on 9 February 2017 (see: *Practice Note (Variation of Trusts: Confidentiality Orders Pending the Hearing of Application), 9 February 2017*, unreported, in CPR para.64 PN.1). The Practice Note concludes:

> "Whether it is appropriate to make an interim order to restrict access to the claim form and evidence on the court file and to make the proceedings anonymous pending the disposal hearing will depend on the circumstances in each case. These orders are not automatic and the applicants will have to provide evidence which justifies the making of such an order. At the full hearing, in the light of more detailed consideration the court can decide whether these orders should be continued and whether the hearing should be in private."

29. Since the decision in *V v T* it appears that anonymity orders have been made in several cases brought under the 1958 Act, including *DC v AC* [2016] EWHC 477 (Ch) a decision of the Chancellor and *A and anor v B and anor* [2016] EWHC 340 (Ch)), a decision of Warren J, though no reasons for anonymisation were given in either judgment.

The factual and procedural background of this case

30. On 27 January 2017, the appellant in this case, commenced a Part 8 claim, under the 1958 Act to vary arrangements for a trust made in 1961. This trust was a Settlement dated 6 December 1961 (the Settlement) of which the appellant is the Settlor. The defendants to the claim are the appellant's three children and their spouses, his seven grandchildren and the trustees of the Settlement. Specifically, they are the appellant's three adult children (R1, 3 and 5) and their respective spouses or former spouses (R2, 4 and 6); their young adult children (R7 to R11); their minor children (R12 and 13) acting through their litigation friend, Mr Andrew Stebbings, and the trustees of the Settlement (R14 to R16, representing the interests of the unborn and unascertained beneficiaries). R1 to R13 are beneficiaries under the Settlement. After the hearing before the judge but before the hearing of this appeal, R11 obtained her majority. By virtue of CPR 21.9(1), the appointment of Mr Stebbings as her litigation friend automatically ceased, but R11 has confirmed that she is content to continue to be a party to this appeal. R12 and 13 are still minors however, and have not yet reached adolescence.

31. The Settlement itself comprises very valuable assets, and the trust fund of the Settlement is currently divided into ten funds. Three of those ten are held on revocable discretionary trusts for the benefit of the appellant's descendants and their spouses. The other seven funds are held on revocable trusts under which there are life interests for the appellant's three children, the former spouse of his heir apparent, and three of his grandchildren (R7 to R10) who are the descendants of his heir apparent.

32. R11 to R13 are not the principal beneficiaries of the Settlement. Their interests are restricted to particular sub-funds subject to the prior interests of their parents. R11 to R13's real interest therefore is a secondary remainder interest (which could be defeated) in funds that are tiny in relation to the value of the trust fund as a whole. Neither of the minor beneficiaries knows of the family trusts or their interest in the Settlement.

33. By way of background, the proposed arrangement in this case (the Arrangement) had two main purposes. First, to extend the permissible duration of the Settlement, by extending the perpetuity period until 125 years after the date of the order making the variation, and secondly to extend the period during which the trustees of the settlement are permitted to accumulate income of the Settlement, variations made possible by the Perpetuities and Accumulations Act 2009.

34. The proceedings were not adversarial and all parties to the proceedings supported the Arrangement. Nonetheless, because the Arrangement affected or was capable of affecting the interests of minors who are beneficiaries of the trust and unborn and unascertainable beneficiaries, the matter had to be brought before the court by an application under the 1958 Act. The judge approved the Arrangement itself: see [2017] EWHC 606 (Ch), and nothing turns on that aspect of her decision.

35. As for the issue of anonymisation, before the claim was commenced, the appellant applied, with the support of all parties, for an interim anonymity order. This was framed in accordance with the guidance referred to at para 28 above, and to cover the period between the issue of proceedings and the hearing. On 21 December 2016 Master Clark made the interim order. This was expressed to be until the substantive hearing of the claim or further order in the meantime. Specifically the interim order (i) required the claim to be listed in an anonymised form; (ii) pursuant to CPR 5.4C(4) (6) and CPR 5.4D(2) restricted access by non-parties to documents on the court file; and (iii) pursuant to CPR 39.2, limited disclosure of the parties' names and addresses (and those of the litigation friend) or any other fact or matter from which a party to the claim may be identified to Authorised Persons (as defined in the Order) save with the permission of the court. Authorised Persons were defined in the Order as (i) a party to the claim; (ii) any other person beneficially interested under the Settlement; (iii) Her Majesty's Revenue and Customs (HMRC) and (iv) a solicitor or barrister acting as a legal representative of a person within (i) to (iii).

36. The hearing before the judge was not listed in private: the case name was anonymised in the daily cause list and outside the door of the court. At the hearing, the appellant, with the support of all parties, applied for a continuation of the interim order, in reliance on evidence from the appellant and Mr Stebbings.

37. The evidence of the appellant and Mr Stebbings in summary is as follows. The trust fund of the Settlement is very valuable. Although much information about the companies whose shares are the principal assets of the Settlement is in the public domain, so far as the appellant is concerned, information about individual beneficiaries' interests under the Settlement is not. The family and trustees have a common approach to the upbringing of the grandchildren, ensuring they should be brought up to appreciate the importance of education and hard work; to establish themselves in worthwhile careers; to make a positive contribution to society and to choose friends who respect them for their personal qualities rather than for the accident of their birth. Accordingly, the grandchildren are introduced to the implications of the family trusts at times and in

a manner that is appropriate having regard to their personal development. R11 is ready to be told about these matters, but R12 and R13, are not. There is real concern that publicity linking the grandchildren to the Settlement (as a result of these proceedings) might be inaccurate, and would lead to the grandchildren's knowledge of their position before this would be appropriate, having regard to their personal development; further, attendant publicity might also undermine their families' approach to their upbringing; it might distract and upset them; it might affect other people's attitude to them in a way that would have an adverse impact on their lives and would increase the risk that they would be the targets of crime. This was particularly the case for one of the grandchildren who did not bear the family name.

38. It appears from the evidence from Ms Richards of Hunters, solicitors, that the application to continue the interim order anonymising the proceedings was made at the start of the hearing, but it was not ruled on until after the application for the variation had been dealt with (the argument was in the morning, and the judge gave her ruling after the lunchtime adjournment). Ms Richards says she cannot say for sure whether some of the parties to the claim were named in court or not (some of the names appear in her notes, but this may have been because she knew to whom Counsel were referring). Whatever the position, and though it would have been better if an express direction to that effect had been made, it is I think tolerably clear that the order made by Master Clark continued to apply, and was regarded as continuing to apply until the issue of anonymity had been resolved.

The judgment below

39. By a supplemental order, made after granting the application for the Arrangement, the judge refused the application to continue the interim order anonymising the proceedings. Specifically, she refused to follow the approach identified in *Gravesham's* case, as the parties had invited her to do, and also held the case before her was not one of the exceptional cases where a derogation from open justice was justified following a close scrutiny of the facts: see para 32.

40. There was, she said, one factor that cases brought under the 1958 Act, such as this one, and those considered in *Gravesham's* case, namely approval hearings, had in common. This was that children unlike adults could not resolve the underlying matters with which such litigation was concerned, in private; there was therefore a potential need to mitigate the discrimination against children that was inherent in both types of litigation. She said that was material, although in this case, it was the Settlor's choice to include the children rather than to restrict the class of beneficiaries to adults, that gave rise to the need to come to court, whereas in *Gravesham's* case X and X's family clearly did not have that choice (see para 31).

41. However, the judge did not consider that the other factors that weighed in the decision in *Gravesham's* case applied here. First, the public interest in disclosure in this case went beyond the mere interest in the public knowing how the court's function under the 1958 Act is performed. This was because there was a legitimate public interest and considerable public debate at present about arrangements made by companies and individuals to obtain a fiscal advantage, even when there was nothing improper in those arrangements: see paras 32 and 41. Secondly, the nature of the information disclosed in this case was very different from that disclosed in *Gravesham's* case (financial

information in this case as opposed to detailed medical information about physical and mental impairment and care needs in approval hearings): see para 32.

42. Against that background, the judge considered the evidence in support of the application for "confidentiality", deriving from the witness statements of the appellant and Mr Stebbings. She referred to the appellant's evidence for example, that much information about the value of the estate is in the public domain; but that information about individual beneficiaries' interests was not.

43. On the facts, the judge said the evidence fell far short of the kind of clear and cogent evidence that demonstrated the necessity for the protection the parties were seeking. She regarded it as implausible that publicity from the proceedings could affect the position of the children or the grandchildren, or that the (premature) disclosure of their interests could affect their future life prospects, other people's views of them or the motivation of those who might wish to form friendships with them in circumstances where it was public knowledge that the estate was worth a great deal of money, and the family were already known to be wealthy or to have expectations of considerable wealth by most people's standards. The judge said the beneficiaries are already known to be wealthy and it was very unlikely that other people would be influenced by knowing that one of the beneficiaries has, say, a 40 per cent share, rather than a 20 per cent share in the Settlement.

44. The judge dealt shortly with some other arguments advanced by the parties in support of the application for anonymity. She said no significance could be attached to the fact that one of the minor beneficiaries did not share the family name because it was far-fetched to suggest that anyone who was interested could not find out about the family connection. Further, there was an absence of evidence as to the steps the family had taken to ensure the minor beneficiaries' connection to the family was withheld from them or to ensure that the connection was not apparent to third parties. The information in the proceedings did not add materially to the publicly available information about the family's assets, or therefore, to the likelihood of the children being the victims of crime. It was not likely that the publicity that might be generated by this litigation would come to the attention of the children or lead to the kind of taunting that might follow, for example, from the splashing of a celebrity parent's infidelity on the front page of the newspapers.

45. In the result, the judge held that to grant an anonymity order on the basis of the evidence before her would be inconsistent with *V v T* and with the clear directions given by superior courts that the open justice principle must only be subject to derogation in exceptional circumstances after close scrutiny of the facts.

46. By paragraph 2 of the Order under appeal the judge granted permission to appeal. Her reasons were these: (i) there is a point of principle as to whether the *Gravesham* case is authority for the proposition that where the need for a court appearance arises only from the fact that one of the parties is a minor, then there is a presumption in favour of granting an anonymity order or whether the stricter test described by Morgan J in *V v T and A* still applies; and (ii) the case raises the question how much evidence is needed to support an application for anonymity where information about the value of the settlement is already in the public domain.

Events post judgment

47. The judge's supplemental order and a further order of the Court of Appeal made on 17 May 2017 extended the prohibition on the identification of the parties, pending the disposal of the appeal. On 27 February 2018 the Court of Appeal [5] made a further order directing the appellant to give notice of the appeal to PA Injunctions Alert Service. This is a commercial service operated by the Press Association (the service was formerly called CopyDirect). It is subscribed to by the national media organisations, and can be used to notify them of an intention to apply for an injunction or other order that may affect their rights under article 10 of the Convention by prohibiting or restricting the reporting of legal proceedings.

48. By paragraph 3 of the 27 February 2018 order, the Court of Appeal authorised the appellant to provide such documents relating to the appeal as he saw fit to any person or organisation wishing to intervene in the appeal, if they provided an irrevocable written undertaking only to use those documents and the information contained in those documents for the purposes of the appeal.

49. On 12 March 2018, the appellant's solicitors notified PA Injunction Alerts Service of the appeal and provided it with a detailed Explanatory Note that explained the facts and the issues raised by the appeal in an anonymised form. It was anticipated that, with the benefit of this information, subscribers that did want to intervene in the proceedings, or who wished to know who the parties were before making that decision, would apply to the appellant to be provided with un-anonymised material after giving the undertaking required. In contrast, those who did not wish to become involved in the appeal had no need to know the identity of the parties. However the Press Association asked for un-anonymised material to be provided, on its assurance that "the names will not be publicised" and said it would only notify its subscribers of the forthcoming application, if it could provide them with the name of the parties to the appeal. It said it was not willing to provide the undertaking asked for, or to require such an undertaking from its subscribers (citing *A Healthcare NHS Trust v P* [2015] EWCOP 15 (Fam)).

50. As there was something of a stalemate, the appellant brought the matter back before the Court of Appeal for further directions. On 5 June 2018, the Court of Appeal (McFarlane and Sharp LJJ) heard argument from Mr Michael Dodd of the Press Association and from Mr Pearce QC. The Court decided that the appellant had complied with the Order made by the court on 27 February 2018, and it did not require any variation (in particular, as the media organisations had requested, to remove the requirement for an undertaking to be given by those organisations that wished to receive the relevant materials in un-anonymised form).

51. Our reasons for reaching this conclusion were these. The form of the order made in this case followed that provided for by *The Practice Guidance: Interim Non-Disclosure Orders* [2012] 1 WLR 1003 at paras 24 to 28 (*The Practice Guidance)*. This envisages that in cases where issues of privacy and/or confidence are concerned, non-parties will only be provided with un-anonymised information, including pending any appeal, if they provide an irrevocable written undertaking to the court not to use it other than for the purposes of the proceedings. Where the non-party is unwilling to provide the undertaking, no further information need be supplied. The logic of requiring such an undertaking is self-evident. As para 24 of *The Practice Guidance* explains, such an

[5] The matter had been listed for the hearing of the appeal. However, by that stage, without any fault on the part of the parties, no notification had yet been given to the media of the issues raised in this appeal.

undertaking is required in relation to applications for interim non-disclosure "In order to provide effective protection of private and/or confidential information and information contained in private and/or confidential documents provided by applicants to non-parties".

52. There can be no doubt that the PA Injunction Alerts Service provides a convenient means (convenient that is, both to litigants and to the media) of notifying the media of cases where section 12 of the Human Rights Act 1998 may be engaged and where they may wish to apply for permission to intervene. However, we could see no principled reason to distinguish between media organisations and other non-parties in relation to the provision of an undertaking. Such an undertaking provides an appropriate degree of protection to the information that the court is being asked to protect, and to the rights of non-parties to engage directly with the issues raised in the proceedings (or to decide whether to do so or not) on a properly informed basis. We were not persuaded therefore that there was any reason to depart from this procedure whether by reference to what was said in *A Healthcare NHS Trust v P* or otherwise.

53. Following the directions hearing, the court invited the Attorney General to appoint an Advocate to the Court to assist on two issues: first, the substantive issue of anonymity and secondly, on an apparent difference of approach between the practice of the Court of Protection and that identified in *The Practice Guidance,* followed in the High Court, to the process of notification through the PA Injunctions Alert Service. The media organisations returned to the notification issue in their written submissions for this appeal. In the event however, Mr Guy Vassall Adams QC on their behalf touched on it very briefly at the hearing; and after the hearing had concluded, the media organisations informed the court that they had decided not to pursue this discrete aspect of the case any further.

Grounds of appeal: submissions of the parties

54. The parties make common cause. The submissions on their behalf are principally advanced by Mr Pearce QC. These are supported by oral submissions from Ms Susannah Meadway for the minor beneficiaries (including R11 for this purpose) and from Mr Francis Barlow QC for the trustees; and by submissions in writing from Mr Piers Feltham for the adult beneficiaries and Mr Matthew Slater for R2.

55. Mr Pearce QC submits as follows. The parties to the appeal fully acknowledge the importance and strength of the open justice principle, and they also acknowledge that applications under the 1958 Act do not fall outside that principle. However, with regard to the issue of anonymisation, there is no material distinction between the position of minors in approval hearings and those involved in variation of trust hearings: the court's function in relation to approval hearings and under the 1958 Act is the same, in form and in substance. Though the jurisdiction of the court under the 1958 Act is entirely statutory, it is, historically, inextricably linked with the court's *parens patriae* jurisdiction, in that it is, like that jurisdiction, a protective (and enabling) jurisdiction, concerned with property.

56. In both cases, the court is exercising a protective function in relation to non-contentious private business where an adult would be free to agree in private that which the court is being asked to approve at a hearing (either a compromise or a variation as the case may be). The fact that the court's approval has to be sought on behalf of a child or

protected party at a hearing in public therefore places the child or protected party at a significant disadvantage in the enjoyment of their article 8 rights when compared to an adult, contrary to article 14; and the reasons relied on by the judge for drawing a distinction between approval hearings and variation of trust hearings, were flawed. Thus, a measure of derogation from the principle of open justice is appropriate where applications are made under the 1958 Act in order to protect the rights of the minor beneficiaries; and while each case must be considered individually, it will normally be appropriate for the court to make an anonymity order. Further, guidance to that effect, would achieve a desirable measure of consistency.

57. In any event, there was a proper case for anonymisation on the evidence; and the facts were, in important respects, misunderstood or mischaracterised by the judge: see further, para 59 below. There is no legal requirement for information concerning *inter vivos* trusts to be in the public domain, and the evidence is that information about individual beneficiaries' interests is not in the public domain. The interests of the beneficiaries are aspects of their private and family life in respect of which they have a reasonable expectation of privacy, and accordingly, the publication of information about the proceedings would engage their article 8 rights. In this connection, it is appropriate to consider the position of all the appellant's grandchildren: four of whom are young adults, and three who are minors, even though the court's jurisdiction under the 1958 Act is only engaged in respect of the appellant's minor grandchildren. Further, the judge, when considering the benefit of the Arrangement for the infant and unborn beneficiaries, did not refer to any fiscal advantage: and the appellant's evidence was that the principal benefits of the Arrangement were the continuation of the Settlement rather than the saving of tax. Save that the Arrangement avoids the additional inheritance tax that would be payable if the trust property were re-settled, the fiscal effects of the Arrangement are broadly neutral. It would be misleading therefore to characterise the object of the variation (which is not an innovative one, and has been sanctioned by previous case law) as tax avoidance.

58. Ms Meadway submits that it would be unjust for the minor beneficiaries to be identified or identifiable in any reports of the proceedings, where their interest in the Settlement is peripheral, they did not propound the variation but were merely necessary defendants and the judge's approval was made without any reference to a benefit accruing to them from any tax advantage resulting from the variation.

59. On the evidence, the judge appeared to proceed on the footing that the fact that the minor beneficiaries were beneficiaries under the Settlement was already in the public domain when it was not, and she ignored the fact that publicity would highlight and confirm what would otherwise be mere speculation. The judge also seemed to think that the minor beneficiaries' interests are far more valuable than they are. She therefore underestimated the consequences to them of the value of their interests being overestimated by others. When considering the effect of publicity/anonymity, the judge gave insufficient weight to the fact that one of the minor beneficiaries did not share the appellant's name. On the issue of public interest, it is accepted that the public has an interest in knowing how the court's function under the 1958 Act is performed, and in knowing how wealthy individuals arrange their tax affairs. But in this case, the public interest could be satisfied by a report that did not name (or otherwise lead to the identification of) the minor parties.

60. Mr Vassall Adams QC submits variation of trust hearings fall squarely within the open justice principle, and that the media have a strong and legitimate interest in identifying the parties to those proceedings, as in any other type of proceedings, in accordance with the exercise of their rights under article 10 of the Convention. There is, he submits, no basis for departing from the principle by creating an exception for this category of cases. Further, the analogy sought to be drawn between approval hearings and applications made under the 1958 Act is inapt. This is because there is a fundamental difference between these two situations in that children and protected persons are the modern equivalent of wards of court and lunatics, and proceedings in relation to those parties have always been an exception to the open justice principle. This, he submits, is the true reason why the Court of Appeal in *Gravesham* was more willing to allow the proceedings to be anonymised, notwithstanding that the open justice principle did apply to approval hearings: the test for derogation from that principle nonetheless remains one of necessity. In any event, the appellant greatly overstates the similarity between variation of trust cases and approval hearings, with a strong focus on form over substance. Approval hearings often involve consideration of highly personal and sensitive information relating to the child in contrast to applications under the 1958 Act, which do not.

Discussion

61. The issue of principle in this case is a nuanced and relatively narrow one. It is common ground that there may be applications made under the 1958 Act where anonymising the proceedings is necessary in the interests of justice in order to protect the rights of the minor beneficiaries. The first question is whether this should be the norm, or default position, as the appellant contends, or whether anonymity should be decided on a case-by-case basis.

62. The essence of the parties' argument before us is that in both approval hearings and applications under the 1958 Act the court exercises a protective jurisdiction in relation to "private business" where a child needed to come to court to achieve what an adult could do privately. As both types of hearings are for these purposes, indistinguishable, the judge was wrong to distinguish *Gravesham's* case from this one and should have held that the same approach to the issue of anonymity should be taken to each.

63. There are certainly similarities between the two types of hearings. However, there are also material differences; and I am not persuaded that there should be a departure from the court's general approach to the issue of anonymity for applications under the 1958 Act. It follows that the existing approach, as identified in *V v T* should be maintained.

64. It must be acknowledged that the court's jurisdiction under the 1958 Act, like that exercised in approval hearings, is in substance, a protective and enabling jurisdiction. Having said that however, the position must not be overstated. These are ordinary civil proceedings, not wardship proceedings. Nevertheless, as Mr Pearce QC points out, whilst the jurisdiction exercised under the 1958 Act is entirely statutory it is has a link historically, to the *parens patriae* jurisdiction to the extent that the wardship jurisdiction of the Chancery Division was based on the need to protect and administer the property of the ward. Further, prior to the decision in *Chapman v Chapman*, the court's jurisdiction to sanction variations of trusts on behalf of persons lacking legal capacity and potential beneficiaries would have been understood to be an aspect of the court's *parens patriae* jurisdiction: see the summaries of the history of wardship by Cross J at

83 (1967) LQR 200 at 200-203; and the Report of the Committee on the Age of Majority (1967) Cmnd 3342 at paras 192 to 3, 198-9 and 202.

65. It does not follow from this however, that the court should adopt the same approach to derogating from the principles of open justice in variation of trust cases, as it does in approval hearings. First, as the court made plain in *Gravesham's* case at para 13 and 16, areas of judicial activity are not excluded *per se* from the general principle of open justice because the court is acting on behalf of the crown as *parens patriae* rather than exercising its ordinary judicial function of deciding disputes. Secondly, in determining what derogations are (exceptionally) considered to be necessary from the principles of open justice, or whether the court should take the even more exceptional step of making such derogations the norm, the court in my judgment is required to look beyond the closeness of the connection of the proceedings to the *parens patriae* jurisdiction, to the underlying matters with which the particular category of proceedings is concerned.

66. In this context, it must be recollected the courts have consistently cautioned of the need to be vigilant when asked to make incremental incursions into the general principle of open justice, which in my judgment is what the court is being asked to sanction here. See for example, the observations of Lord Shaw of Dunfermline in *Scott v Scott* at p 477-8. As Lord Woolf MR explained at p 977 in *R v Legal Aid Board ex parte Kaim Todner (A firm)* [1999] QB 966, in a passage cited with approval by Lord Steyn in *In Re S (A Child) (Identification: Restrictions on Publication) House of Lords* [2004] UKHL 47; [2005] 1 A.C. 593 at para 29:

> "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely … Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary."

67. The court in *Gravesham's* case decided there should be a presumption of anonymity in approval hearings for a number of reasons. One, obviously, is the fact that the court is exercising a protective and enabling jurisdiction; and bound up with this is the potential need to mitigate the discrimination that is inherent in that type of litigation, because children unlike adults cannot resolve in private the underlying matters with which such litigation is concerned. These features are ones that cases brought under the 1958 Act, and approval hearings have in common. The importance of these features however, is in turn inextricably bound up with the particular nature of the underlying matters with which the litigation is concerned. In many, if not most approval hearings, evidence is

put before the court of a highly sensitive and personal nature about particularly vulnerable claimants. It is in these circumstances, that justice requires a limited derogation from the principle of open justice, to afford an appropriate degree of respect for the private lives of claimants and their families.

68. Thus, the court in *Gravesham* said at paras 30-31:

> 30. By virtue of article 14 of the Convention children and protected parties are entitled to the same respect for their private lives as litigants of full age and capacity (who are free to settle their claims without resort to the court), subject only to the need to ensure that their interests are properly protected. In many, if not all, cases of this kind the court will need to consider evidence of a highly personal nature relating to the claimant's injuries, current medical condition, future care needs and matters of a similar nature. In our view that is an important matter which the court is bound to take into account when deciding whether anonymity is necessary in order to do justice to such a claimant, notwithstanding the public interest which is served by the principle of open justice. Withholding the name of the claimant mitigates to some extent the inevitable discrimination between these different classes of litigants. In some cases it will be possible to identify a specific risk of dissipation of the sum awarded as damages when the claimant reaches the age of majority (as was the case, for example, in JXF v York Hospitals). If such a risk exists it will provide an additional argument in favour of anonymisation. Although a fear of intrusive Press interest is sometimes said to provide grounds for relief, we accept Mr. Dodds's submission that in general the Press seeks to act responsibly in reporting matters of this kind.
>
> 31. Mr. Barr reminded us that the range of settlements that come before the court for approval is very wide and submitted that we should be cautious about accepting Mr. Weir's submission that anonymity orders should generally be made in such cases. He suggested that we should go no farther than to hold that each case should be considered on its own merits. In our view he was right to counsel caution, but, ultimately we have been persuaded that, although each application will have to be considered individually, a limited derogation from the principle of open justice will normally be necessary in relation to approval hearings to enable the court to do justice to the claimant and his or her family by ensuring respect for their family and private lives."

69. The nature of the evidence that the court needs to consider in this case by way of contrast, is very different. It is true that information about people's personal financial position is usually regarded as a private matter. However, information about the individual shares of the minor beneficiaries in the Settlement, and their connection with the Settlement, is of a different order of sensitivity to the sort of highly personal medical and other information which parties to approval hearings are required to put before the court. Further, though harm is not a condition of establishing either that privacy rights are engaged, or of infringement, when considering questions of the kind that have arisen

here, the court is bound to consider the real life implications of making an order or not – and hence the different vulnerabilities of the individuals concerned in approval hearings on the one hand and variation of trust hearings on the other.

70. The approach taken by the court in *Norman v Norman* [2017] EWCA Civ 49; [2017] 1 WLR 2523 is instructive. In that case the Court of Appeal (Gloster, Lewison and King LJJ) declined to apply the guidance in *Gravesham's* case on presumptive anonymity to appeals to the Court of Appeal against orders for financial remedies from the Family Division of the High Court, holding that save in exceptional circumstances, the general rule in CPR r 39.2(1) governed the Court of Appeal's approach to hearings in public and anonymisation, and that a hearing was to be in public subject to the discretionary exceptions set out in rule 39.2(3)(4).

71. Mr Pearce QC draws attention to Lewison LJ's judgment in *Norman v Norman* at para 82, where he set out the differences between the context of *Gravesham's* case and the context of ancillary relief proceedings. As Mr Pearce QC points out, this summary contains no reference to the nature of the evidence heard in approval hearings. Instead, it refers to three propositions. First, that approval hearings unlike ancillary relief proceedings are not concerned with the resolution of disputes; secondly, that the classes of litigant in approval hearings are children and protected parties; and thirdly, the need to eliminate as far as is possible and compatible with the principle of open justice, discrimination against children and protected parties that would have resulted from fully open proceedings. Each of these propositions, Mr Pearce QC submits, is equally applicable to variation of trust cases.

72. That point might have more force if the summary stood on its own. However, it is not freestanding; and must be considered in the context of what is said both in *Gravesham's* case and in the leading judgment given in *Norman v Norman* by Gloster LJ, with whom Lewison (and King LJJ) expressly agreed. In her judgment, Gloster LJ said as follows:

> "66. …I see no need for this court to reconsider its approach to the hearing of financial remedy appeals or anonymisation in the light of *X v Dartford and Gravesham NHS Trust.* That case was a very different kind of case from a financial remedies appeal arising in divorce proceedings. It involved an appeal against the refusal of a High Court judge, when exercising the power under CPR r 21.10 to approve the settlement of a child's claim for damages for personal injuries, to make an anonymity order in respect of the names of the child and her parents. Moreover, the evidence before the Court of Appeal in financial relief appeals is very different from the evidence before the High Court in applications under CPR 21.10(1) for the authorisation of settlements involving children and protected parties. As Moore Bick LJ pointed out in *Gravesham* at para [30], applications under CPR 21.10(1) have very distinctive features:
>
> "In many, if not all, cases of this kind the court will need to consider evidence of a highly personal nature relating to the claimant's injuries, current medical condition, future care needs and matters of a similar nature."

> 67. These features are absent from normal appeals against orders for ancillary relief. Medical evidence of this kind is rarely before the Court of Appeal in standard cases involving ancillary relief. If, as in *K v L,* in the interests of children (or indeed the parties) it is necessary to restrict public reporting of family finances, or other evidence, such as medical evidence, then, applying the well-established approach set out in the authorities above, an appropriate order may be made. But it by no means follows…that, so far as financial remedy appeals *in this court* are concerned, such appeals should be routinely categorised "as private business entitling the parties to anonymity as well as to preservation of the confidentiality of their financial affairs", or, even if the appeal is to be heard in public, entitling the parties "to anonymity and preservation of the confidentiality of their financial affairs". As Sir Mark Potter P emphasised in *Clayton v. Clayton* [2006] EWCA Civ 878; [2006] Fam 83 at para. 64, applications for restricted reporting or anonymity:
>
> "fall to be decided not on the basis of rival generalities but by focussing on the specifics of the rights and interests to be balanced in the individual case".”

73. At paras 25 to 27 of *K v L,* referred to by Gloster LJ in *Norman v Norman* and by Morgan J, in *V v T* (see para 27 above), Ward LJ described why the court was persuaded to order full anonymisation, and the cogency of the evidence, upon which that decision was made:

> “25. … although in the normal way the court conducted the hearing of this appeal in public, it acceded at the outset to a joint application by the parties for an order which prevented publication of the names or photographs of themselves or the children, of the name of the town in which the members of the family all currently continue to reside or of any other information likely to lead to identification of the children. Indeed, following the hearing and in the light of our order, we caused the title of the proceedings in this court to be changed so as to eliminate the names of the parties; and, for the convenience of readers of the law reports, we substituted the initials which the judge appears arbitrarily to have chosen when authorising publication of his judgment on an anonymous basis. I wish to stress that it is very rare for this court to order anonymisation of any publication in respect of an appeal to it against an order for ancillary relief. Such an order is more easily justified for the protection of the rights of children under Article 8 of the ECHR when, at the centre of the appeal to this court, whether under the Children Act 1989 or otherwise, lies an issue about the optimum future arrangements for them.
>
> 26. In making their application for an order for reporting restrictions in the present case counsel drew to our attention the summary of the relevant principles recently given by Lord Neuberger, the Master of the Rolls, in this court in JIH v. News Group Newspapers Ltd [2011] EWCA Civ 42, [2011] 2 All ER 324, at [21]. My colleagues persuaded me that, by

> reference to those principles, it was appropriate to make the order. We did so in order to protect the rights of the three children under Article 8. We considered that their rights outweighed the general interest in a publication of these proceedings which identified them, whether directly or by the identification of one or other of their parents. The fact is that the children live with a mother who is abnormally wealthy but who over many years has, together with the father, assiduously sought to create for them a normal life in which they and the family's friends are unaware even of the broad scale of her wealth and over which she has been astute to cast no trappings indicative of it. For example, the wife does not provide, and, for reasons entirely unrelated to cost, does not wish to begin to provide, the security customarily provided for their children by wealthy celebrities. We concluded that, unless we made the order, the normality of the current lives of the children would be forfeit, with results likely to be substantially damaging, perhaps even grossly damaging, to them."

74. This brings me to the second question, that is, if the presumption does not apply, was the judge wrong nonetheless, not to make an anonymity order on the facts?

75. The judge's overall approach was a careful one; and I do not accept that she misunderstood, or misstated the evidence, as the parties suggest. In particular, the judge's references to percentage interests were by way of example only, and not meant to be an accurate reflection of the true position.

76. Further, the judge correctly identified the well-established relevant legal principles by which the court should determine whether an order should be made that derogates from the principle of open justice by granting anonymity in a particular case (see for example, the summary in para 17 of *Gravesham's* case set out at para 11 above). As part of this determination, the judge was required to conduct the necessary balancing exercise between the competing rights under articles 8 and 10 of the Convention, considering the proportionality of the potential interference with each right, considered independently. In relation to the rights engaged under article 10, the judge gave full weight to the strength of the open justice principle, and to the public interest in a report of proceedings such as these. However, I would respectfully depart from her view to this extent. In my judgment, I consider that the judge focused rather too narrowly on the issue of demonstrable harm to the minor beneficiaries, and failed to consider whether a less extensive order than the one that was asked for, might strike a proper and proportionate balance between the different rights that were engaged.

77. Section 39 of the of the Children and Young Persons Act 1933, as amended, (the 1933 Act) provides that:

> "(1) In relation to any proceedings other than criminal proceedings, in any court . . . the court may direct that the following may not be included in a publication —(a)...the name, address or school ... of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein: (aa) any particulars calculated to lead to the identification

> of a child or young person so concerned in the proceedings; (b) a picture that is or includes a picture of any child or young person so concerned in the proceedings .; except in so far (if at all) as may be permitted by the direction of the court.
>
> (2)Any person who **i**ncludes matter in a publication in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding level 5 on the standard scale. (3) In this section— "publication" includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme shall be taken to be so addressed), but does not include a document prepared for use in particular legal proceedings; "relevant programme" means a programme included in a programme service within the meaning of the Broadcasting Act 1990."

78. Before the 1933 Act was amended, section 39 applied only in respect of newspapers and sound and television broadcasts; it did not include publication on the internet/social media: see *MXB v East Sussex Hospitals NHS Trust* [2012] EWHC 3279 (QB) and para 32 of *Gravesham's* case. However, section 39(3) of the 1933 Act was inserted on 13th April 2015 by the Criminal Justice and Courts Act 2015: see sections 79(7), 95(1) and S.I. 2015/778, and it provides a definition of a publication, which includes publication by on-line means. Further, orders under the 1933 Act expire when the young person attains the age of eighteen, as he or she is no longer a child in the proceedings: see *R (On the application of JC) v Central Criminal Court* [2014] EWCA Civ. 1777; [2015] 1 W.L.R. 2865.

79. The evidence in this case is not as strong as that in *V v T* or *K v L* and there is no cogent evidence that persuades me that it is necessary to provide anonymity for the young adult beneficiaries. However, I am satisfied that it is necessary for the court to provide a measured degree of protection to the rights of the minor beneficiaries until their majority, but no further, when, on the evidence, they will be introduced to their interests under the Settlement. Having regard to the need to ensure that the restriction on publication is the minimum encroachment that is necessary in the circumstances, and bearing in mind that the privacy rights with which this case is concerned are those of the minor beneficiaries, rather than those of the adult parties, in my view those privacy rights can be afforded the necessary degree of protection by making an order under section 39(1)(a) and (b) of the 1933 Act. Such an order is a more acceptable alternative to an anonymity order, if the case is one in which some protection is necessary for the child's welfare and private life, and if it is not necessary to make a more restrictive order.

80. For the avoidance of doubt, and if my Lords agree, the order which is to be made pursuant to section 39(1)(a) and (b) does not prohibit the identification by name of any party to this litigation, other than the minor beneficiaries; nor does it prohibit the identification of the Settlement, or the general nature of the trust property and provisions.

81. It is true that in this case, if someone was determined to do so, they could find out the identity of the minor beneficiaries and their connection with these proceedings. However, the order will then prohibit them from publishing that fact, including on the Internet and social media. I should add that on different facts, a court in a variation of trust case may consider it is necessary to grant a wider anonymity order, such as that made by Morgan J in *V v T*. For the sake of completeness, I should also record that in his submissions, Mr Vassall-Adams QC made it clear that the media parties he represents have no interest in, or intention of publishing the names of the minor beneficiaries.

82. Finally, I should address a specific issue that Ms Overdijk invites us to consider, namely the position of minor beneficiaries who lack capacity within the meaning of section 2(1) of the 2005. As she points out, applications made under the 1958 Act on behalf of minor beneficiaries who lack capacity must be brought in the High Court, whereas those for incapacitated adults are brought in the COP: see *T v P* referred to at para 19 above.

83. The rules relating to anonymisation and privacy in the CPR and the Court of Protection are not the same. Thus, the standard form of transparency order in the Court of Protection now provides that an "attended hearing" should be held in public, but with a prohibition on the publication of material identifying P or P's family: see Parts 4 and 5 of the COPR 2017 and para 2.1(a) and (b) and 2.3 of PD4C; see further, *R(C) v Secretary of State for Justice (Media Lawyers Association intervening)* [2016] UKSC 2 and *PW v Chelsea And Westminster Hospital NHS Foundation Trust & Others* [2018] EWCA Civ. 1067 at paras 69-70 and 98-99. It follows from this difference in the rules that incapacitated adults would appear to enjoy a greater degree of protection for their privacy in relation to applications under the 1958 Act than do incapacitated minor beneficiaries. On any view, this would seem to be an odd result. However, the incapacity of a minor beneficiary would plainly be capable of being a highly material factor for the court to consider when determining whether it was necessary to derogate from the principle of open justice in a given case. To my mind, though not a matter of presumption, it would normally be a factor of such weight, that it would tip the balance in favour of protecting the identity of the individual concerned.

84. As it is, and if my Lords agree, to the limited extent identified in paras 77-78 above, I would allow this appeal.

President of the Family Division:

85. I agree.

Lord Justice Henderson:

86. I also agree.