Neutral Citation Number: [2020] EWCOP 46

Case No: 1344811T

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2020

Before :

THE HONOURABLE MR JUSTICE MACDONALD
(Sitting in Public)

- -

Between :

P **(By Her Litigation Friend, the Official Solicitor)**	**Applicant**
- and -	
Dahlia Griffith	**Respondent**

- -
- -

Ms Sarah Simcock (instructed by **the Official Solicitor**) for the **Applicant**
Mr Adam Tear (of **Scott-Moncrieff & Associates Ltd**) for the **Respondent**

Hearing dates: 29 September and 2 October 2020

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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.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter, I am concerned with an application by P acting through her litigation friend the Official Solicitor for an order committing Ms Dahlia Griffith to prison for contempt arising out of her alleged interference with the due administration of justice. On 31 January 2020 the court granted P permission to make her application for committal of Ms Griffith. The applicant is represented by Ms Simcock of counsel. Ms Griffith has not attended the hearing in circumstances I will come to below but is represented by her solicitor advocate, Mr Adam Tear.

2. The grounds for the application to commit Ms Griffith are set out as follows in the application form issued on behalf of P:

> "[Dahlia Griffith] falsified a court order and presented this in support of her request in order to obtain disclosure of confidential medical records of P. [Dahlia Griffith] conduct in falsifying a court order is a contempt of court, being an interference with the due administration of justice, as well as a breach of the court order(s) of HHJ Hilder of 22 August 2019 dismissing [Dahlia Griffith's] application for disclosure of P's medical records."

3. The evidence in support of the application for committal is before the court in the form of an affidavit of Nicola Mackintosh QC (Hon), an affidavit of Kris Jackson and an affidavit of Marian Shaughnessy. At the last adjourned final hearing I directed, with the consent of all parties, a further statement from Nicola Mackintosh QC dealing with those questions that Mr Tear on behalf of Dahlia Griffith wished to put to Ms Mackintosh, Mr Tear having confirmed that the scope of the challenge he was instructed to make to the evidence filed and served with respect to the committal application was sufficiently limited to render this a just and proportionate approach.

4. The process of committal for contempt is a highly technical one. Within this context it is important, in circumstances where the liberty of the citizen is at stake, to recall at the very outset the strict procedural requirements of a properly constituted committal hearing that have to be complied with, which principles apply with equal force in the Court of Protection.

5. Within this context, and in addition to having regard to the provisions of the Court of Protection Rules 2017 r. 21.28, I have also borne in mind the following requirements:

    i) The committal application must be dealt with at a discrete hearing and not alongside other applications.

    ii) The alleged contempt must be set out clearly in a notice of application or document, the summons or notice identifying separately and numerically each alleged act of contempt.

    iii) The application notice or document setting out separately each alleged contempt must be proved to have been served on the Respondent in accordance with the rules. Where the committal hearing is adjourned personal service of the

adjourned hearing is required unless the respondent was in court at the time of the adjournment.

iv) The Respondent must be given the opportunity to secure legal representation as he or she is entitled to.

v) The committal hearing must be listed publicly in accordance with the Lord Chief Justice's Practice Direction: Committal / Contempt of Court – Open Court of 26 March 2015 (and as amended on 20 August 2020) and should ordinarily be held in open court.

vi) Consideration must be given to whether the allocated judge should hear the committal or whether the committal application should be allocated to another judge.

vii) The burden of proving the alleged contempt lies on the person or authority alleging the contempt.

viii) The Respondent is entitled to cross examine witnesses, to call evidence and to make a submission of no case to answer.

ix) The alleged contempt must be proved to the criminal standard of proof, i.e. beyond reasonable doubt.

x) The Respondent must be advised of his or her right to remain silent and informed that he or she is not obliged to give evidence in his or her own defence.

xi) Where a contempt is found proved on the criminal standard the committal order must set out the findings made by the court that establish the contempt.

xii) Sentencing should proceed as a separate and discrete exercise, with a break between the committal decision and the sentencing of the contemnor. The contemnor must be allowed to address the court by way of mitigation or to purge his or her contempt.

xiii) The court can order imprisonment (immediate or suspended) and / or a fine, or adjourn consideration of penalty for a fixed period or enlarge the injunction.

xiv) In sentencing the contemnor the disposal must be proportionate to the seriousness of the contempt, reflect the court's disapproval and be designed to secure compliance in the future. Committal to prison is appropriate only where no reasonable alternative exists. Where the sentence is suspended or adjourned the period of suspension or adjournment and the precise terms for activation must be specified.

xv) The court should briefly explain its reasons for the disposal it decides.

6. In this case, I am satisfied that each of the aforesaid procedural imperatives has been met. In this case, the court is also faced with a preliminary issue in circumstances where Ms Griffith has again failed to attend the final hearing of the committal application notwithstanding that she has had proper notice of the same, she also having failed to attend the final hearing listed on 1 September 2020. On that occasion, having been

informed by Mr Tear that Ms Griffith was stating she was too ill to attend court, I adjourned the final hearing to allow her to provide medical evidence to that effect. Ms Griffith failed to supply that evidence and her further failure to attend the first stage of this hearing remained unexplained despite attempts by Mr Tear to contact her ahead of the matter being called on.

7. The relevant legal principles on whether the court can proceed with a committal hearing in the absence of the Respondent were summarised by Cobb J in *Sanchez v Oboz* [2015] EWHC 235 (Fam). Namely:

   i) Whether the Respondent has been served with the relevant documents, including the notice of this hearing.

   ii) Whether the Respondent has had sufficient notice to enable her to prepare for the hearing.

   iii) Whether any reason has been advanced for the respondent's non-appearance.

   iv) Whether by reference to the nature and circumstances of the respondent's behaviour, they have waived their right to be present (i.e. is it reasonable to conclude that the respondent knew of, or was indifferent to, the consequences of the case proceeding in their absence).

   v) Whether an adjournment would be likely to secure the attendance of the Respondent, or at least facilitate their representation.

   vi) The extent of the disadvantage to the Respondent in not being able to present her account of events.

   vii) Whether undue prejudice would be caused to the applicant by any delay.

   viii) Whether undue prejudice would be caused to the forensic process if the application were to proceed in the absence of the respondents.

   ix) The terms of the overriding objective to deal with cases justly, expeditiously, and fairly.

8. In considering these factors, the court must bear in mind that committal proceedings are essentially criminal in nature and the court should proceed in the absence of the accused with great caution, that findings of fact are required before any penalty can by imposed and the presumption of innocence applies penalty of imprisonment for a proven breach of an order is one of the most significant powers of a judge exercising the civil/ family jurisdiction and that Arts 6(1) and 6(3) ECHR are actively engaged, entitling the respondent to, inter alia, a 'fair and public hearing' and to 'have adequate time and the facilities for the preparation of his defence.'

9. Having given careful consideration to the factors articulated in *Sanchez v Oboz* I am satisfied it is appropriate to proceed with the final hearing of the committal application in the absence of Ms Griffith. Ms Griffith has had proper notice of these proceedings and has had proper notice of this hearing, which was listed to provide a further period of 14 days' notice to Ms Griffith following the adjourned hearing on 1 September 2020. Within this context, I am satisfied that Ms Griffith has had sufficient notice to enable

her to prepare for the hearing and, as I have noted, she remains legally represented at this hearing. In addition to no credible reason being advanced for her failure to appear today, Ms Griffith has also failed to provide any medical evidence in support of her contention that she was too ill to attend the adjourned committal hearing on 1 September 2020. Within this latter context, I have no confidence that a further adjournment would be likely to secure her attendance. At the last hearing, and again at this hearing, Mr Tear confirmed that Ms Griffith intended to exercise her right to silence in respect of the contempt alleged and would rely on the challenges made by Mr Tear to the evidence deployed by the applicant. Within this context, any disadvantage to Ms Griffith of not being able to give her account of events is mitigated. I am likewise satisfied that, in these circumstances, no undue prejudice is caused to the forensic process by the absence of Ms Griffith. By contrast, any further delay in these already significantly delayed proceedings would cause the applicant considerable prejudice, not least in circumstances where this committal application remains the only extant application in proceedings that have otherwise been satisfactorily concluded. Having regard to the terms of the overriding objective to deal with cases justly, expeditiously and fairly, it would not be appropriate, in the circumstances I have outlined, to further adjourn the final hearing.

BACKGROUND

10. The substantive Court of Protection proceedings from which the alleged contempt arises concerned P, a 50 year old woman who resides at a specialist hospital on a long term care ward. She was admitted to that hospital on 17 September 2018 having previously been at a different hospital from 28 May 2018. On 28 January 2018 P suffered a bilateral stroke which caused significant brain damage, leaving her with profound cognitive impairment. P has a diagnosis of a permanent disorder of consciousness of the type known as Minimally Conscious State Minus.

11. Within the proceedings in the Court of Protection, Ms Griffith was the applicant. Ms Griffith is a relative of P. The proceedings, in which P was represented by the Official Solicitor instructing Mackintosh Law, concerned a dispute between Ms Griffith and the other parties as to P's condition and prognosis and as to her best interests in relation to her medical treatment, her residence and care and in relation to whether she should be subject to a DNR CPR notice.

12. As I have noted, the substantive proceedings before the Court of Protection have now concluded. On 8 April 2020, following a final hearing before Mr Justice Cohen, the court made final declarations. In addition to the making of final declarations, Ms Griffith's application was dismissed by Cohen J. Ms Griffith made an application to the Court of Appeal for permission to appeal the orders of Mr Justice Cohen. That application for permission to appeal was dismissed by Lady Justice King on 10 July 2020.

13. The application for the committal of Ms Griffith arises out of alleged actions taken by her during the course of the proceedings summarised above, to which alleged actions I now turn.

14. On 10 July 2019 HHJ Hilder gave directions in the substantive Court of Protection proceedings and made three third party disclosure orders for disclosure of P's medical

records to the solicitors instructed by the Official Solicitor, Mackintosh Law. Those order were against:

i) Tower Hamlets CCG for medical records from 1 January 2018 to date.

ii) Northwick Park Hospital for medical records from 1 January to 18 September 2018.

iii) Royal Hospital for Neuro-disability for medical records from 18th September 2018 to date.

15. On 12 August 2019 HHJ Hilder made a further third party disclosure order in respect of P's medical records against East London NHS Foundation Trust, for all records held. No further third party disclosure orders in respect of P's medical records were made by the court and each of the third party disclosure orders that were made by the court directed the disclosure of the medical records to P legal representatives only. None of the disclosure orders made by the court made provision for disclosure of medical records to Ms Griffith.

16. Within the foregoing context, Ms Griffith made application for disclosure dated 26 July 2019, by which application she sought an order for disclosure to her of what was described in her application as P's "full medical file", Ms Griffith asserting that such disclosure was required in circumstances where the Official Solicitor had only sought disclosure from September 2018. In response to that application on 13 August 2019 HHJ Hilder made no order, noting that disclosure orders had already been made on 10 and 12 August 2019, which orders appeared to meet the request for disclosure made in Ms Griffith's application dated 26 July 2019.

17. In response, Ms Griffith made a further application for disclosure on 21 August 2019, again seeking disclosure to her of what was again described in her further application as P's "full medical file". Within that application, Ms Griffith described herself as the Second Respondent to the Court of Protection proceedings and asserted that the application for disclosure to her was now urgent.

18. In response to this further application by Ms Griffith HHJ Hilder made two further orders. On 22 August 2019 HHJ Hilder made an order which, referring to Ms Griffith's application of 26 July 2019, stated that:

> "For the avoidance of doubt the Court is not presently satisfied that it would be appropriate to make an order providing for disclosure of P's medical records to her [relative][Dahlia Griffith] [Orders have already been made to P's own representatives]".

19. A further order was made by HHJ Hilder on 22 August 2019 which referred to both applications by Ms Griffith, dated 26 July 2019 and 21 August 2019 as well as the order of 22 August 2019 referred to above. The second order of 22 August 2019 provided that:

> "...the Court is not presently satisfied that it would be appropriate to make an order providing for disclosure of P's medical records to [Dahlia Griffith] (as previously recited at paragraph 6 of the first order made today)...For the

> avoidance of doubt, the COP application by DG dated 21 August 2019 is refused...The first order of 22 August 2019 stands".

20. Within the foregoing context, as at 22 August 2019 no order had been made by HHJ Hilder that provided for disclosure of P's medical records to Ms Griffith. Moreover, as at 22 August 2019 HHJ Hilder had expressly declined to grant two applications made by Ms Griffith for disclosure to her of P's medical records.

21. On 18 October 2019 Ms Griffith sent an email to Barts Health NHS Trust attaching what purported to be a court order made on 10 July 2019. A copy of that email is before the court. In the body of the email, Ms Griffith informed Barts Health NHS Trust that she was "submitting the above stated form and associated proofs required" and that "she had been alerted to the fact that I needed to approach this organisation for the information myself". The purported court order attached to Ms Griffith's email is also before the court. That purported order provides for the disclosure of P's medical records directly to Ms Griffith from Barts Health NHS Trust. The purported order bears no court seal and contains none of the recitals that characterise the third party disclosure orders made by HHJ Hilder. The court confirmed in December 2019 that no such order for disclosure is held on the court file and that no such order for disclosure had, in fact, been made by the court.

22. Whilst as at 10 July 2019 Ms Griffith was acting in person, by 18 October 2019 she had engaged Sinclairslaw Solicitors. Barts Health NHS Trust acted in good faith on the purported order attached to Ms Griffith's email of 18 October 2019 and disclosed P's medical records to Sinclairslaw. The court has before it the affidavit of Marian Shaughnessy of Sinclairslaw deposing to the fact that the medical records were sent to Sinclairslaw by Barts Health NHS Trust at the request of Ms Griffith. Ms Shaughnessy further confirms that she did not read the records nor did she show them to Ms Griffith.

23. The circumstances by which the purported court order sent by Ms Griffith to Barts Health NHS Trust came to the attention of the Official Solicitor are set out in the affidavit of Mr Kris Jackson. In short, on 6 November 2019 further orders were made by Cohen J enabling the Official Solicitor and the solicitors retained by her, Mackintosh Law, to obtain P's records from St Georges University Hospitals NHS Foundation Trust and Barts Health NHS Trust. When Mackintosh Law made the request to Barts Health NHS Trust pursuant to the order of Cohen J Barts Health NHS Trust informed Mackintosh Law that it had already received a request for P's medical records from Ms Griffith, which request included a copy of a court order.

24. On 10 December 2019, Mr Justice Cohen made an order requiring Ms Griffith's legal representatives to send to Mackintosh Law the records pertaining to P that they had received without opening, considering or copying those records, together with a continuing obligation to act in this manner with respect to any further records received. I pause to note further that the order of Cohen J of 10 December 2019 contains the following recital:

> "AND UPON the court noting that no order has been made which enables [Dahlia Griffith] to obtain or receive a copy of P's medical records, the orders which have been made enabling disclosure to be made to P's legal representatives."

25. On 21 January 2020 Mr Justice Mostyn made an order directing that, upon the Official Solicitor having made an application for permission to make an application for committal under rule 21.15 of the Court of Protection Rules 2017, there be a permission hearing in February with a time estimate of one hour. Again, I pause to note the following observation made by Mostyn J during the course of his judgment on 21 January 2020:

> "Since Cohen J's order of 8 January 2020 disclosure was made by solicitors acting for Royal London Hospital, Whitechapel, of the purported third party disclosure order. That purported order was never made by the court. In those earlier hearings, HHJ Hilder made disclosures orders but not against Royal London Hospital Whitechapel. She made orders against Northwick Park, RHND and Tower Hamlets Clinical Commissioning Group. In each instance, disclosure was to be made to P's legal representatives. No order was made in the terms of the purported order. These are circumstances in which the permission application will be made and the facts will need to be verified by affidavit."

26. Ms Griffith was represented at the hearing for permission to make a committal application before me on 25 February 2020 when I granted permission for the application pursuant to Rule 21.15 and gave directions. As I have noted, Ms Griffith failed to attend the final hearing of the committal application listed on 1 September 2020 and, having heard submissions, I declined on that occasion to proceed in her absence and adjourned the final hearing of the committal application to today. As I have also noted, Ms Griffith has again failed to attend and I decided to proceed in her absence for the reasons set out above.

27. As I have noted, Ms Griffith exercised her right to silence. On her behalf, Mr Tear submits that the circumstances I have set out above, which circumstances are relied on by the Official Solicitor in support of the committal application, do not prove beyond reasonable doubt that Ms Griffith falsified a court order and presented this in support of her request in order to obtain disclosure of confidential medical records of P. Within this context, Mr Tear informed the court that Ms Griffith denies forging the purported order dated 10 July 2019 and contends that she simply sent to Barts Health NHS Trust in good faith a purported order that had been drafted by another, unidentified person, possibly someone at Sinclair Solicitors. Within this context, Mr Tear also pointed to certain parts of a number of other case management orders made by the court in this case that he submits would have given Ms Griffith the idea that she was entitled to the disclosure sought by the purported order of 10 July 2019, which in turn would have led Ms Griffith to forward the order drafted by another in all innocence. Mr Tear submitted that the applicant has failed to demonstrate that the foregoing scenario did not take place.

RELEVANT LAW

28. In addition to the procedural imperatives set out above, the following legal principles are also relevant in the particular circumstances of this case. As set out in Aldridge, Eady & Smith on Contempt 5th Ed. At 3-28 for largely historical reasons, different forms of contempt have been allocated to one or other of the two traditional broad categories, namely criminal contempts and civil contempts. The learned authors go on to note that:

> "Most examples of conduct classified as contempt have been characterised as "criminal". They include contempts in the face of the court; publication of matter scandalising the court; acts calculated to prejudice the fair trial of a pending case (criminal or civil); reprisals against those who participate in legal proceedings for what they have done; impeding service of, or forging, the process of the court; and also most contempts in relation to wards of court."

Within this context, in England and Wales the general approach has been that an act which so threatens the administration of justice that it requires punishment from the public point of view constitutes a criminal contempt. By contrast, a civil contempt involves disobedience of a court order or undertaking by a person involved in litigation, in response to which the court may invoke its summary contempt jurisdiction.

29. This distinction has been referred to as an unhelpful one (see for example Salmon LJ in *Jennison v Baker* [1972] 2Q.B. 52 at 61G). More recent decisions of the House of Lords and the Supreme Court tend to suggest however, that the distinction is one that remains. In *Att-Gen v Times Newspapers Ltd* [1992] 1 A.C. 191 at 217-18 Lord Oliver stated as follows:

> "A distinction (which has been variously described as 'unhelpful' or 'largely meaningless') is sometimes drawn between what is described as 'civil contempt', that is to say, contempt by a party to proceedings in a matter of procedure, and 'criminal contempt.' One particular form of contempt by a party to proceedings is that constituted by an intentional act which is in breach of the order of a competent court. Where this occurs as a result of the act of a party who is bound by the order or of others acting at his direction or on his instigation, it constitutes a civil contempt by him which is punishable by the court at the instance of the party for whose benefit the order was made and which can be waived by him. The intention with which the act was done will, of course, be of the highest relevance in the determination of the penalty (if any) to be imposed by the court, but the liability here is a strict one in the sense that all that requires to be proved is service of the order and the subsequent doing by the party bound of that which is prohibited. When, however, the prohibited act is done not by the party bound himself but by a third party, a stranger to the litigation, that person may also be liable for contempt. There is, however, this essential distinction that his liability is for criminal contempt and arises not because the contemnor is himself affected by the prohibition contained in the order but because his act constitutes a wilful interference with the administration of justice by the court in the proceedings in which the order was made. Here the liability is not strict in the sense referred to, for there has to be shown not only knowledge of the order but an intention to interfere with or impede the administration of justice—an intention which can of course be inferred from the circumstances."

30. In *R v O'Brien* [2014] A.C. 1246 at [42] Lord Toulson noted as follows with respect to the existence of a distinction between civil contempt and criminal contempt:

> "The question whether a contempt is a criminal contempt does not depend on the nature of the court to which the contempt was displayed; it depends on

> nature of the conduct. To burst into a court room and disrupt a civil trial would be a criminal contempt just as much as if the court had been conducting a criminal trial. Conversely, disobedience to a procedural order of a court is not in itself a crime, just because the order was made in the course of criminal proceedings. To hold that a breach of a procedural order made in a criminal court is itself a crime would be to introduce an unjustified and anomalous extension of the criminal law. 'Civil contempt' is not confined to contempt of a civil court. It simply denotes a contempt which is not itself a crime."

31. The Court of Protection Rules 2017 make specific provision for a Tier 3 Judge of the Court of Protection to deal with an alleged contempt that amounts to an interference with the due administration of justice (as opposed to a contempt committed in the face of the court or disobedience of a court order or breach of an undertaking to the court). Rule 21.13 of the Court of Protection Rules 2017 provides as follows:

> "**Scope**
>
> 21.13.—(1) This Section regulates committal applications in relation to interference with the due administration of justice in connection with proceedings in the Court of Protection, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court.
>
> (2) A committal application under this Section may not be made without the permission of the court."

32. The standard of proof applicable where the contempt is alleged to comprise interference with the due administration of justice remains beyond reasonable doubt. In Aldridge, Eady & Smith on Contempt 5th Ed. At 3.45 the authors note that "In the case of criminal contempts not falling within the strict liability rule, it would appear that an intention to interfere with the administration of justice is required, at least for publication contempts. For other types of criminal contempt, the mental element is less clear."

33. As I have noted, and as confirmed in *Att-Gen v Times Newspapers Ltd*, this will require not only proof of the *actus reus* but also *mens rea* in the form of an intention to interfere with or impede the administration of justice, an intention which may be inferred from the circumstances demonstrated by the admissible evidence. For the avoidance of doubt, in this case I have proceeded on the basis that to prove the alleged contempt in this case beyond reasonable doubt the applicant must prove both the relevant act on the part of Ms Griffith, namely the counterfeiting of the purported court order, but also an intention on her part to thereby interfere with or impede the administration of justice.

34. The matter is listed today for final hearing. Rule 21.28 of the Court of Protection Rules 2017 governs the final hearing:

> "(1) Unless the court hearing the committal application or application for sequestration otherwise permits, the applicant may not rely on—
>
> (a) any grounds other than—

(i) those set out in the application notice; or

(ii) in relation to committal applications under Section 4, the statement of grounds required by rule 21.15(1)(a) (where not included in the application notice);

(b) any evidence unless it has been served in accordance with the relevant Section of this Part or a practice direction supplementing this Part.

(2) At the hearing, the respondent is entitled—

(a) to give oral evidence, whether or not the respondent has filed or served written evidence, and, if doing so, may be cross-examined; and

(b) with the permission of the court, to call a witness to give evidence whether or not the witness has made an affidavit or witness statement.

(3) The court may require or permit any party or other person (other than the respondent) to give oral evidence at the hearing.

(4) The court may give directions requiring the attendance for cross-examination of a witness who has given written evidence."

DISCUSSION

35. On the evidence before the court, I am satisfied that the court made no order, whether on 10 July 2019 or otherwise, requiring Barts Health NHS Trust to disclose to Ms Griffith P's medical records. A comprehensive review of the court file has revealed no such order. Within this context, I am satisfied beyond reasonable doubt that the order sent by Ms Griffith to Barts Health NHS Trust was not an order made by the court during the course of the substantive proceedings.

36. Whilst Ms Griffith contends that, notwithstanding this, the applicant has not been able to prove beyond reasonable doubt that *she* fabricated the purported order in circumstances where she contends that she simply and in good faith forwarded an order drafted by another, as yet unidentified, person, I am satisfied that the applicant has discharged the heavy burden of proving beyond reasonable doubt that Ms Griffith forged the purported order dated 10 July 2020. I am so satisfied for the following reasons:

i) The evidence before the court demonstrates that Ms Griffith felt *very* strongly that the court should have before it all of P's medical records covering the period prior to September 2018. Following the orders made by HHJ Hilder on 10 July 2019 (which orders did not permit P's legal representatives to obtain a copy of P's medical records from the Royal London Hospital, Barts Health NHS Trust) Ms Griffith made an application on 26 July 2019 for disclosure of what she described as P's "full medical file" to include P's medical history prior to September 2018. Ms Griffith made a further application, dated 21 August 2019, for disclosure of P's full medical file to her, stating that matter had now become "urgent".

ii) The evidence before the court further demonstrates that Ms Griffith was repeatedly frustrated in her attempts to obtain orders providing for the disclosure of P's medical records covering the period prior to September 2018, which records included those held by Barts Health NHS Trust. On 13 August 2019 HJJ Hilder made no order on Ms Griffith's application of 26 July 2019 and on 22 August 2019 refused her second application for such disclosure.

iii) Within this context, Ms Griffith persistently sought disclosure of P's medical records from the Royal London Hospital, Barts Health NHS Trust and was persistently refused such orders by the court on a principled basis.

iv) The purported order dated 10 July 2019 sought disclosure from Barts Health NHS Trust and, accordingly, provided for the disclosure that Ms Griffith had twice sought and which the court had twice denied Ms Griffith on a principled basis.

v) The purported order dated 10 July 2019 was sent by Ms Griffith on 18 October 2019 to Barts Health NHS Trust from her own email address. The purported order was attached to an email in which Ms Griffith set out the reasons that she contended justified disclosure of the medical records to her.

vi) The purported order contained sensitive and specific information to the proceedings. Given the level of detail contained in the order, I am satisfied that it was compiled by a person with intimate knowledge of the proceedings.

vii) For the reasons set out above, the purported order was not made by the court. I am further satisfied that it was not drafted by the Official Solicitor or a representative of Mackintosh Law.

viii) Whilst on behalf of Ms Griffith, Mr Tear contends that the court cannot exclude the possibility that the order was drafted by an as yet unidentified third party, there is no evidence before the court to support such a contention. It is, of course, important to again acknowledge that the burden of proof remains at all times on the applicant. Within this context, I accept Ms Simcock's submission that such a contention does not, in any event, fit well with the facts. As at the date of the purported order, Ms Griffith was acting in person. Further, whilst on the date the order was emailed to Barts NHS Health Trust it is the case that Ms Griffith had instructed Sinclairslaw, she sent the email containing the purported order to Barts Health NHS Trust herself and not through her then solicitors. Further, had Sinclairslaw been the author of the purported order, it is very difficult to see why they would have thereafter consented without comment to a third party disclosure order being made against Barts Health NHS Trust by Cohen J on 6 November 2019, which order again did not provide for disclosure to Dahlia Griffith. Finally, in her affidavit Ms Shaughnessy of Sinclairslaw confirms, in evidence that was not challenged, that the documents were provided to that firm at the request of Ms Griffith.

37. Within this context, I am satisfied that the only reasonable inference to be drawn from the foregoing matters is that Ms Griffith's persistent and strongly held desire to obtain the medical records she sought regarding P, and the repeated dismissal of her applications for orders to this end, led her deliberately to fabricate the purported order

of 10 July 2019 permitting disclosure of P's medical records held by the Royal London Hospital, Barts Health NHS Trust and subsequently to send that fabricated order to Barts Health NHS Trust, along with a Subject Access Request, on 18 October 2019.

38. I am further satisfied that the evidence before the court demonstrates beyond reasonable doubt that Ms Griffith's took this action with the intention of interfering with the due administration of justice. The evidence demonstrates that, at the time she sent the forged order of 10 July 2019 to Barts Health NHS Trust, Ms Griffith was plainly aware that her applications for the disclosure sought in the forged order of 10 July 2019 had twice been expressly considered and refused by HHJ Hilder on 13 and 22 August 2019. Within this context, I am satisfied that the only reasonable inference that can be drawn from Ms Griffith's action in seeking to obtain, by way of a forged court order, disclosure of P's confidential medical records that she knew the court had repeatedly declined to order in the course of the proceedings is that she intended to circumvent the court's principled decision on this issue. Within this context, I am satisfied beyond reasonable doubt that Ms Griffith intended by her actions to interfere with the due administration of justice.

CONCLUSION

39. Within the foregoing context, I am satisfied beyond reasonable doubt that Dahlia Griffith forged the purported court order and sent the forged purported order to Barts Health NHS Trust with the intention of obtaining the medical confidential records of P despite the court refusing to direct this. This action constituted a very serious interference with the due administration of justice. I am further satisfied beyond reasonable doubt that Dahlia Griffith took this action with the intention of interfering with the due administration of justice, her applications for the disclosure provided for by the purported order having previously been refused by the court on a principled basis.

40. Having found the contempt proved, I adjourned the question of sentencing for the contempt that I found to be established for two days, in order to allow Ms Griffith a further opportunity to attend court.

SENTENCING

41. Ms Griffith has not attended the resumed hearing to consider the penalty for her contempt. Prior to this hearing, Ms Griffith sent an email to my clerk stating that she would not be attending the hearing by reason of illness, stating that she had acquired a medical note. No medical note was attached to the email. Mr Tear has attempted this morning to contact Ms Griffith but has been unable to elaborate on the reasons for her non-attendance. Whilst Mr Tear applied to adjourn sentencing, for the reasons I gave for proceeding with the first stage of the hearing in the absence of Ms Griffith, I am satisfied for those reasons that it remains appropriate to proceed to sentence Ms Griffth in her absence.

42. As Marcus-Smith J made clear in *Patel v Patel and Ors* [2017] EWHC 3229 (Ch) at [22] and [23] a penalty for contempt has two primary functions. First, it upholds the authority of the court by marking the disapproval of the court and deterring others from engaging in the conduct comprising the contempt. Secondly, it acts to ensure future compliance. Whilst in some cases therefore, and in particular those cases where the

contempt arises from the breach of a court order, a penalty will have the primary objective of ensuring future compliance with that order. In this case however, the proceedings are concluded. In the circumstances, in this case the objective of any penalty for the contempt is to uphold the authority of the court by marking the disapproval of the court of the contemnors actions and to deter others from engaging in the conduct comprising the contempt.

43. In considering the appropriate penalty in this matter, I have had regard to the following principles applicable to that exercise:

i) The penalty chosen must be proportionate to the seriousness of the contempt.

ii) Imprisonment is not the starting point and is not the automatic response to a contempt of court.

iii) Equally, there is no principle that a sentence of imprisonment cannot be imposed on a contemnor who has not previously committed a contempt.

iv) In circumstances where the disposal chosen must be proportionate to the seriousness of the contempt, where an immediate term of imprisonment is appropriate it should be as short as possible having regard to the gravity of the contempt and must bear some reasonable relationship to the maximum sentence of two years imprisonment that is available to the court.

v) Where a term of imprisonment is the appropriate sentence, the length of the term should be determined without reference to whether the term is to be suspended or not.

vi) Having determined the length of the term of imprisonment, the court should expressly ask itself whether a sentence of imprisonment might be suspended.

44. In the particular circumstances of this case I also note that, whilst a criminal case, in *R. v. Montgomery* [1995] 2 Cr App R 23 Potter LJ held that "an immediate custodial sentence is the only appropriate sentence to impose upon a person who interferes with the administration of justice, unless the circumstances are wholly exceptional".

45. Within this context, considering the appropriate punishment in this case, I have of course borne carefully in mind the mitigation ably advanced by Mr Tear as follows:

i) Whilst misguided and mistaken, in taking the actions she did, Ms Griffith considered herself to be trying to protect her relative P in the context of the issue before the court being the medical treatment of P, which included consideration of the appropriateness of a DNR notice for P.

ii) Ms Griffith's actions resulted in a low level of harm to P in circumstances where the records disclosed as a result of the forged order presented by Ms Griffith were sent to Ms Griffith's then solicitors and not to Ms Griffith herself, it being possible that Ms Griffith was responsible for this outcome.

iii) Ms Griffith's failure to apologise to the court should not be counted against her in circumstances where the court has determined to proceed to sentence her in her absence.

iv) In taking the action she did, Ms Griffith demonstrated a highly obsessive approach to obtaining disclosure and an unerring desire to achieve her goal in this regard, although there is no evidence before the court that Ms Griffith suffers from a psychiatric or psychological condition that impacted on her conduct.

v) Ms Griffith did not interfere with the administration of justice by the use of violence against officers of the court or in order to obtain pecuniary advantage.

vi) By reason of the COVID-19 pandemic, at the present time a given sentence of imprisonment is significantly more punitive (by reason of the lockdown restrictions that are imposed in prison with a concomitant limitation on exercise and time out of the cells) than it would be during normal circumstances.

vii) Ms Griffith is of previous good character and has never before experienced prison (see *Patel v Patel* at [14] and [15]).

46. It is proper also to record that whilst Ms Simcock acknowledged that the applicant is not ordinarily involved in the question of penalty, the Official Solicitor made clear through Ms Simcock during the course of the hearing that she had no wish to see Ms Griffith sentenced to a term of imprisonment but felt compelled to bring the conduct of Ms Griffith before the court by way of an application for committal on behalf of P given the gravity of that conduct.

47. Against these matters, Ms Griffith acted intentionally in forging a court order in order to obtain disclosure which the court had denied her. Ms Griffith's action in forging a court order, whilst not resulting in her receiving P's medical records, resulted in confidential medical records to which she was not entitled being disclosed to her solicitors. It was only a matter of chance that Ms Griffith actions were discovered when a legitimate order was made by the court. Within this context, P was, to a certain extent, prejudiced by Ms Griffith's contempt, particularly in circumstances where medical records are confidential to the individual and it is crucial to respect the privacy of a patient (see *Z v Finland* (1997) 25 EHRR 371). These actions by Ms Griffith were undertaken in the face of repeated, principled decisions of the court that Ms Griffith should not have such disclosure. In the circumstances, a high degree of culpability must attach to Ms Griffith's actions which, as I have noted, were deliberate in nature. Ms Griffith has shown no remorse for these actions, and indeed has failed to co-operate with the court by attending court in response to the application to commit her. There is no indication that she appreciates the gravity of her conduct.

48. Further, the act of forging a court order strikes at the very heart of the due administration of justice. The need for litigants and third parties to be able to have confidence in the integrity of orders made by the court is fundamental not only to the integrity of individual proceedings but to the maintenance of the rule of law. Any course that acts to undermine confidence in the integrity of court orders is accordingly highly corrosive of both the administration of justice by the courts and to the rule of law more widely (see *Commissioners for Her Majesty's Revenue and Customs v. Munir* [2015] EWHC 1366 (Ch) at [9(i)]). Within this context, the counterfeiting of court documents is considered by the courts to amount to a very serious contempt of court (see for example *Dryer v HSBC Bank Plc* [2014] EWHC 3949 (Ch) and *Patel v Patel and others*).

49. Finally, as I have noted above, one of the legitimate objectives of any penalty for contempt is to deter others from engaging in the course pursued by the contemnor (see Patel v Patel and Ors at [22] and [23]) and this objective will have particular resonance in cases where the conduct in issue has impeded the proper administration of justice (see *Chelmsford County Court v Simon Abraham Ramet* [2014] EWHC 56 (Fam) at 30). Each committal application will, of course, turn on its own facts, both with respect to the question whether the contempt alleged is proved and with respect to the sentence that is appropriate where that contempt is proved. However, as part of the sentencing exercise in this case, I have borne in mind the need to deter others from forging orders of the court by making abundantly clear that by doing so they would place themselves at grave risk of an immediate and lengthy sentence of imprisonment.

50. In the foregoing circumstances, I am satisfied that the threshold for custody is plainly crossed in this case and that, having regard to the factors I have summarised above, the appropriate and proportionate penalty in this case is an immediate term of imprisonment of 12 months. I make clear that but for the fact that Ms Griffith has not to date experienced prison, and the current impact on the nature of custody of the COVID-19 pandemic, I would have imposed on her an immediate sentence of imprisonment of 18 months for forging the court order with the intention of interfering with the due administration of justice.

51. I do not consider it appropriate to suspend the sentence of imprisonment I have imposed on Ms Griffiths in circumstances where the objective of the sentence is to mark the disapproval of the court of Ms Griffith's deliberate and calculated actions and to deter others from acting in a similar fashion, rather than to ensure future compliance with orders of the court in circumstances the substantive proceedings having now concluded.

52. Accordingly, for the contempt I have found proved in this case I sentence Ms Griffith to an immediate term of imprisonment of 12 months. I will make a committal order accordingly and, in circumstances where Ms Griffith has not attended today, will issue a warrant. I will reserve to myself any application Ms Griffith may wish to make in the future to purge her contempt.

53. That is my judgment.