Neutral Citation Number: [2021] EWHC 3455 (QB)

Claim No: F90MA228

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

1 Bridge Street

Manchester

M60 9DJ

21st December 2021

Before :

MR JUSTICE FORDHAM

- -

Between :

UXA **Cla**

- and -

MERSEYCARE NHS FOUNDATION TRUST **Defe**

- -

- -

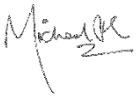
Marc Willems QC, Professor Conor Gearty QC and Peter Edwards (instructed by Lexent Partners) for the **Claimant**

Charles Feeny and David Lawson (instructed by Hill Dickinson) for the **Defendant**

- -

Final Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM :

Part 1. Introduction

1.
This judgment addresses questions which have arisen in the present proceedings as a satellite issue (see §5 below). They concern use of, and access to, court documents in circumstances where there has been the "judicial act" (see §10 below) of the Court determining an issue of substance, but this was done without a hearing, there being an agreed final order. The court documents whose use is in issue had all been filed with the Court for reliance by the parties in the proceedings. The judicial act was a declaration of breaches of the Human Rights Act 1998. The Defendant has described the order in question ("the Substantive Order": see §4 below), which I made without a hearing, as a "proper and public explanation" of the Court's judicial determination. Questions arising include whether the "open justice principle" applies to my determination without a hearing and, if so, what its effect is. There are also questions about: the application of CPR 31.22 (use of disclosed documents); and about the legitimate interests of the parties, and third parties.

2.
I am able to start by expressing confidence about a number of interrelated things. I am confident that a substantive judicial determination without a hearing – such as the Substantive Order in the present case – is part of "the legal process", which must attract that "transparency" of "open justice" which "lets in the light and allows the public to scrutinise the workings of the law, for better or for worse": see Dring v Cape Intermediate Holdings Ltd [2019] UKSC 38 [2020] AC 629 (§26 below) at §2. I was exercising "the judicial power of the state". (Dring Proposition (iii): see §27 below). Like the conduct of a trial which settles part-way without any ruling or judgment, my substantive judicial determination without a hearing was "part of the public judicial function", to which the principle of "open justice" applies, which principle serves "to facilitate maintenance of the quality of the judicial process in all its dimensions, so that the public may be satisfied that the courts are acting justly and fairly": Law Debenture Trust Corp (Channel Islands) Ltd v Lexington Insurance Co [2003] EWHC 2297 (Comm) (§24 below) at §34. My determination must engage that "public policy in the administration of justice", as to which "public knowledge of the evidence and arguments" is "as important as expedition": Law Debenture at §23. I am confident that the "Counterbalancing Concern" (§28 below) – which arises where the legal process uses the written word, in place of what would traditionally have been the spoken word in the courtroom – is relevant to the present case. I am confident that the Court has the power (indeed the duty) to secure that access to court documents promotes the open justice principle and the public interest, as well as operating in the interests of justice in the individual case, balancing the relevant interests, having regard to the facts that: (i) the parties have agreed a final order and the case is not being proceeded with to trial; and (ii) court orders relating to access to court documents need to be justified, fair, practical and proportionate.

3.
If all or any of these things – about which I have just expressed confidence – were untrue, there would, in my judgment, be seriously detrimental consequences. There would be serious question-marks arising out of the practice enshrined in judicial review cases in CPR PD54A §16.2 (§14 below) and provided by CPR 54.18 (§15 below), given "the constitutional principle of open justice which applies to all courts and tribunals exercising the judicial power of the state" (Dring Proposition (iii): see §27 below). If these things are not true, in the present case I would have convened (and probably in any PD54A §16.2 or CPR 54.18 case I would convene) a SmithKline Hearing (see §41 below), to ensure that the principles and standards of open justice were engaged by and applicable to my judicial act. There has, rightly, been no suggestion that such a hearing would have been in private, applying the principled approach to open justice under CPR 39.2 (§17(6) below). As it happens, a short hearing in public was what the Claimant's legal team was envisaging and inviting. I would

convene one, even now, if I thought that determination without a hearing had – by comparison to convening such a hearing – involved a weakening in transparency and open justice standards. But I am satisfied (including after my consideration of the submissions of the parties on the satellite issue) that, following a judicial determination without a hearing, the Court can address the issues relating to access to court documents, without impairment of the interests of justice and the open justice principle. That is what I seek to do in this judgment.

The Substantive Order

4.
I made this Order in these proceedings on 15 October 2021. I will set it out in full below (adding in numbers to the Recitals and using updated numbering for CPR PD54A). In this judgment, I will be referring to the following (as described in the Substantive Order): "the Anonymity Order" (Recital [2]); "the Judgment in Default" (Recital [3]); "the Admissions" (Recital [4]); "the Agreed Five Heads" (Recital [12]); "the HRA Declaration" (Operative Paragraph 2). Here is the text of the Substantive Order:

Recitals:

[1] UPON reading the written submissions of Marc Willems QC, Peter Edwards and Professor Conor Gearty QC (Hon) for the Claimant, and of Charles Feeny and David Lawson for the Defendant, and the parties' agreed draft consent order (8.10.21).

[2] AND UPON an anonymity order having been made by David Allan QC on 12 th July 2017 and varied by Master Cook on 17 th January 2018.

[3] AND UPON judgment in default having been entered by Master Cook on 12 th April 2019, with damages to be assessed, in respect of the Claimant's claims of (i) sexual assault; (ii) breach of the common law duty of care/negligence; (iii) misfeasance in public office; (iv) breach of the Defendant's ongoing duty of providing care (also a breach of section 117 of the Mental Health Act, 1983); and (v) the misuse of private information/breach of confidence and breach of data protection.

[4] AND UPON the Defendant having filed admissions on 31 May 2019 (Bundle A page 36-37).

[5] AND UPON trial (three weeks) having been fixed for Monday 11 th October 2021 of (a) the assessment of damages pursuant to the judgment in default and (b) the Claimant's claims for declarations of breach of the Human Rights Act 1998.

[6] AND UPON the evidence filed by the parties with the Court including an Agreed Joint Psychiatric Statement (28.5.21) written by the parties' expert Consultant Psychiatrists (Dr Daly and Dr Adshead).

[7] AND UPON the parties having reached terms of settlement in respect of damages and costs at a Mediation held on 4 th October 2021.

[8] AND UPON the parties having reached agreement, subject to the Court's approval, on the declarations that are appropriate under the Human Rights Act 1998.

[9] AND UPON it being acknowledged by the parties that the damages include a substantial sum in respect of psychotherapy and related treatment.

[10] AND UPON the parties having confirmed that the terms of the financial settlement do not require Court Approval since it is common ground that the Claimant has litigation capacity.

[11] AND UPON it being agreed between the parties that:

(1) The agreed damages are paid and the Declaration agreed in full and final settlement of all claims made by the Claimant arising out of the issues in this litigation.

(2) The Claimant undertakes not to issue any further proceedings, or make any further claim, against the Defendant Trust its predecessors or any Director, officer, employee (past or present) in relation to the index events.

[12] AND UPON the following matters, which form the basis of the declaration in this Order, being agreed between the parties:

(1) The relationship between the Defendant's employee PD and the Claimant was an "abusive relationship" (see paragraph (5) below) which was (a) a criminal offence by PD contrary to section 38 of the Sexual Offences Act 2003 and (b) a gross breach of PD's duties as a nurse for which PD would have been dismissed (had he not resigned) and for which PD was struck off by the Nursing and Midwifery Council.

(2) There was a corporate failure by the Defendant to ensure (a) that it carried out adequate supervision of PD and (b) that he kept adequate records of his contact with UXA.

(3) The events in paragraphs (1) and (2) materially contributed to the Claimant's serious self-harming and her risk of suicide.

(4) The Defendant failed in a timely manner to report the abuse after its disclosure on 21 st March 2016 as a Serious Untoward Incident Review through the Strategic Executive Information System, thereby failing to make timely notification of the abuse to the Care Quality Commission.

(5) PD's abusive relationship with the Claimant from July 2015 until 2 May 2016 was a breach of the Claimant's Article 2 and 3 rights and, given the consequent loss of contact with her daughter, a breach of the Claimant's Article 8 rights, which breaches are attributable to the Defendant as an emanation of the State.

[13] AND UPON the Court recording that the Claimant's written submissions before the Court were the Opening Submissions and Scott Schedule (27.9.21) and the Further Submissions (11.10.21); and that the Defendant's written submissions before the Court were the Skeleton Argument (29.9.21) and the Note on Draft Order (11.10.21).

[14] AND UPON the Court having regard to the case-law and commentary on declarations without trial (White Book 2021 p.1397) and the analogy – in the context of breach of the HRA – with CPR PD54A [§16.2].

[15] AND UPON the Court being satisfied on the basis of the written submissions of the parties, in light of the evidence and the authorities filed by them: (a) that it is appropriate to make this Order including the declaration of breaches of the Human Rights Act 1998 and (b) that it is not necessary to that end to hold a trial or further hearing, to hear oral evidence, to make any further determinations of fact, or to give a judgment.

[16] AND UPON the Claimant's representatives having raised (by email on 14.20.21) the issues, in relation to which there is current disagreement between the parties, of: (i) an interim payment of costs; and (ii) the application of CPR 31.22 to a document before the Court in this case.

Operative Paragraphs:

BY CONSENT, IT IS ORDERED THAT:

Assessment of Damages

1.
The Defendant do pay damages to the Claimant in the agreed sum of £1,700,000 (net of CRU, which is nil, and net of interim payments already made by the Defendant) within 21 days of the date of this Order.

Human Rights Act Declaration

2.
It is declared that the Defendant acted unlawfully, for the purposes of section 6 of the Human Rights Act 1998, in a way which was incompatible with the Claimant's Convention rights pursuant to Articles 2, 3 and 8.

Costs

3.
The Defendant do pay the Claimant's reasonable costs of, and incidental to, the action, to be the subject of detailed assessment if not agreed, on the following basis: (a) all reasonable costs of quantification of damages pursuant to the judgment in default of Master Cook dated 12 th April 2019; and (b) in relation to the Claimants' claims pursuant to the Human Rights Act 1998, 70% of all reasonable costs, in addition to costs already ordered to be paid by the Defendant pursuant to previous Orders relating to the Human Rights Act claims.

Liberty to apply

4.
The Claimant has liberty to apply, in writing on notice, by 4pm on 19.10.21: (a) for an order for payment of costs on account pursuant to CPR 44.2(8); and/or (b) for permission pursuant to CPR 31.22(1)(b) regarding use of disclosed documentation. The Defendant – and any other person interested in the CPR 31.22(1)(b) application – shall have until 4pm 22.10.21 to respond to any such application, and the Claimant shall have until 4pm 25.10.21 to reply to any such response. Any party or, in the case of CPR 31.22 any interested person, may apply in writing on notice to vary the terms of this paragraph of this Order.

5.
Copies of all documents filed and served in accordance with paragraph 4 of this Order shall also be provided promptly by email to the clerk to Fordham J who – if available – will consider the applications pursuant to paragraph 4, in the first instance on the papers.

Reasons:

(1)

The settlement does not require approval. It is agreed that the Claimant has litigation capacity. There is no need for any 'approval hearing'.

(2)
The making of the declaration is a judicial act. The Court needs to be satisfied that the declaration is appropriate and that making it is necessary to do justice in this case. I am so satisfied. It is also appropriate that the Order should make clear on its face the basis on which the Court is satisfied. I am satisfied that this Order entails such clarity.

(3)
The position is this. The agreed matters set out in the preamble to the Order – and specifically (1)-(3) – provide proper and sufficient support, in the circumstances of this case, for the HRA declaration matching agreed matter (5), which is the proper and sufficient scope of the declaration of breaches. The case has been properly compromised, on this basis, so far as HRA declarations are concerned. The sexual relationship which PD – the Defendant's employee and the Claimant's mental health care coordinator – pursued with the Claimant is accepted to have been "abusive". It is accepted that the abusive relationship, and the Defendant's corporate failure of supervision of PD, each materially contributed to serious self-harm (Article 3) as well as suicide risk (Article 2), and a knock-on consequence of the Claimant's loss of contact with her daughter (Article 8). The parties have, in my judgment, properly and convincingly identified these accepted matters as supporting their agreed declaration of breaches of the HRA. Having regard to the materials, including the admissions and joint experts' statement referred to in the recitals to this Order, and including the parties' submissions before the Court, I am satisfied that there are sound reasons to accept – rather than to go behind or decline to accept – the matters which the parties have agreed. I am also satisfied that the severity of the consequences and risks have appropriately been recognised by the parties as meeting the relevant legal thresholds in relation to the Convention rights, and that the Defendant cannot (not least since it does not now seek to) discharge the onus of showing Article 8(2) justification.

(4)
I have been able to come to these conclusions – and embody them in this Order – by consideration on the papers. I am satisfied that I can and should make this Order without holding a hearing, without making further or ancillary findings, and without giving a judgment. The parties have compromised the HRA claims. It has not been – and is not – necessary or appropriate for the Claimant, or anyone else, to give evidence or be cross-examined. This is not a case in which there are disputed issues requiring resolution going to the severity of admitted HRA breaches, or outstanding issues needing to be resolved, or unresolved questions relating to remedies: cf. Wilson [2021] UKIPTrib IPT/11/167/H (30.9.21) at §§15-16, 348. It is in the public interest that parties should be able, in an appropriate case and on an appropriate basis, to resolve HRA issues and recognising HRA breach, in a manner obviating the need for hearings and avoiding unnecessary further costs. That has happened in this case.

(5)
Late in the day, but prior to the making of the Order, the Claimant's representatives have raised two questions – on which there is not agreement: one as to payment on account of costs (CPR 44.2(8)); the other as to whether a particular disclosed document is to be deemed to be in the public domain (CPR 31.22(1)(a)). I have formed no view, as yet, on

either of these matters. I am satisfied that this Order should now be made, but with provision for applications and written submissions (including any notified agreement). That allows the parties to address the position, to agree what can be agreed, and to assist the Court. Nobody and nothing is shut out. In relation to CPR 31.22, I add these observations. There has not – as yet, in any event – been on my part any "hearing … held in public" (CPR 31.22(1)(a)). I have noted the general provision for the Court's permission (CPR 31.22(1)(b)). By giving liberty to apply for an application for permission to be made, I am satisfied that the parties can address me on all and any relevant considerations, with any relevant materials and authorities. This would include any remaining question whether, on analysis, permission is needed. It would also include any consideration of open justice which is said to arise in the context of this case and of determination of HRA declarations made without a hearing (as could happen equally in judicial review: CPR PD54A §16.2). Any interest in that issue on the part of the press can be accommodated within the terms of the Order, referring to interested person(s). Having circulated this Order in draft, neither party disagreed with this course.

The Satellite Issue (and its determination without a hearing)

5.
The questions addressed in this judgment originated as described in the Substantive Order (Recital [16], Reason (5)), by reference to the liberty to apply (Operative Paragraph 4(b)). The original concern, raised by the Claimant's representatives, was "whether a particular disclosed document is to be deemed to be in the public domain", by reference to CPR 31.22 (§20 below). That document was the NICHE Report (see §48 below). In the event, the ensuing submissions ranged wider. I had indicated (Reason (5)) that the parties should be able to address the position and assist the Court, that I could be addressed on all and any relevant considerations with any and all relevant materials and authorities, including any consideration of open justice, and with nobody and nothing shut out. I am satisfied that it is appropriate that I address the points raised by the parties. Neither party sought an oral hearing – I offered 12 November 2021 as a possible date for one – and I concluded that it was not necessary in the interests of justice or the public interest for the Court to insist on one, with the imposition for the parties of the costs of doing so. Relevant to the satellite issue addressed in this judgment, I received the following by way of written submissions: Claimant's Further Submissions (19.10.21); Defendant's Submissions (22.10.21); Claimant's Submissions in Reply (25.10.21). Then, precipitated by my request for any draft orders or redacted versions of documents, I received: Claimant's draft Order (11.11.21) with a redacted Scott Schedule (27.9.21) and redacted Claimant's Further Submissions (11.10.21); and Defendant's Note (16.11.21). I also received authorities on which the parties were relying. I turn to what it is that the parties seek.

The Claimant's Proposed Order

6.
The Claimant asks me to make an Order with two Proposed Recitals:

… UPON the Claimant having invoked the liberty to apply contained in paragraph 4 of the Order of Mr Justice Fordham, dated 15 October 2021, … (b) for permission to use certain specified documents for purposes other than the proceedings.

AND UPON the Court exercising its inherent jurisdiction to allow access to Court Documents in order to promote Open Justice in order to allow the Public to understand the Declaration

made pursuant to s.6 of the Human Rights Act 1998 and the matters behind the Judgment[] in Default.

Then this Proposed Operative Paragraph:

The parties have permission, pursuant to CPR 31.22 and under the inherent jurisdiction, to use the following documents other than for the purposes of the proceedings herein, including to disclose the same to third parties (including media organisations): (i) The Claimant's Opening Submissions and Scott Schedule, dated 27 September 2021; (ii) The Claimant's Further Submissions, dated 11 October 2021; (iii) The Defendant's Skeleton Argument, dated 29 September 2021; (iv) The Defendant's Note on the Draft Order, dated 11 October 2021; (v) The Agreed Joint Psychiatric Statement of the parties' expert Consultant Psychiatrists, Dr Daly and Dr Adshead, dated 28 May 2021; (vi) The judgment in default entered by Master Cook on 12 April 2019; (vii) the Defendant's Admissions dated 31 May 2019; (viii) The NICHE Report, of an 'Independent investigation into care and treatment of a service used in Wigan, dated 17 March 2017, in the anonymised form in which it appears at page A1799 of the Hearing Bundle [and excluding the Appendices].

The Claimant's Proposed Order is opposed by the Defendant.

7.
I should explain that the reference to "the Hearing Bundle" is a reference to a 2197-page "Bundle A: Main Bundle" ("the Main Trial Bundle"). It had been filed and served for the 3-week trial ("the Trial") which had been due to take place before me commencing on 11 October 2021, described in Recital [5] of the Substantive Order (§4 below). Of the documents referred to in §§(i)-(viii) of the Claimant's Operative Paragraph, those which were included within the Main Trial Bundle (and the pages which they occupied within it) were as follows: (v) Agreed Joint Psychiatric Statement of Experts (pp. 301-309); (vi) Judgment in Default (pp.259-263); (vii) Admissions (pp.36-37); (viii) NICHE Report (pp. 1799-1879). The exclusion of the appendices to the NICHE Report was clarified in the Claimant's submissions. The Claimant's representatives provided versions of (i) the Scott Schedule and (ii) the Claimant's Further Submissions which ensured that initials used for the Claimant match those prescribed in the Anonymity Order.

The Defendant's Proposed Order

8.
The Defendant asks me to vary §6 of the Anonymity Order, to include the words underlined here:

6. … [A] non-party may not inspect or obtain a copy of any document on or from the Court file (other than this order duly anonymised as directed) without the permission of a Master or District Judge. Any application for such permission must be made on notice to the Claimant and the Defendant , and the Court will effect service. The file is to be retained by the Court and marked "Private".

The Anonymity Order was made on 12 July 2017, varied on 17 January 2018 (see Substantive Order Recital [2]). Anonymity protection had been sought by the Claimant by application on 8 June 2017. The Order of 12 July 2017 provided anonymity for the Claimant and her daughter, as follows: that the Claimant and her daughter should be anonymised in any statement of case, in other documents filed in the case, and in any judgment or order; that their address in those documents should be given as that of the Claimant's solicitors; that any such documents previously filed should be replaced with

compliant copies; that the original documents disclosing these names or address be placed in a sealed, marked envelope; that the file be retained and marked as private; and that reporting restrictions apply to the disclosing of any information that may lead to the subsequent identification of the Claimant or her daughter. Paragraph 6 of the anonymity order is as above (without the underlined words). Finally, the anonymity order gives liberty to apply to any non-party affected by it, to have the Order set aside or varied "on notice to all parties".

The proceedings and their settlement

9.
The proceedings had been commenced by claim form issued on 27 February 2017, with initial Particulars of Claim dated 2 April 2017. Judgment in default had been entered on 12 April 2019, with damages to be assessed, in respect of five claims (Recital [3]). Given the "rule of practice" (see §11 below), no judgment in default was entered as to the HRA Declaration. Admissions were filed by the Defendant on 31 May 2019 (Recital [4]). A three-week trial was to take place (Recital [5]), before me, starting on Monday 11 October 2021 (a) for assessment of damages pursuant to the judgment in default; and (b) to determine the claims for the HRA Declaration. A week before the trial, terms of settlement were agreed (Recital [7]). The assessment of damages was agreed (Recital [11], Operative Paragraph 1) and the terms of the financial settlement involved no judicial determination by me, in circumstances where the Claimant had litigation capacity (Recital [10]). The terms of the HRA Declaration (Operative Paragraph 2) were also agreed between the parties, as was its basis (Recital [12]), but the agreement as to the declaration was recognised to be subject to the Court's approval (Recital [8]).

The judicial act and its basis

10.
As the parties recognised (Recital [8]), the Court needed to be satisfied that the declaration of HRA breaches was appropriate. The making of the declaration was "a judicial act" (Reason (2)): I needed to be satisfied that the declaration was appropriate, and that making it was necessary to do justice; I also needed to ensure clarity as to the basis on which the Court was so satisfied. I recorded that I had had regard to the case-law and commentary on declarations without trial (White Book 2021 Vol.1 p. 1397) and the analogy (see §16 below) – in the context of breach of the HRA – with CPR PD54A §16.2. I recorded (Recital [15]) that I was:

… satisfied on the basis of the written submissions of the parties, in light of the evidence and the authorities filed by them … that it is appropriate to make this Order including the declaration of breaches of the Human Rights Act 1998

I recorded (Recital [13]) that "the written submissions before the Court" were: the Claimant's Opening Submissions and Scott Schedule (27.9.21); the Claimant's Further Submissions (11.10.21); the Defendant's Skeleton Argument (29.9.21); and the Defendant's Note on Draft Order (11.10.21). As to "evidence", this was located within a Main Bundle of some 2197 pages. As to "authorities", I had an Authorities Bundle of some 5538 pages, and further authorities were cited in the post-settlement written submissions. I now have yet further authorities, in the post-Order written submissions filed by the parties in relation to the satellite issue. I recorded (Recital [12]) that there had been agreement between the parties as to five matters which formed the basis of the agreed declaration. That recital was based on an agreed Appendix ("Declarations under the Human Rights Act as agreed between the parties") in an agreed "Final Order and Human Rights Act Declarations", filed by the parties on 8 October 2021. I set out my reasoning (Reason (3)), in which I referred to "the admissions" filed on 31

May 2019 (Recital [4]), to the "joint experts' statement" described as the "Agreed Joint Psychiatric Statement (28.5.21) written by the parties' expert Consultant Psychiatrists (Dr Daly and Dr Adshead)" (Recital [6]), and to the "submissions before the Court" (Recital [13]). I made the HRA Declaration of HRA breaches without a hearing, without making any further findings of fact, and without giving a judgment. I recorded why I had taken that course (Recital [15]; Reason [4]).

Part 2. The Legal Landscape

Declarations 'by consent'

11.
In making the Substantive Order and the HRA Declaration in the present case, I was making a determination on which there was agreement between the parties. It is a "rule of practice" (though "not of law") in civil litigation "that a declaration is a judicial act and ought not to be made on default of pleading, or on admissions of counsel, or by consent, but only if the court is satisfied by evidence": see the White Book 2021 Vol.1 §40.20.3, discussing cases such as Wallersteiner v Moir [1974] 1 WLR 991 at 1029A-B; and Animatrix Ltd v O'Kelly [2008] EWCA Civ 1415 at §53 ("Declarations can be granted by consent where that is necessary to do justice in the case"). See too Mazhar v Lord Chancellor [2017] EWHC 2536 (Fam) [2018] Fam 257 at §52 ("there is a rule of practice though not of law that the court does not grant declarations without trial including by consent"). As was explained in Lever Faberge Ltd v Colgate-Palmolive Co [2005] EWHC 2655 (Pat) [2006] FSR 19 at §7: "if the court is to make a declaration … without giving a full judgment, the terms of a declaration ought to make it clear the basis on which the court has reached [its] conclusion". In the present case, it was common ground between the parties that the HRA Declaration could properly be granted by the Court without conducting "the trial", without hearing evidence and without determining any disputed issue; but also that making the HRA Declaration was a "judicial act" and that the Court needed to be satisfied that it was appropriate. I recorded the position in the Substantive Order, in my reasons (Reason (2)) and referred to this White Book commentary on "declarations without trial" (Recital (14)).

Judicial determinations without a hearing

12.
In making the Substantive Order and the HRA Declaration in the present case, I was making a determination without a hearing. I am doing so again in determining the issues in this judgment. It is also what I decided I would do in relation to another "satellite issue" – the Claimant's application (see Operative Paragraph 4(a): §4 above) for an order for payment of costs on account – which I have determined by an Order with Reasons (20.12.21), ordering a further payment on account of costs in the sum of £850,000.

13.
I have introduced determinations without a hearing and commented on their implications already (see §§2-3 above). There are a range of situations in which judicial acts of making determinations, are done without a hearing. The Judge will sit in a private room – usually their Judge's room at the Court building – read the relevant papers, deliberate on the issues, and write the Order with reasons or write a judgment. There may be no judgment, but rather an Order with reasons, being an "other judicial decision" (Law Debenture at §31). The fact that there may be a substantive determination without a hearing is reflected in CPR 5.4C(1), which provides that the "general rule", entitling any person who, not being a party to proceedings, seeks from the court records any "judgment or order given or made in public", applies to an order made "without a hearing". That "general rule" applies in

situations where defendants have filed an acknowledgment of service or defence, or the claim has been listed for hearing, or judgment has been entered on the claim (CPR 5.4C(3)). An order made by way of determination on the papers may be accompanied, or followed, by a judgment delivered in open court. An example is where an order made on the papers involves restrictions or derogations from open justice, such as an anonymity order or an order restricting access to documents from the court records, and a judgment in open court will "ensure that the reasons for any derogation from the principle of open justice are publicly explained" (see White Book 2021 Vol. 1 at §39.2.11).

14.
Examples of judicial determinations without a hearing are to be found in judicial review. In that world, decisions on permission for judicial review (CPR 54.12) and decisions on applications for interim relief can be made without a hearing, just as applications in civil proceedings generally can be determined on the papers (CPR 23.8). In judicial review cases, where there is agreement between the parties as to the substantive order that the judicial review Court should make, the procedure is as set out in CPR PD54A §16.1-16.4 (and the Administrative Court Judicial Review Guide 2021 at §23.4.1).

Agreed final order. 16.1 If, prior to judgment being given on a claim the parties agree the terms of a final order to be made disposing of the claim, the claimant shall file 3 copies of the proposed agreed order together with a short, agreed statement of the matters relied on as justifying the proposed agreed order and copies of any authorities or statutory provisions relied on. Both the draft order and the agreed statement shall be signed by all parties to the claim. 16.2 The court will consider the documents referred to in paragraph 16.1 and will make the order if satisfied that the order should be made. 16.3 If the court is not satisfied that the order should be made, a hearing date will be set. 16.4 Where the agreement relates to an order for costs only, the parties need only file a document signed by all the parties setting out the terms of the proposed order.

Under this procedure (previously §17 of PD54A), the Court may be satisfied that the Order – agreed between the parties – should be made, based on having considered the documents (PD54A §16.2). A hearing will be convened if the Court is not satisfied on the papers that the order should be made (PD54A §16.3). Despite the language ("will make the order if satisfied") the judicial review Court could certainly decide that, although it is satisfied on the papers that the agreed order should be made, nevertheless there should be a hearing. The judicial review Court may convene a hearing where one of the parties to the proposed consent order has identified a good reason for the agreed order to be the subject of a hearing (a point which Walker J explained in R (Elmes) v Essex County Council [2018] EWHC 2055 (Admin) [2019] 1 WLR 1686 at §149). Where the Order is made without a hearing, the judicial review Court may decide to give a judgment, listed for hand-down in open Court. Or the judicial review Court may issue an Order with reasons. Such an Order may be the subject of comment in the public domain. An example is the note on my Order in R (Kauser) v Secretary of State for Work and Pensions CO/987/2020 (7.10.20) in the Journal of Social Security Law (2021) JSSL 28(1) D21, that Order having declared – as was agreed between the parties – that the Secretary of State had acted unlawfully by failing to conduct work capability assessments before deciding students' claims for universal credit. In judicial review cases, it is recognised that consent orders are only approved if scrutinised by a person with judicial powers who is satisfied that the order is satisfactory, given the nature of the supervisory jurisdiction being exercised by the Court (see Elmes at §§74, 193).

15.
Another example of substantive determination without a hearing, drawn from judicial review proceedings, is CPR 54.18. It provides:

Judicial review may be decided without a hearing. 54.18. The court may decide the claim for judicial review without a hearing where all the parties agree.

That means the judicial review Court can determine public law issues which are disputed between the parties, and can make a substantive order reflecting the Court's determination of the judicial review claim, provided that the parties are agreed on the Court determining the disputed claim without a hearing. Another example of a determination without a hearing, not from judicial review but involving the Administrative Court, concerns the making of orders under the Proceeds of Crime Act (see the White Book 2021 Vol. 2 at §3K-6, discussing National Crime Agency v Simkus [2016] EWHC 255 (Admin) [2016] 1 WLR 3481), which became the "general practice" in those cases before being reflected in any provision of the CPR or any CPR PD (Simkus at §§19-20). In that context, emphasis has been placed on the Court Order embodying reasons (Simkus at §§26, 48) and involving conscientious consideration (Simkus at §26).

An "analogy" with PD54A §16.2

16.
As I explained in Recital [14] to the Substantive Order (see §4 above), "in the context of a breach of the HRA", I saw "an analogy" between the HRA Declaration being made without a hearing in the present case, and the position under PD54A §16.2 (§14 above). Claims for a breach of the HRA are claims against public authorities which can be made by way of judicial review. That would engage the Court's supervisory jurisdiction. The judicial review Court could make an Order including giving a declaration of a breach of the HRA, as a judicial act being satisfied that the Order was appropriate, but without a hearing.

Some relevant rules

17.
It is worth listing, and having in mind, the following provisions of the CPR. (1) CPR 5.4B makes provision regarding supply of documents to a party from the court records ("the records of the court"). (2) CPR PD5A §4.2A contains a list of documents to which a party has a presumptive entitlement of access from the court records. (3) CPR 5.4C makes provision regarding supply of documents to a non-party from the court records. (4) CPR 31.22 (§20 below) makes provision regarding subsequent use by a party of disclosed documents. (5) CPR 32.13 makes provision regarding inspection during a trial of a witness statement which stands as evidence in chief. (6) CPR 39.2 makes provision for hearings being in public, for private hearings and for anonymity orders.

Harman (1982)

18.
I am going to discuss here the position in some of the many cases which have been cited by the parties to assist me in grappling with the satellite issue. In Home Office v Harman [1983] AC 280 (HL 11.2.82) the House of Lords decided that a solicitor had acted in contempt of court by providing the Home Office's disclosed documents to a journalist after they had been read out in open court at a trial. The case arose out of the action by Mr Williams, suing the Home Office for damages and declarations, in relation to being held in a control unit at Hull prison (p.300B). The Home Office had disclosed minutes and memoranda of high-level policy meetings (p.300D) and Mr Williams' barrister had read these out (among some 800 pages of documents) in open court (p.301A). Mr Williams' solicitor (Ms Harman) then allowed a Guardian journalist (Mr Leigh) to inspect the 800 pages including the minutes and memoranda (p.301E-F) and he wrote an article about the control unit (p.

301H). The House of Lords discussed the “implied undertaking” (or implied obligation) on a party to civil proceedings not to use, for purposes other than those proceedings, disclosed documents from another party, and the relevant case-law. The identified rationale for the implied undertaking were the strong public policy considerations arising out of the importance of full disclosure (discovery) in proceedings, and the compulsion and invasion of privacy entailed by it. The House of Lords held (3-2) that the solicitor had acted in contempt, concluding that the implied undertaking relating to disclosed documents continued to apply where the documents had been read out in open court.

19.
The minority (Lord Scarman and Lord Simon) held that, once the documents had been read out in open court, they had become public knowledge and the implied undertaking ceased to apply (p.313C, 314E). They thought the (constitutional) right to freedom of communication was relevant to the analysis (pp.311B, 312G-H, 319E), together with considerations of “open justice” and “public justice” (pp.316E-F, 319D-E), that a “balance has to be struck” between a litigant’s private right to keep their documents to themselves and the right (of everyone) to impart information upon matters of public knowledge (p.313B), and that there was a public interest in a litigant and their advisers being able to use even disclosed documents in “public discussion” after they had become public knowledge (p. 316G).

20.
The sequel to Harman were proceedings in the European Commission of Human Rights which settled by means of a Government undertaking to “seek to change the law so that it would no longer be a contempt of court to make public material contained in documents compulsorily disclosed in civil proceedings once those documents had been read out in open court”, an undertaking “honoured” by the introduction of what became RSC Order 24 rule 14A and then CPR 31.22, reversing the rule identified by the majority in Harman: see SmithKline Beecham Biologicals SA v Connaught Laboratories Inc [2000] FSR 1 at pp.9-10; and Marlwood Commercial Inc v Kozeny [2004] EWCA Civ 798 [2005] 1 WLR 104 at §§9-10. These rules, which therefore reflect the position of the dissenting Lords Scarman and Lord Simon in Harman, were designed as follows. O24 r14A provided:

Any undertaking, whether express or implied, not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such a document after it has been read to or by the Court, or referred to, in open Court, unless the Court for special reasons has otherwise ordered on the application of a party or the person to whom the document belongs.

CPR 31.22 provides:

Subsequent use of disclosed documents and completed Electronic Documents Questionnaires. (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where – (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public; (b) the court gives permission; or (c) the party who disclosed the document and the person to whom the document belongs agree. (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public. (3) An application for such an order may be made – (a) by a party; or (b) by any person to whom the document belongs. (4) For the purpose of this rule, an Electronic

Documents Questionnaire which has been completed and served by another party pursuant to Practice Direction 31B is to be treated as if it is a document which has been disclosed.

In light of the post-Harman rule change, it is unsurprising to find repeated citation of observations found within Lord Scarman and Lord Simon's dissent in Harman: see eg. SmithKline at p.9; Law Debenture at §§23, 26; and Dring at §37.

SmithKline (1999)

21.
In SmithKline (CA 7.7.99), the Court of Appeal held that a patent petitioner was entitled pursuant to the predecessor to CPR 31.22 to use, for purposes other than the proceedings, disclosed documents on which it had relied to obtain a revocation order by way of a judicial determination by a judge at a hearing in court; on which materials the judge had based that ruling; in circumstances where the judge needed to be satisfied that grounds for the revocation were made out. That was so, notwithstanding that the thoroughness of the judge's pre-reading, and the absence of opposition to the revocation ruling, made the hearing very short indeed and meant the judge did not need the grounds for the ruling to be outlined. The documents, like the skeleton arguments, witness statements and experts' reports, were all "referred to in open court".

22.
SKB had brought a petition for Connaught's pertactin cough medicine patent to be revoked. The case was listed for an 8-10 day trial before Laddie J, preceded by 2 days for his judicial pre-reading. The parties had entered an agreement (see p.14) governing the handling of documents which either of them marked as "confidential". They had exchanged expert reports and witness statements for the trial, and filed an agreed reading list for the judge comprising: the patent in suit, the parties' skeleton arguments, SKB's particulars of objection, a number of specified documents and witness statements, and the parties' expert reports. This is what happened next.

(1)
On the eve of the trial (the afternoon of pre-reading day 2), Connaught notified its intention to surrender the patent. The trial was postponed for a day. On what had been going to be day 2 of the trial (7.5.98), there was a hearing in open court. Laddie J stated that he had read the relevant papers: "I have read it all". SKB's barrister asked for a revocation order. Connaught's barrister said: "I am not here to consent to an order for revocation, but if your Lordship believes that that is the appropriate order in the circumstances, then so be it". Laddie J proceeded to give a short judgment ([1999] FSR 284), based on what he had pre-read. He explained that it was open to the Court to order revocation "if, having regard to what is pleaded and the material which I have seen, that is the appropriate course". He said he had "come to the conclusion that in the absence of any resistance from [Connaught], the petition" for revocation was "well founded" and that "the proper course" was "to order revocation forthwith". Laddie J later said that the hearing had "taken a few minutes". Lord Bingham CJ said it was "very short indeed" (p.13).

(2)
There were then these developments. (i) About a week after the hearing (13.5.98), Connaught wrote to ask SKB to destroy the documents "marked as confidential", and which had therefore been covered "by the confidentiality agreement between the parties" (p.6). (ii) Ten weeks after the hearing (21.7.98), solicitors for Chiron, a company involved in opposing Connaught's patent in proceedings in the European Patent Office (EPO), wrote to SKB and Connaught requesting copies of the skeleton arguments, the witness statements and the experts' reports which had been before Laddie J.

Connaught declined. (iii) SKB sent Chiron both parties' skeleton arguments and both parties' evidence referred to in the reading list which had been provided to the judge. (iv) Subsequently, SKB filed the parties' expert reports and witness statements in the Japanese Patent Office (JPO).

(3)
Against that background, SKB made two alternative applications by notice of motion. Application (a): for "a declaration that it was free to use" certain documents on the basis that they had been "read to or by the court, or referred to in open court". Alternatively, application (b): for the court's permission ("leave") to use those documents, for the purposes of opposition proceedings in the EPO and the JPO. Applications (a) and (b) arose in the context of the then RSC O24 r14A (the predecessor to CPR 31.22) (see §20 above). Applications (a) and (b) related comprised four categories of documents: (A)-(D) (p.7). The Court of Appeal said of all these documents that they were "documents supplied or disclosed by Connaught … to [SKB] pursuant to a court order in the course of [the] litigation" and "documents received from Connaught" (p.3). The Court of Appeal also explained that they were all documents being relied on by SKB in its legal challenge to the patent. Documents (A)-(D) were as follows (pp.7, 12-13). (A) were documents, disclosed by Connaught in the proceedings (p.12), annexed to SKB's expert's report (Professor Findlay) and discussed in that report. (B) was a scientific report of a workshop, annexed to a Civil Evidence Act (CEA) notice, and included in the judge's reading list (p. 13). (C) were scientific documents including Connaught's internal documents, disclosed by Connaught in the proceedings (p.12), and annexed to another CEA notice. (D) were documents of Connaught relating to the stability of pertactin, being Connaught's own records of its laboratory results, referred to in Professor Findlay's report (p.13).

(4)
Applications (a) and (b) were heard by Laddie J (21.20.98) and he gave a judgment (30.10.98) refusing them both. He refused application (a), essentially because (pp.7-8): there had been no "contested oral hearing"; his decision had been "as a result of what I had read in my private room"; Connaught's notified intention to surrender the patent meant "none of the skeletons, witness statements, expert reports or discovery documents were going to be read or referred to" in court, the only discussion being of "the patent itself"; "the only question of substance was how to formally terminate the proceedings as quickly as possible and without generating ongoing costs"; and only "a small number of the documents referred to were identified in the reading list". This refusal of application (a) was what SKB challenged by way of appeal to the Court of Appeal. Laddie J also refused application (b), which SKB did not pursue in the Court of Appeal (p.7). When later told about the documents which SKB had sent to Chiron and had filed in the JPO, Laddie J indicated a "preliminary view" that those disclosures were a break of SKB's "obligation of confidence" and "a contempt of court". In consequence, SKB undertook to retrieve the documents it had sent to Chiron and the JPO (p.8).

(5)
In the light of all of this, SKB made a third application (c) to Laddie J. Application (c) was for permission (leave) to use three classes of document (p.8). The first of those three classes of document was SKB's particulars of objection, a document which had appeared in the reading list for the trial. In a further judgment (21.1.99), Laddie J granted application (c), in relation to all three classes of document (p.8). As to the first class of document (the particulars of objection), Laddie J gave two reasons. The first reason was that the particulars of objection were in a re-amended form and had been referred to in open court at the hearing "on the application to amend" the particulars of objection, so that O24 r14A was applicable. The second reason was that the Court's permission (leave) would have been appropriate, had O24 r14A not applied, because "the nature of the attacks raised

against the patent" were "prima facie matters which should be made known to the public" so that the Court's "public revocation of the patent can be understood". There can be no doubt that Laddie J's second reason for allowing SKB's application (c) was about information being capable of being "made known to the public" in order to understand the decision which the Court had made. There was no appeal by Connaught to the Court of Appeal against this decision by Laddie J.

23.
This was the context in which SKB appealed to the Court of Appeal against Laddie J's refusal of application (a), in relation to documents (A), (B), (C) and (D). SKB's argument was that O24 r14A applied to those documents (A)-(D). Connaught argued that O24 r14A did not apply to those documents. Connaught also argued (by a Respondent's Notice) that, even if O24 r14A did apply to those documents, given the parties' confidentiality agreement there were "special reasons" under r14A and the Court of Appeal should order "otherwise" (ie. that those documents could not be used by SKB otherwise than for the purpose of the proceedings). In its judgment (7.7.89), the Court of Appeal also considered the documents which SKB had supplied to Chiron and filed with the JPO. The Court of Appeal concluded that O24 r14A was applicable to documents (A)-(D), on the basis that they had been "read to or by the Court, or referred to, in open court". The Court of Appeal concluded that there were no "special reasons" to order that those documents could not be used. The Court of Appeal also made clear (p.14) that it regarded r14A as applicable to the documents which SKB had supplied to Chiron and the JPO. SKB was entitled – though not obliged – to make use of the documents (p.16). The reasons given by Lord Bingham CJ (for the Court of Appeal) for these conclusions were as follows:

(1)
There were five identifiable situations (SmithKline p.12) in which the implied undertaking came to an end (absent an order to the contrary, made for "special reasons"), because a compulsorily-disclosed document has been "read to or by the Court, or referred to, in open court", namely: (a) when material parts of the document are read out by Counsel in open court; (b) when Counsel in open court draws the judge's attention to the document, and the judge – in court – reads the document to himself or herself; (c) when the judge has pre-read a document, to which Counsel's skeleton argument refers, and then Counsel has incorporated that skeleton argument in oral submissions in open court; (d) when the document is referred to by counsel in open court; and (e) when the document is referred to by the judge in open court. The reason why all these situations were included is referable to what would otherwise have happened at the hearing. The "changed environment of practice" was no longer for Counsel to read the documents aloud in open court; but rather for the judge to read materials outside the courtroom; and for Counsel's submissions to be summarised in a skeleton argument. If it were not for these changed practices, "it would be necessary" for every "full submission" to be made "orally" and for Counsel in open court to "read aloud" or refer the judge to "each page of the material relied on". If those things had happened, the implied undertaking would have come to an end.

(2)
It was necessary to focus on the "reality" of what took place at the short hearing before Laddie J (p. 12). The position at the hearing was that documents (A) and (C) were being relied on in Professor Findlay's expert report, on which SKB was relying to challenge the patent. Documents (B), which were also being relied on by SKB to challenge the patent, were in the reading list for the judge and referred to in SKB's skeleton argument. Documents (D) were also being relied on by SKB to challenge the patent, were relied on in Professor Findlay's expert report, and were referenced in SKB's skeleton argument. Documents (A) to (D) were all material which Laddie J "must be taken to have read and absorbed" (pp.12-13). The judge's decision was "plainly based on the material before him" which

included documents (A) to (D) (p.14). Because, at the hearing, SKB “did not accept” Connaught’s offer to surrender the patent but “asked for revocation” and because the judge only had power to revoke “on certain grounds”, the judge could only make the order that he did if “he was of the opinion that the grounds … or some of them were made out” (p.13). The hearing was “not a formality”. His task was “much easier and shorter” because of the absence of “opposition” from Connaught. The reason why the hearing was “very short indeed” because the judge “said he had read all the material” and “made his decision to revoke having regard to what was pleaded and the very large quantity of material which he had read”, which “enabled him to conclude, in the absence of resistance from Connaught, that the petition for revocation was well-founded”. This “compendious reference”, by the judge at the hearing, to “what he had read” was “no less of a reference” because of “the thoroughness of his preparation” which “relieved him of the need to ask for the grounds of objection to be expressly outlined to him”. These were documents “referred to in open court”. There was “reference to the documents in open court” (p.14). In other words, this was “a judicial determination of the revocation issue”: see Law Debenture at §33. That conclusion too was referable to what would otherwise have happened at the hearing, in the absence of the changed environment of practice. If “the judge had come into court without familiarising himself with the case at all, it would have been necessary for [SKB]’s counsel to outline the grounds of objection” and “draw the judge’s attention, however briefly, to the material relied on to support it”. The judge’s decision “based on what he had read” was “no less a reference” to the documents because the “thoroughness of his preparation relieved him of the need to ask for the grounds of objection to be expressly outlined to him” (p.13). As observed in Law Debenture (at §33), what would make “access” to documents like skeleton arguments or written openings “justifiable” in a scenario like SmithKline would be “the use which the judge ultimately made of them to arrive at his decision”, namely “to proceed as if there previously had been a hearing at which the case had been orally opened or at least at which counsel had … put in the submissions after orally introducing the issues”, so that “the effect of the judge’s reliance on the submissions to reach his decision” had “the effect” of a “substitution” where “written submissions” are “deployed at the hearing in substitution for … oral argument”.

(3)
In relation to both parties’ skeleton arguments and both parties’ evidence referred to in the reading list (as sent by SKB to Chiron), and as to the parties’ expert reports and witness statements (as filed by SKB with the JPO), the same conclusions applied “by parity of reasoning” (p.14). They were materials “which the judge had read” and “on which SKB relied in seeking revocation of the patent” and “on which the judge must be taken to have relied … when ruling that the patent should be revoked”.

(4)
It was important to understand what was not happening at the hearing before Laddie J. If, at that short hearing before the judge, SKB had accepted Connaught’s offer to surrender the patent and the judge “without more” had dismissed SKB’s petition “by consent” and “on that basis”, that would have been different. The implied obligation on SKB would not have ended. It would not have mattered “how much of” the material the judge “had read” or “how carefully”. It was “significant that the judge’s order was not made by consent” (p.14). This part of SmithKline is encapsulated at §28 of Law Debenture (§24 below). That conclusion was also referable to what would otherwise have happened, in the absence of the changed environment of practice. “Even under the old practice”, in those circumstances, “there would have been no argument and no citation of the materials relied on” by SKB (p.13).

(5)
Rejecting Connaught's argument that, if covered by r.14A, there were "special reasons" to extend the implied obligation, the Court reasoned as follows. The confidentiality agreement was "a relevant matter to consider", but there were no "special reasons" to justify the order sought by Connaught. Although marked "confidential", and although it was understandable "why Connaught would wish to maintain the confidentiality of their documents", there was "a significant public dimension" to avoiding decisions in patent "proceedings elsewhere" being made "in ignorance of the grounds which led the Patents Court in this country to hold the patent invalid" (p.15). It was "not suggested that the documents … contained any trade secrets or information of a truly secret nature" (pp.14-15). That conclusion was another one which was referable to what would otherwise have happened, this time positing "a full hearing" (p.15). Had there been "a full hearing", Connaught could not say that "any part of it would have been conducted in camera" (i.e. in private). Although Connaught "should not be in a worse position than if the materials on which Laddie J relied on making his decision had been read aloud in open court" but, in the Court of Appeal's view, "nor … should they be in a better position" (p.15).

Law Debenture (2003)

24.
In Law Debenture (Colman J 9.10.02), various allegations of fraud had been raised in proceedings concerning film and TV financing arrangements (Hollywood 4-5), whose trial had commenced but which had then settled after five days of the trial (§20). One species of fraud allegation, although contained in a party (Lexington)'s written opening read by the judge, had not yet orally been opened (§20), and there was an unresolved dispute as to whether it could be raised (§14). A third party (HIH) now wanted access to documents, to aid its consideration (§§8, 12-13) of whether to make similar fraud allegations in its own similar proceedings regarding other similar financing arrangements (Hollywood 1-3). HIH's applications for access to documents were tailored. It wanted access to pleadings and written openings "to the extent that" they related to fraud allegations relevant to Hollywood 1-3. The High Court allowed HIH's application (1) pursuant to the then CPR 5.4(2)(c) (the predecessor to CPR 5.4C(2)) for permission to inspect from the court records pleadings (the defence, reply, replies to requests for information), because HIH had "an entirely legitimate interest in inspecting the pleadings to the full extent necessary to follow the allegations of fraud … in respect of Hollywood 1-3" and as to overlapping Hollywood 4-5 allegations of fraud (§13). The High Court also allowed, in part (§38), HIH's application (2) pursuant to the Court's inherent jurisdiction for permission to obtain copies of the written openings (a) including as to issues which had not yet been reached in the trial (§35) but (b) excluding parts concerning the contentious fraud allegation (the controversy not having reached resolution by the trial judge) (§§36-37).

25.
In the course of the judgment in Law Debenture, the Court reasoned as follows: (1) CPR 31.22 is limited to documents provided in the course of disclosure (§17). (2) The function of a skeleton argument or written opening can include (and did here) taking the Court through key documents in the evidence and giving a comprehensive overview of the case (§20). (3) The exercise of the inherent jurisdiction to order access to skeleton arguments (and written openings: §23) is based on an "open justice" rationale of "exposing to public scrutiny" documents providing "a substitute mode of submission" to oral argument, to "enable" a "public observer" to "understand what the case was about" (§22); and to be able to submit judges to "the discipline of public scrutiny" (§23); to "facilitate maintenance of the quality of the judicial process in all its dimensions, so that the public may be

satisfied that the courts are acting justly and fairly", in relation to all aspects which are "part of the public judicial function", as "the public policy of openness" (§34). (4) Where a hearing culminates in a judgment – or "other judicial decision" (§31) – there is a prima facie entitlement on the part of a member of the press or public to a copy of a skeleton argument or written opening, accepted by a judge at a hearing in lieu of oral submissions (§§24-25), even if "by the end of the trial, certain issues had been abandoned" (§30), this being because the third party "will otherwise have been deprived of the whole or part of that which was submitted to the judge" (§30). (5) If a case settles before a hearing commences, even though the judge having read the skeleton arguments (or written openings) for the trial, it would be inappropriate to exercise the inherent jurisdiction to allow a member of the press or public to have a copy of the skeleton argument or written opening, since "no observer of a public hearing would have been denied knowledge of submissions made at that hearing by reason of their having been committed to writing" (§29). (6) If a hearing has begun but does not culminate in a judgment – or "other judicial decision" (§31) – a key question is whether "written submissions have already been deployed at the hearing in substitution for, or as auxiliary to, oral argument", even if the judge is proceeding "as if there previously had been a hearing at which the case had been orally opened" so that "the effect of the judge's reliance on the submissions to reach his conclusion" was a "substitution" where "written submissions" are "deployed at the hearing in substitution for … oral argument" (§33). (7) Where the skeleton arguments or written openings have been read by the judge, "from the very moment" that the trial has "commenced", "the public policy of openness requires that the outside observer should be given access to these materials in the course of the hearing", and the same logic follows where the hearing proceeded but has then settled (§34), it being "in principle" irrelevant that settlement came before "a particular point in those written submissions" was reached (§35).

Dring (2019)

26.
In Dring (SC 29.7.19) the Supreme Court held that a non-party's application for access to the skeleton arguments, witness statements and other documents used in a 6-week trial, in proceedings which had then settled before judgment had been given: (1) did not fall within the "court records" for the purposes of CPR 5.4C; but (2) did fall within the inherent jurisdiction and involved (a) a fact-specific balancing exercise (§§39, 45), (b) where the purposes of the open justice principle (§§41-43) are central to the court's evaluation (§39, 45), (c) where there is a "default position" in favour of access to written submissions deployed at a hearing and other documents placed before the court and referred to at a hearing (§§38, 44), (d) where it is for a person seeking access to explain why they are seeking it and how access will advance the open justice principle (§45), (e) where the court considers in the balancing exercise questions of harm and the protection of legitimate interests of others (§46), as well as questions of practicality and proportionality (§47).

27.
The editors of the White Book 2021 Vol.1 have provided (at §5.4C) the following helpful extraction of propositions which can be derived from the key paragraphs in the judgment in Dring. I will refer to these as "Dring Propositions (i) to (ix)":

… although (i) for the purposes of the rules "the 'records of the court' must … refer to those documents and records which the court itself keeps for its own purposes. It cannot refer to every single document generated in connection with a case and filed, lodged or kept for the time being at court." (§23) nonetheless: (ii) "There can be no doubt at all that the court rules are not exhaustive of the circumstances in which non-parties may be given access to

court documents. They are a minimum and of course it is for a person seeking to persuade the court to allow access outside the rules to show a good case for doing so. However, case after case has recognised that the guiding principle is the need for justice to be done in the open and that courts at all levels have an inherent jurisdiction to allow access in accordance with that principle" (§34). (iii) "The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case." (iv) That whilst "… the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so." (§45). (v) "The court has to carry out a fact-specific balancing exercise. On the one hand will be 'the purpose of the open justice principle and the potential value of the information in question in advancing that purpose'. On the other hand will be 'any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others'. " (§§45-46). (vi) "There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality." (§46). (vii) "Also relevant must be the practicalities and the proportionality of granting the request. It is highly desirable that the application is made during the trial when the material is still readily available, the parties are before the court and the trial judge is in day to day control of the court process. The non-party who seeks access will be expected to pay the reasonable costs of granting that access." (§47). (viii) "In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate." (§47). (ix) Lastly, "A clean copy of the bundle, if still available, may in fact be the most practicable way of affording a non-party access to the material in question, but that is for the court hearing the application to decide." (§48).

The Counterbalancing Concern

28.
One key concern which is clearly identifiable in the context of questions of access to court documents is this: where there is an "environment of practice" which is "changed", when compared with the conventional model of a court hearing with everything being spoken in the courtroom, it can be appropriate in principle for the approach to access to ensure that open justice is secured, by way of a counterbalancing adjustment in that "changed" environment. Here are some examples of this important idea:

(1)
Many key changes in “environment” involve moves from the spoken word to the written word. In Dring (at §2), Lady Hale said this:

… whereas in the olden days civil proceedings were dominated by the spoken word - oral evidence and oral argument, followed by an oral judgment, which anyone in the court room could hear, these days civil proceedings generate a great deal of written material - statements of case, witness statements, and the documents exhibited to them, documents disclosed by each party, skeleton arguments and written submissions, leading eventually to a written judgment.

(2)
A concern, expressed by the Court of Appeal in a 1999 case (see Dring at §29) was this:

It is of great importance that the beneficial saving in time and money which it is hoped to bring about by such new procedures should not erode the principle of open justice.

(3)
As Lord Woolf MR had put it in a 2000 case (see Dring at §30):

As a matter of basic principle the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings.

(4)
In SmithKline, Lord Bingham CJ had said this (p.12):

For reasons which are very familiar, it is no longer the practice for counsel to read documents aloud in open court or to lead the judge, document by document, through the evidence. The practice is, instead, to invite the judge to familiarise himself with material out of court to which, in open court, economical reference, falling far short of verbatim citation, is made. In this new context, the important private rights of the litigant must command continuing respect. But so too must the no less important value that justice is administered in public and is the subject of proper public scrutiny.

(5)
Counterbalances to secure open justice in the context of the change from oral to written process will also avoid having to revert to an oral process which would defeat the aims of changes which are intended to save time and money and promote the efficient resolution of litigation. As the Court of Appeal (Toulson LJ) had observed in a case in 2012 (see Dring at §37):

Requiring [documents referred to in open court] to be read out would defeat the purpose of making hearings more efficient.

(6)
It is against the background, of the change from oral submissions to written submissions, that (as seen in Law Debenture) it has come to be recognised that (see Dring at §31):

… the court ha[s] inherent jurisdiction to allow access to all parties’ skeleton arguments, not just the opening submissions, provided there was an effective public hearing at which they were deployed …, and the same would apply to other advocates' documents provided to

the court to assist its understanding of the case, such as chronologies, dramatis personae, reading lists and written closing submissions …

This is because skeleton arguments and written submissions constitute "a substitute mode of submission" (Law Debenture at §22) and are "deployed at the hearing in substitution for, or as auxiliary to, oral argument" (at §33).

(7)
In the same way, it was because of the change from evidence in chief being delivered orally, to witness statements standing as evidence in chief (CPR 32.5(2)), that CPR 32.13(1) was introduced to allow a right to inspect such a witness statement during a trial (Dring at §27), so that:

… those observing the proceedings in court … [are] put[] back into the position they would have been in before that practice was adopted.

However, since there is an inherent jurisdiction to determine what the open justice principle requires, and the court's rules on access to court documents are not determinative (Dring at §41), it has been recognised that there is "no reason why access to witness statements taken as evidence-in-chief should not be allowed under the inherent jurisdiction after the trial", and that "what applied to witness statements should also apply to experts' reports which are treated as their evidence-in-chief" (Dring at §31).

(8)
It is also against the background of the change from oral content to written content that the inherent jurisdiction extends to allowing access to documents relied on at a hearing, where they are (Dring at §32)

… documents which were likely to have been read out in open court had the trial been conducted orally.

This addressed Lord Bingham CJ's concern in SmithKline about receiving evidence without it being read in open court, as having "the side effect of making the proceedings less intelligible to the press and the public" (Dring at §37).

(9)
As it was put in SmithKline at p.15 (in the context of O24 r14A and third party access to documents "referred to in open court"), a litigant resisting that access:

… should not be in a worse position than if the materials on which [the judge] relied in making his decision had been read aloud in open court, but nor… should they be in a better position.

(10)
What all of these references have in common is that they identify a concern about ensuring that there are counterbalances to secure that open justice is not undermined, when Courts adopt procedures – especially involving the use of the written word in place of the spoken word – intended to discharge the judicial function in a way which promotes efficiency and the saving of costs.

The open justice principle and access to documents

29.

In Dring (at §33), Lady Hale explained that the case-law makes the following position plain, as regards the court's inherent jurisdiction and the open justice principle:

… the courts have accepted that they have an inherent jurisdiction to allow access to materials used in the course of court proceedings and that the rationale for doing so is the constitutional principle of open justice

Lady Hale went on to explain (at §41) that:

… unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what [the open justice] principle requires in terms of access to documents or other information placed before the court or tribunal in question.

In Harman (at 316) Lord Scarman and Lord Simon linked "public knowledge of the evidence and arguments of the parties" to "public policy in the administration of justice". As to the purposes of the constitutional principle of open justice (Dring at §§42-43):

The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases – to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly…

But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases.

Part 3. Analysis

Prompt application to the trial judge

30.
The appropriate starting-point is that the parties are quite right to have raised questions relating to the documents before the Court with me as the trial judge, striking while the iron is hot and while the matter is fresh. In Harman (at 309G), Lord Keith explained that it is important to address a "doubt" which has arisen as to what use could be made of disclosed documents. In SmithKline, SKB's applications (a) and (b) were made to the trial judge, some four months after his ruling revoking Connaught's patent. In Dring Lady Hale said this (at §47):

It is highly desirable that the application is made during the trial when the material is still readily available, the parties are before the court and the trial judge is in day-to-day control of the court process.

Lady Hale contrasted the position "after the proceedings are over" when "the court will probably not have retained [the material]" and when "the burden placed upon the trial judge in deciding what disclosure should be made may have become much harder, or more time-consuming, to discharge". These same practical considerations mean that, where the parties have concerns as to the position regarding documents filed in the proceedings, and where a trial judge is seized of the case and has control of the court process, and has the papers, it is right in principle to raise those concerns with the judge at that time. In this case, the parties have commendably done so.

CPR 31.22(2)(1)(a) does not apply

31.
The Claimant's initial position had been to invite the Court to confirm that, so far as concerns the NICHE Report as a disclosed document, she is entitled by virtue of CPR 31.22(1)(a)) (§20 above) to use the document other than for the purpose of these proceedings, subject to any order restricting her use pursuant to CPR 31.22(2). I cannot accept that interpretation of CPR 31.22(1)(a). It refers to the situation where "the document has been read to or by the court, or referred to, at a hearing which has been held in public". In my judgment, it is clear that this limb of the rule applies only where there has been "a hearing … held in public". In SmithKline Laddie J had a hearing before his judicial act of revoking Connaught's patent. In this case, I had no hearing before making the HRA Declaration. I did what I would have done under CPR PD54A §16.2 (§14 above). Earlier public hearings have been held in this case. Unlike SKB and the re-amended particulars of objection (see §22(5) above), the Claimant has not contended that the NICHE Report was "read to or by the court, or referred to at" some earlier hearing. It follows that the relevant power in relation to the NICHE Report will be CPR 31.22(1)(b) which provides for use of a disclosed document by a party, in a situation not covered by limb (a).

"Access" is sought by the Claimant, a party

32.
The applications before the Court are made by the parties. There is no application by a non-party, as there was in Dring. CPR 5.4C (third party access to documents from the court records) is not engaged, there being no application by a third party. It is the Claimant who is "seeking access" (Dring Proposition (iv): §27 above), in the context of documents which she has already seen and has in her possession, herself and through her lawyers. However, I am satisfied that the following principles are engaged: the open justice principle; the balancing exercise which considers, on the one hand, "the purpose of the open justice principle and the potential value of the information in question in advancing that purpose" and, on the other hand, "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others" (proposition (v)); which balancing exercise considers the "very good reasons for denying access" which include "national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality" (proposition (vi)); and which exercise also considers "the practicalities and the proportionality of granting the request" (proposition (vii)).

33.
These principles are engaged, in my judgment, for the following reasons. (1) The Claimant is "seeking to persuade the court to allow access" (proposition (ii)). A party to proceedings may wish to invite the Court to exercise its inherent jurisdiction to allow access to court documents, which access that party is itself intending to provide. That would be the court allowing access to materials used in the course of court proceedings. It would fit with the rationale for doing so as being the open justice principle. It would also fit with the idea that the person asking for access can be expected to give their reasons, and explain how those reasons further the open justice principle, both of which could in an appropriate case be applied to a party. A litigant may promote open justice through communication with a journalist, including providing access to court documents. (2) The open justice principle can be engaged where the Court is considering the exercise of its power (CPR 5.4B(1)) to restrict the right of a party to obtain from the court records documents listed in CPR PD5A §4.2A, or its power (CPR 5.4B(2)) to give permission in respect of documents not listed there. (3) The open justice principle can be engaged where the court is considering the "use" which a "party" may make of a disclosed document, where the court is considering the exercise of its power (CPR 31.22(2)) to restrict or

prohibit use of a document which “has been read to or by the court, or referred to at a hearing which has been held in public”, or of its power (CPR 31.22(1)(b)) to give permission to a party to make use of a disclosed document not falling within that description (CPR 31.22(1)(a)), to whose use the disclosing party and the person to whom the document belongs do not agree (CPR 31.22(1)(c)). It would be odd and surprising if such questions did not engage considerations arising under the open justice principle. The very design of CPR 31.22, although concerned with what a party to proceedings can or cannot do with disclosed documents, is reflective of considerations of open justice (“the document has been read to or by the court, or referred to, at a hearing which has been held in public”). (4) The open justice principle can also be engaged where the Court is considering a non-party application for access to documents, such as skeleton arguments (Law Debenture at §22(ii)), even if the non-party’s “motive” for access relates to informing themselves as to the course they ought to adopt in other litigation (§22(iv)). So, a non-party may pursue access to court documents for a collateral reason, invoking open justice. It would be very odd and unsatisfactory if a party could not pursue access to court documents for an open justice purpose. (5) In Harman the access to the documents was from a party’s solicitor to a journalist. The dissenting judgments of Lord Scarman and Lord Simon referred to mapping out “the true path forward” (316G-H). That was the path subsequently taken by the rules (see §20 above). In a key passage, they linked the open justice principle to freedom of communication and the position of the litigant and their advisers. Lord Scarman and Lord Simon said this as to open justice and freedom of communication:

… the common law by its recognition of the principle of open justice ensures that the public administration of justice will be subject to public scrutiny. Such scrutiny serves no purpose unless it is accompanied by the rights of free speech, ie the right publicly to report, to discuss, to comment, to criticise, to impart and to receive ideas and information on the matters subjected to scrutiny. Justice is done in public so that it may be discussed and criticised in public. Moreover, trials will sometimes expose matters of public interest worthy of discussion other than the judicial task of doing justice between the parties in the particular case.

They then said this as to the position of a litigant and their advisers:

It cannot be desirable that public discussion of such matters is to be discouraged or obstructed by refusing to allow a litigant and his advisers, who learnt of them through the discovery of documents in their action, to use the documents in public discussion after they have become public knowledge.

If the open justice principle can be relevant in the context of a party to proceedings and what use can be made of disclosed documents, there is no reason why the open justice principle should not be relevant in other contexts where a party is seeking to invoke the inherent jurisdiction so as to be able to supply other court documents to third parties such as the media.

34.
There is, in my judgment, every reason why the Court’s jurisdiction should extend to the exercise of the powers contained in the rules and the inherent jurisdiction to “allow access in accordance with” the “guiding principle” concerning “the need for justice to be done in the open” (proposition (ii)). There is, in my judgment, every reason for concluding that the “constitutional principle of open justice applies” to this case involving the exercise by the court of “the judicial power of the state” and that, “unless inconsistent with statute or the rules of court” I should approach the issue on the basis that I have “an inherent jurisdiction to determine what [the open justice] principle requires in terms of

access to documents or other information placed before the court …", so that the "extent of any access permitted by the court's rules is not determinative".

Key points made by the Claimant

35.
Key contentions advanced, on behalf of the Claimant, by Mr Willems QC and Mr Edwards included the following. The documents properly attract the exercise of the Court's inherent jurisdiction to allow access to Court documents "in order to promote open justice" and in order to "allow the public to understand" the HRA Declaration made by the Court. Seven of the eight documents (the exception being (viii) the NICHE report) were expressly referred to in the Substantive Order and were, expressly, part of the basis of the Court making the HRA Declaration. They were stated to have been read by, and were expressly relied on by, the Court in doing so. The NICHE Report was a key further document which the Court can be taken to have read and relied on. A member of the public, or legal commentator, wishing to understand the basis for the Substantive Order could not properly do so without having access to the documents as key documents on which the Court stated it had relied. The principles of open justice require that the documents be made publicly available. The Claimant should be entitled to explain, by reference to the documents relied on by the Court, why the HRA Declaration was appropriate. She should not be an HRA "victim who is unable to explain why the [HRA] Declaration was appropriately made". These were documents read by the Court in preparation for trial and, although there had here been no trial or hearing, there has been a judicial determination. Individuals associated with the Defendant, whose actions mean that the Defendant acted in breach of the Claimant's HRA rights have already been named and are identifiable from the pleadings. They are persons in respect of whom no anonymity order had or has been sought, and none is justified as necessary. The Defendant has pointed to no issues such as the interests of children or mentally disabled adults or privacy interests or protection of trade secrets or commercial confidentiality. The Court has the inherent jurisdiction to allow access to court documents, where necessary to give effect to the open justice principle and "the need for justice to be done in the open" (Dring at §34). For access to be denied on the basis that there had been "no hearing", would undermine the "two guiding principles that provide the purpose of open justice" (Dring at §§37, 43). It would mean "an illogical technicality that relates to how justice used to be done and how it is done today" where (as seen in CPR PD54A §16.2) "in order to achieve efficiency within the Court system important judicial acts such as the approval and making of Declarations pursuant to the [HRA] can be done in writing without the need or expense of arranging for a hearing". The Court should use its inherent jurisdiction to "prevent the 'hearing' argument standing in the way of open justice". It would be damaging to open justice if the State could "make concessions in order to avoid public scrutiny", which would moreover "deter claimants from attempting settlement so that claims are heard in open court". It would be "ironic" if a case involving serious HRA breaches, "where concessions were properly made", "public scrutiny could be avoided". In the present case, the Claimant's stated preference and expectation had been that there would be a hearing. The Court had gone to "great lengths" in the Substantive Order to identify the documentation which it had considered and relied on. The Claimant has "set out all the potential reasons for wishing to have the ability to disclose documentation" (§39 below). There is a strong public interest in open justice in the present case. It is "believed that this is the first time that the National Health Service has been found to be in breach of Article 3 and the first time in breach of Article 2 where the victim was not in a hospital setting but was instead entitled to s.117 MHA 1983 aftercare provision and the victim has survived".

Key points made by the Defendant

36.
Key contentions advanced, on behalf of the Defendant, by Mr Feeny and Mr Lawson included the following. The Claimant's application for access to the Documents extends beyond the liberty to apply (Operative Paragraph 4). The stated reasons why access to the documents is sought by the Claimant "in practical terms would amount to wholesale use", involving "free use of the documents" after "merely indicating ways that documents could be used". CPR 5.4C has no application, since the Claimant is a "party" (who already has the documents covered by CPR 5.4B), and has been wrongly characterised by the Claimant as meaning "statements of case" are "publicly available". CPR 31.22(1)(a) is inapplicable where there "has been no hearing". It would be "wholly inappropriate" for the Court to consider making an order for access to Documents (i)-(vii) "on the basis of the information provided by the Claimant". This "would require considerably more detail". The written submissions are "very voluminous" and "contain a considerable amount of material to which there is legitimate objection to wider use". They "quote extensively" and "selectively" from the disclosed documents and "effectively disclose much of the bundle", with "quotes from a large number of disclosure documents". They "quote the Claimant's preferred part of the disclosure" and the Claimant suggests no redaction from any disclosure information referred to. The Claimant should instead identify specific disclosed documents and identify a specific purpose for seeking permission to use them. This is a "wholesale disapplication of CPR 31 through the release of submissions". The written submissions "cannot explain what the Court did", and they extended to "many things which are not in the [Substantive] Order". They also contain "specific allegations of misconduct against named individuals", which are not "supported by evidence", are not admitted, and were not part of the agreement to compromise the litigation. Use of the written submissions would mean "named individuals" should be "entitled to be heard". As "authors" of the "various allegations" made in the Claimant's written submissions, the "Claimant and her advisers" may "choose to reiterate them subsequently", but this "should not be done on the basis of asserted association with the Court". There are important policy reasons for CPR 31.22, to protect disclosed documents and the information derived from them, reflecting the due administration of justice, given the invasion of rights constituted by the rules of compulsory disclosure in civil proceedings. Cogent and persuasive reasons are needed for permission under CPR 31.22(1)(b) and none have been shown. As to written submissions, there has been no public hearing at which they were deployed. The cases, collectively, emphasise the continued relevance of whether there has been a hearing, to the application of the open justice principle. The Claimant has identified "no particular information" from the Documents, and no information which she says is "only available from disclosure documents". The Defendant has not supressed the NICHE Report, which has been sent by it to various relevant public authorities. The Substantive Order contains its own "very full explanation", being "a proper and public explanation of the order". The Dring case is "not relevant", as it "dealt with the rights of non-parties to access documents". Finally, the Defendant did not consider "redaction" of any document to be "an issue at this stage", or to be "proportionate, pending any order".

Access and the Judgment in default (document (vi))

37.
The Judgment in Default is document (vi) in the Claimant's Proposed Operative Paragraph (§6 above). It is described in the Substantive Order (recital [3]). The trial was to be, in part, for the assessment of damages pursuant to it (recital [5]). That matter was, in the event, dealt with by settlement agreement (recitals [7], [11]), a description of one component of which was the subject of an agreed recital (recital [9]). The financial settlement did not require approval (recital [10], reason (1)) and its terms were embodied in the order by consent (operative §1), including an agreed costs order (Operative

Paragraph 3(a)). This aspect was not the subject of my “judicial act” of being satisfied as to appropriateness (reason (2)). The judgment in default is a 4-page Court Order, made on 12 April 2019 and sealed on 29 April 2019, being recorded in paragraph 1 of that Order. It records in its recitals that it was an Order made after a hearing at which Counsel for both parties were heard. The Order is anonymised, in accordance with the Anonymity Order. In its submissions – so far as discernibly relevant to the judgment in default – the Defendant has submitted: that the Claimant “has an entitlement to certain documents under the provisions of CPR 5.4B” and “already has copies of these documents”; that “she has access … already”; and that “the cases show the continued relevance of whether there has been a hearing to the application of the open justice principle”. In my judgment, the Claimant must be entitled to use the judgment in default other than for the purposes of the proceedings, including by way of disclosure to third parties, including media organisations. My reasons are as follows. The judgment is a Court Order. It is anonymised and complies with the terms of the Anonymity Order. It was a Court Order made after a public hearing, which would in my judgment fall within the “general rule” as to accessibility on the part of a non-party from the court records (CPR 5.4C(1)(b)). Even if the parties – and both of them – were to decline to provide a copy of the judgment in default to such a third party, I can think of no proper basis – and none in my judgment has been given by the Defendant – on which access could justifiably be refused. The judgment in default, in my judgment, falls squarely within CPR PD5A §4.2A(j) (“a judgment or order given or made in public (whether made at a hearing or without a hearing”), engaging the Claimant’s entitlement to obtain it from the court records (CPR 5.4B(1)) – if she did not already have it – an entitlement which applies “unless the court orders otherwise”. Suppose she had never received it, or had lost it, I can think of no proper basis – and none in my judgment has been given by the Defendant – on which access could justifiably be refused. Nor why the Court would be justified in refusing “permission” (CPR 5.4B(2)), insofar as it were characterised as an “other document”. This is a Court Order, in the Claimant’s favour, which vindicated her claim. No rule or practice direction prohibits, or contingently prohibits, use other than for the purpose of the proceedings: the judgment in default is not a “disclosed” document for the purposes of CPR 31.22(1). In a fact-specific balancing exercise, the purposes of the open justice and potential value of the information decisively outweigh any risk of harm to the maintenance of an effective judicial process or the legitimate interests of others, and the granting of access will not be impracticable or disproportionate.

Access and the Substantive Order

38.
To be clear, the Claimant must – equally – be entitled to use the Substantive Order other than for the purposes of the proceedings, including by way of disclosure to third parties, including media organisations. That too is a Court Order, in her proceedings, in her favour and vindicating her claim. If she wishes to communicate it to any third party, including media organisations – provided always that the Anonymity Order is adhered to in any reporting of the proceedings – she is fully entitled to do so. The Defendant has the same entitlement. Nobody has suggested the contrary. Had I thought – when making the Substantive Order, or now – that this required the Substantive Order to be “given or made in public”, I would have (and would now still) listed the case for pronouncement in open court, with attendance by the parties dispensed with. I made clear at this point in the confidential draft judgment circulated to the parties that they would be able to consider this, and would be able to liaise, as to whether anything needed to be said about the Substantive Order in the Order which I make. In the event, they were agreed that this was unnecessary. The Defendant’s submissions on the satellite issue themselves describe the contents of the Substantive Order as containing a “public” explanation of the order.

Why access to documents is being sought

39.
As to “why” the Claimant is seeking access to the court documents (Dring §45 and Dring Proposition (iv): §§26-27 above), she has put forward these key points. (1) Access will “promote Open Justice” and “enable the Public to understand” the HRA Declaration, as well as understand “the matters behind the Judgment in Default” (Claimant’s Proposed Order, second recital: §6 above). (2) The purposes for which the documents would be usable by the parties would include “to disclose[them] to third parties”, specifically “including media organisations” (Claimant’s Proposed Operative Paragraph: §6 above). (3) The “purposes for which it is intended that the … documents would be used by and on behalf of the Claimant” have been identified for the Court (Claimant’s Further Submissions 19.10.21) as being “(a) in respect of current and future communications with, meetings with and hearings before the relevant statutory and regulatory bodies, including the Safeguarding Board, the CQC, the CCG, the Police and the NMC; (b) in pursuance of the Claimant’s role as an Expert by Experience; (c) in respect of the Claimant’s dealings with recognised media organisations which intend to report on the [Substantive] Order and on the wider implications of the Claimant’s case; and (d) in articles and in academic texts examining the legal implications of the Claimant’s case and the [Substantive] Order”.

An entirely legitimate interest

40.
In my judgment, this explanation of why access to documents is being sought by the Claimant reflect and constitute an “entirely legitimate interest” (cf. Law Debenture at §13: §24 above). As I see it, there are – at this stage of the analysis – five key points.

(1)
The Claimant has convincingly demonstrated in the explanation given, so far as the HRA Declaration is concerned, “how access will advance the open justice principle” (Dring §45, Dring Proposition (iv): see §§26-27 above). By means of the Substantive Order, I have decided a case. I have performed a judicial act, discharging my public judicial function. I have given reasons. But I have not given a judgment. Access to documents in this case can promote the “public policy in the administration of justice”; it can promote “public scrutiny of the way in which courts decide cases”; it can promote effective “policing” of myself as a judge dealing with this case in the way that I have; it can serve “to hold” me as a judge “to account” for the decision that I have made; it can serve to inform whether in this case I have been “doing my job properly”; it can “enable the public to have confidence”; it can serve to “enable the public to understand how the justice system works” and “why decisions are taken”, by being “in a position to understand the issues and the evidence adduced in support of the parties’ cases” (see §27 above). All of these points arise, moreover, in the context of a judicial determination made without a hearing (§§12-16 above), and without a judgment of the Court. There is an “entirely legitimate interest” in my decision and decision-making in this case – and its implications for the system of justice – being scrutinised, commented upon, criticised, disapproved of, or approved of. It is important that a judge embraces the prospect of scrutiny, and facilitates its effectiveness.

(2)
Secondly, all of this arises in a situation where this is the Claimant’s case, based on her lived experience of what has happened to her, where she was claiming violation of her human rights under the HRA, and where she has a substantive determination of that case by this Court. It would be different, if and insofar as documents being sought had been prepared for a judicial evaluation of quantum of damages. Quantum of damages was settled. There was no need for judicial approval. Like

the scenario discussed in SmithKline (§23(4) above), this part of the case was dealt with "by consent" and "without more", where it did not matter what material I had read, and where there was never going to need to be argument and the citation of materials. For the same reasons, I am not convinced that anything is added by – or anything can be based on – the additional reference (Claimant's Proposed §2) to public understanding of the "matters behind the Judgment in Default". That was a judgment based on the Defendant's "default" in the proceedings. So far as concerns the HRA Declaration, the scrutiny of the public administration of justice is alongside the Claimant's entirely legitimate interest in being able (in the words of Lord Scarman and Lord Simon: §33 above) "to report, to discuss, to comment, to criticise, to impart and to receive ideas and information" about her case, in which the Court has made a judicial determination; by using documents in "discussion" – including "public discussion" – of the "justice … in the particular case", but also in "matters of public interest worthy of discussion" which these proceedings have served to "expose".

(3)
Thirdly, all of this arises in a context where there is an Anonymity Order (see §8 above). That Order has been made because it has been shown to be necessary. It follows that any discussion of this case would need to be consistent with and compliant with that Anonymity Order. The Claimant and her representatives are well aware of that. The Claimant will be able to speak about this case, within the confines of and consistently with, the anonymity protection which she has secured from the Court. On the other hand, in respect of no other person has there – in the 4½ years since the Anonymity Order was made (12.7.17) – been any application to this Court for any order involving any restriction or prohibition, still less one seeking to demonstrate that some other person has a justified reason why anonymity is necessary.

(4)
Fourthly, the application made by the Claimant in relation to access to court documents is a targeted one. There are four sets of written submissions and four other specified documents. The two documents which needed anonymised initials to be regularised have been filed with the Court. There is no problem of practicality, and there has conspicuously been ensuring proportionality (Dring §47; Dring Proposition (vii): see §§26-27 above). The documents are identified as principal documents in the case, relevant to the HRA Declaration. Putting this into context, the Main Trial Bundle alone contained 2197 pages. There were, within it, 3 Joint Statements of Experts (Psychiatry, Care and Health & Welfare) (Main Trial Bundle pp.301-320); 30 expert reports (pp.321-1150); 18 witness statements (pp.1151-1798); and 4 items of other documentation (pp.1799-2197). In preparing for the trial, I needed to commission – for my Judge's room at the Manchester Civil Justice Centre – five 'stowaways' (units of cardboard shelving), each able to hold 6 lever arch files, all of which were printed double-sided. Once all submissions on the satellite issue had been received and I had been able to give them a 'first read', I was able to prepare from the documents filed by the parties – and from the Main Trial Bundle – the materials which are the subject of, and relevant to, this satellite issue (and the remaining costs issue). Leaving aside authorities, these fit within a single lever arch file, within which are the eight documents (including the two newly redacted versions), together with all the submissions on the court orders, pleadings and the relevant email traffic. The targeting of the request is illustrated by the portability of the materials, back to London, for my deliberating on the issues and then the preparation of this judgment.

(5)
Fifthly, all of this operates in a way which is even-handed between the parties. The Order sought does not seek to place the Claimant at an advantage over the Defendant as to court documents to which

she can provide access. The Claimant's Operative Paragraph would involve the Court ordering that "the parties" have the Court's "permission" to "use" the documents. The documents include the written submissions of Claimant (documents (i) and (ii)) and of the Defendant (documents (iii) and (iv)) and the expert statement is a Joint Statement (document (v)). The design of the proposed order would mean that, if and insofar as points are made in the public domain about this case, the Defendant would in principle be able to be making them or responding to them, on equal terms, respecting the Anonymity Order. The Defendant would be able to provide access to the documents to any person who it considers ought to be able to do the same. The Defendant was, moreover, able to point to any further document or documents inclusion of which was said to be necessary in the interests of promoting balance and even-handedness.

What if there had been a "SmithKline Hearing"?

41.
In my judgment, there is a sure way of testing the position – as a matter of principle – in a case where the Court has adopted the course of making a HRA Declaration without a hearing, whether for the reasons I gave in this case (Recital 15; Reason (4)) or in a judicial review case pursuant to CPR PD54A §16.2 (§14 above). The test is this. Suppose I had done the equivalent of what Laddie J did at the hearing in SmithKline on 7 May 1998 (§22(1) above), a hearing which Lord Bingham CJ described as "very short indeed" in SmithKline. In what I will call a "SmithKline Hearing" I could have entered the Court room, with Counsel present in the room or on screens by way of a hybrid hearing. After a brief discussion with Counsel, I could have said this (supposing a transcript of the Hearing):

MR JUSTICE FORDHAM: Mr Willems QC, and Mr Feeny. I have read the papers. Thank you for your industry and assistance. I am satisfied, based on what I have read, as to the appropriateness of the HRA Declaration. In relation to that, I do not need to trouble you and I do not need either of you to outline the position. I am going to make an Order, embodying the HRA Declaration on which the parties, for their part, are agreed. I am also going to deal with the other aspects which are relevant for inclusion. In order to explain what I am doing, I will need to identify 16 background points, then make an Order which involves 5 operative paragraphs, and then give my reasons. What I am about to say will be embodied on the face of a Court Order which I will make, with the 17 background points recorded in the form of recitals, prefixed by the conventional phrase "and upon". The explanation is this. [The Judge proceeded here to read the Substantive Order, aloud, and in its entirety.]

42.
The questions which arise out of this include the following. What would the correct and principled analysis be, of the Claimant's application for access to the documents, if there had been a SmithKline Hearing? How would the Counterbalancing Concern (§28 above) manifest itself, in the context of my decision not to have even a SmithKline Hearing, but to determine the HRA Declaration without a hearing? What would the position be if this had been a claim of breaches of the HRA which had been brought by judicial review, or if the claim for declarations of breaches of the HRA had been transferred for resolution in the Administrative Court following the Judgment in Default, and if the HRA Declaration had been dealt with, without a hearing, pursuant to PD54A §16.2? Insofar as there is an asymmetry, in terms of the open justice principle and access to court documents, between determination of the HRA Declaration without a hearing on the one hand, and with a SmithKline Hearing on the other hand, what action would it have been appropriate for me to take as the Judge dealing with the matter?

43.

In my judgment, these questions permit of answers at the level of principle.

(1)
If there had been a SmithKline Hearing, so far as concerns the assessment of damages pursuant to the Judgment in Default (Substantive Order Recital (5)(a)), I would "without more" simply be recording (Operative Paragraph 1) the agreed compromise of the parties, on the "basis" of their "consent". It would have been like the scenario discussed by Lord Bingham CJ in SmithKline (see §23(4) above). I was not performing the "judicial act" of approving a settlement (Recital [10]). I was not determining whether the agreed quantum was "appropriate". On this issue, it did not matter "how much" material I had read, or "how carefully". Applying the what would have happened approach (see §23(1), (2), (4) and (5) above), if I had walked into the court room having read nothing, there would have been no submissions or citation of materials in relation to the quantum of damages of £1.7m (net of interim payments).

(2)
If there had been a SmithKline Hearing, so far as concerns the HRA Declaration (Substantive Order Recital (5)(b)), the position is different. Focusing on the "reality" of what was happening (§23(2) above), there were documents before the Court which were being relied on by the parties, in relation to the question of breach of the HRA. There were documents which I had, and needed to have, "read" and "absorbed". The "judicial act" of my making the HRA Declaration, "plainly", needed to be and was "based on the material before" me. The HRA Declaration could only be "appropriate" if I was of the opinion that there were "grounds" for it, which were "made out". What would have been relieving me of the "need" to "ask for the grounds … to be expressly outlined" to me, would have been my reference – a "compendious" one – to what I "had read". This was what would have "enabled" me to "conclude" that the HRA Declaration was "well-founded". Again, applying the what would have happened approach (§23(1), (2), (4) and (5) above), if I had walked into the court room having read nothing – or having not read and absorbed a sufficiency of materials – there would have been submissions and the citation of materials in relation to the HRA Declaration. In these circumstances, and having regard to the authorities, the consequences of a SmithKline Hearing would have included the following. The written submissions deployed at the Hearing, and documents placed before the Court and referred to at the Hearing, would attract the "default position" in favour of access (Dring §§38, 44: §26 above). Deployed at the hearing would be "from the very moment" when the hearing commenced (Law Debenture §34: §25(7) above). Deployed at the hearing (or referred to) would include the Judge's pre-reading and a "compendious reference" to it (SmithKline p.14: §23(2) above). The principled approach to access to court documents, including the protection of legitimate interests (Dring Proposition (vi): §27 above; also Eurasian Natural Resources Corp Ltd v Dechert LLP [2014] EWHC 3389 (Ch) [2015] 1 WLR 4621 at §§57-58).

(3)
It can be argued (as Mr Feeny has): that there was no hearing; that this makes a difference to the application of the powers which the Court has so far as access to court documents are concerned; that no documents were 'deployed at a hearing'; that this matters; that it makes all the difference as to the applicability of CPR 31.22(2)(1)(a) (see §20 above); and that it makes a substantial and significant difference – to the application of the principles which govern access to court documents – that the Court's judicial act was a determination without a hearing.

(4)
But the answer to that, at the level of principle, is that the Court has the powers – and should be prepared to use them – to avoid a substantial and significant difference of that nature. A helpful

reference point is a description given by Lord Woolf MR in 2000, in the context of a hearing and judicial pre-reading, but which is a good fit with the judicial act of a substantive determination made without a hearing. It is found cited in Dring in the Court of Appeal [2018] EWCA Civ 1795 [2019] 1 WLR 479 at §77; and in Eurasian at §55. Lord Woolf MR said this:

If the [documents] had been read in open court they would have been in the public domain. If they were read by the judge, in or out of court, as part of [the judge's] responsibility for determining what order should be made, they should be regarded as being in the public domain.

The exercise of the "responsibility for determining what order should be made" is a description which fits with the situation where a substantive judicial determination is made, but without a hearing.

(5)
It is true that the Counterbalancing Concern (§28 above) has been expressed in the context of counterbalancing the use of the written word, rather than traditionally the spoken word, at a hearing. A SmithKline Hearing is a classic illustration of a hearing, at which the determination is "based" exclusively on the spoken word, by reason of the comprehensive pre-reading, in circumstances where no party is opposing the order which is sought. It is a judicial act (§10 above). It is "part of the public judicial function", and one of the "dimensions" of the "judicial process" to which the open justice concern about "maintenance of the quality of the judicial process" must apply (Law Debenture §34: see §25(3) above). There is, in my judgment, no reason in principle why the Counterbalancing Concern should not feature equally when the judicial process is based on the 'spoken word' to the logical conclusion, of a substantive determination known as being made "on the papers" (without a hearing). Determination without a hearing – like determination with a SmithKline Hearing, in a case where the parties are agreed as to the final order which the Court should make – is a situation where a Judge's comprehensive reading and the use of and reliance on the documents by the Court enable the Judge (Law Debenture §33: §25(6) above): "to proceed as if there previously had been a hearing". The Court has ample powers to address the Counterbalancing Concern and to deal with issues relating to access to court documents. The Counterbalancing Concern – by which I mean the idea which animates its various articulations (see §28 above) – is in my judgment, in principle, plainly relevant to the situation where the Court could make its judicial act (a) in the Judge's private room behind the courtroom or (b) in the public court room itself.

(6)
If this is wrong, and if there really is a substantial and significant difference – in terms of the open justice principle and access to documents – between the Court making the HRA Declaration without a hearing, and with a hearing (whether a SmithKline Hearing or some fuller hearing), then the impact of that logic would in principle be as follows. The Judge should not – whether acting in the procedural context of judicial review (including HRA breaches) and PD54A §16.2 (§14 above) or CPR 54.18 (§15 above), or whether acting outside that procedural context (such as in the present case) – proceed to a determination on the papers without recognising the comparative restriction of the open justice principle which this entails. The parties, whether by their agreement as to mode of hearing (CPR 54.18) or their agreed final order (PD54A §16), secure a position where the purposes of the open justice principle are undermined. Unless satisfied that there will be no such curtailment, or that such a curtailment is justified, the Court should always convene a SmithKline Hearing. If that is the position, the hearing will not be needed for the Court to be able to perform its judicial act, and the avoidable costs incurred by the parties could have been spared, but the hearing will – always – be needed for the Court to be able to perform its judicial act, in a way which promotes the "principle of

open justice which ensures that the public administration of justice will be subject to public scrutiny" (§33 above) and which secures the purposes of open justice to enable the public to understand how the justice system works, why decisions have been taken and that judges are doing their job properly. Judicial determinations without a hearing must not be judicial determinations in the shadows, and if it is a short hearing in a courtroom that is needed to bring the sunshine scrutiny of open justice then that it what must happen. Had I thought – then or now – that this was the position, I would unhesitatingly have had a hearing in the courtroom.

Documents (i)-(iv): The written submissions

44.
The first four documents described in the Claimant's Proposed Operative Paragraph (§6 above) are the parties' written submissions. Added together, they are 170 pages of submissions. I will describe them. (i) The Claimant's Opening Submissions (27.9.21) were a 56-page document prepared for the trial. It comprised: introductory pages (pp.1-9); a lengthy and detailed section regarding the HRA and breach (pp.9-51); a section on the common law claims (pp.51-53); and some miscellaneous topics relating to the trial (pp.53-56). The accompanying Scott Schedule (27.9.21) was a 51-page document constituting a "Schedule of Claimant's [HRA] Claims, Relevant Admissions and Witness/Expert Evidence", prepared by reference to the paragraph numbers within Appendix A to the Amended Particulars of Claim (20.11.20), in which the Claimant's pleaded case on breach of the HRA had been set out in detail. (ii) The Claimant's Further Submissions (11.10.21) were a 27-page document which: began by recognising that HRA declarations "are, ultimately, a matter for the Court and that the Court will need to be satisfied as to the appropriateness of both the scope and wording of the declarations to be made"; set out "to explain, from the Claimant's perspective, why the proposed declarations are appropriate and, critically, supported by the evidence"; and which addressed "evidence in support of the proposed Declarations" by reference to each of the Agreed Five Heads (Recital [12]); included a short Appendix containing submissions on topics relating to trial and the conduct of the litigation. (iii) The Defendant's Skeleton Argument (29.9.21) was a 30-page document prepared for the trial, which did not elaborate as to quantum of damages (the Defendant's position being set out in its Counter-Schedule of Loss), but which addressed the Claimant's HRA claim (by reference to the Claimant's pleaded HRA claim in Appendix A to the Amended Particulars of Claim) including: relevant key events in the litigation; evidence/facts; the judgment in default and admissions; sexual behaviour and Article 3 ECHR; operational duty under Articles 2 and 3 ECHR; and other key topics. (iv) The Defendant's Note on the Draft Order (11.10.21) was a 6-page document which: recognised that whether to make the HRA declarations was a matter for the Court; explained why the Court should not accept submissions by the Claimant going "beyond the agreed declaration into contentious parts of the evidence"; identified and discussed authorities relevant to the nature of the judicial act; explained what was not within the parties' specific, agreed declaration; and explained that much of what was being submitted by the Claimant in the Further Submissions was disputed and irrelevant to the specific question raised by the agreed declaration.

45.
I am satisfied that it is justified as appropriate, in the exercise of the Court's inherent jurisdiction, having regard to the open justice principle and the interests of justice, to record that both parties have permission to make use of the written submissions (documents (i)-(iv). I would go further: I am satisfied that it is necessary. My reasons are as follows.

(1)

I read these written submissions and I relied on them in my judicial act of determining that it was appropriate to make the HRA Declaration. I specifically asked myself the question: what were the relevant written submissions for the purposes of my judicial act? I was aware that documents (i) and (iii) were written submissions which had been intended for the trial. Nevertheless, they were written submissions whose primary object and predominant content had been for the parties to address the claims of HRA breaches. I specifically recorded documents (i)-(iv) as having been the parties' "written submissions before the Court" (Recital [13]), to which "written submissions" I then made express reference as being part of the "basis" on which the Court was "satisfied" that it was "appropriate to make this Order including the [HRA] Declaration" (Recital [15]); Reason (3)), that being the Court's judicial act (Operative Paragraph 2). No contention has been put forward that there is some justification for excluding some parts of the written submissions (cf. Law Debenture at §§36-37: §24 above). An example of that would have been if the Defendant could identify sections of the written submissions which were addressing the quantum issue which was dealt with by consent, "without more" (§32(1) above).

(2)
Although Documents (i) and (iii) were written for the trial of what – when they were written – was a contested issue of whether the Defendant had breached the HRA, that was the necessary and inevitable backcloth for consideration of the HRA Declaration and its appropriateness. Documents (ii) and (iv) were not filed in substitution for (i) and (iii), in circumstances where the parties had agreed a final order. Nor were they standalone documents. There was no freestanding, joint statement (cf. CPR PD54A §16.1). Document (ii) from the Claimant made express reference to Document (i). It said (on p. 2): "The legal basis for the proposed declarations was explained in the Claimant's Opening Submissions, to which reference will be made, as required". The focus of Document (ii) was to discuss the "evidence in support" of each of the Agreed Five Heads. It did not address the law, or the authorities, or the route from the (evidenced) Agreed Five Heads to the conclusions of HRA breach. If I had been sent Document (ii) without Document (i) I would have asked for the latter. If I had been asked to make the HRA Declaration without reference to Document (i), I would have declined, insisting on a more comprehensive set of written legal contentions from the Claimant. Document (iv) from the Defendant was 6-pages (19 paragraphs). It did not set out a position on why the Agreed Five Heads was supported by the evidence, nor on the route from them to conclusions of HRA breach, still less on a standalone basis. Indeed, it made submissions criticising document (ii) for including points which were said to be "disputed" and "irrelevant". What I had to decide was whether the Five Agreed Heads were supported by the evidence and, in particular, whether they supported a conclusion of HRA breaches – as agreed – in light of the authorities and legal analysis. If Document (iii) had contained, emanating from the Defendant, a cogent legal answer to why the five matters from those being alleged – now being the Agreed Five Heads – could not in law support a conclusion of breach of the HRA, I could not have made the HRA Declaration without going back to the Defendant to explain how it was now accepting HRA breach. If I had been sent Document (iv) without Document (iii) I would have asked for the latter. If I had been asked to make the HRA Declaration without reference to Document (iii), I would have declined, insisting on a more comprehensive set of written legal contentions from the Defendant.

(3)
The Defendant is correct when it submits that the written submissions contain references to the evidence, including disclosed documents, including quotations. But that is inevitably what a good and helpful skeleton argument does: see Law Debenture at §20 (§25(2) above). I needed reference to the evidence in order to understand what was being relied on, in particular in relation to the Agreed Five

Heads, so as to be “satisfied that there are sound reasons to accept … the matters which the parties have agreed” (Reason (3)), being “satisfied … in light of the evidence” (Recital [15]). The Defendant is also correct when it points out that the Claimant’s written submissions, especially those submissions prepared for the trial, included submissions relating to aspects of HRA breach which was not the subject of agreement, going beyond the Agreed Five Heads and beyond the HRA Declaration. A good example of this is the Claimant’s claim that there has been no effective independent investigation putting the Defendant in breach of positive obligations under the HRA to ensure that one has been conducted. The Agreed Five Heads and the HRA Declaration does not involve a finding of such a breach. If it had been maintained when the case was settled, then there would have been “outstanding issues needing to be resolved” at a trial, as in the Wilson case (Reason (4)). It is not uncommon for a skeleton argument to cover issues which, at a hearing, the Court is told are not now being pursued. That is not a reason to decline to provide a member of the press or public with a copy of the skeleton argument for the hearing. The same is true as to a skeleton argument and an issue which has not yet been reached, when the case settles: Law Debenture at §35: see §25(7) above). Indeed, one of the points being made in Document (iv) involved making the Court aware that the HRA Declaration did not cover the entire ground of those HRA breaches which had been alleged. The fact that the Court had visibility on those matters, and the submissions concerning them, does not begin to undermine the basis for granting permission to use the written submissions.

(4)
The Claimant has given a legitimate reason, pointing to an entirely legitimate interest. The open justice principle and its purposes are engaged and promoted by access, which will enable a person reading the skeletons better to understand the judicial function that I discharged, and better able – if they wish – to criticise my decision, process or reasoning. These things are in the public interest. There is no breach of anonymity. No cogent reason – the familiar ones being national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests, the protection of trade secrets, or commercial (Dring Propositions (vi) and (viii): §27 above) has, in my judgment, been identified. There is no problem of proportionality or practicality. In a fact-specific balancing exercise, the purposes of the open justice and potential value of the information decisively outweigh any risk of harm to the maintenance of an effective judicial process or the legitimate interests of others, and the granting of access will not be impracticable or disproportionate.

(5)
If I had conducted a SmithKline Hearing (§41 above) and if, at the hearing, a member of the press or public had asked for a copy of the written submissions (to which I was going to refer when reading out Recital [13]), I would have allowed the parties’ Counsel to make observations. Had Mr Feeny made submissions along the lines of his submissions filed on the satellite issue, I would have allowed the member of the press or public to have copies of the written submissions, there and then.

Document (vii) the Admissions

46.
Document (vii) in the Claimant’s Proposed Operative Paragraph (§6 above) are the Admissions dated 31 May 2019 filed by the Defendant. This is a two-page document containing 12 paragraphs. In it, the person who has been referred to as “PD” was given their full name by the Defendant. The Defendant declined the opportunity which I afforded it, to provide redacted versions of any documents, claiming that this would be disproportionate. I have taken it that the use of “PD” has been treated as necessary in the light of the Claimant’s own anonymity protection. There is, moreover, a virtue in consistency. The parties will be able to consider this, and liaise, on receipt of this judgment in draft. I am satisfied

that it is justified as appropriate, in the exercise of the Court's inherent jurisdiction, having regard to the open justice principle and the interests of justice, to record that both parties have permission to make use of the Admissions (document (vii)). Again, I am satisfied that it is necessary. My reasons are as follows. (1) I read these Admissions and relied on them in my judicial act of determining that it was appropriate to make the HRA Declaration. I specifically referred to them (Recital [4]) and described them as part of the materials to which I had "regard" in being "satisfied" that the HRA Declaration was appropriate (Reason (3)). (2) The Admissions were directly referable to the Five Agreed Heads (Recital [12]) which were the basis of the HRA Declaration. Admission §4 was directly relevant to Agreed Head (1); Admissions §§5-6 were directly relevant to Agreed Head (2). The Defendant's written submissions regarding the HRA Declaration (Document (iv)) themselves emphasised the link between "concessions" made by the Defendant and the Agreed Five Heads. The Claimant's written submissions (Document (i)) had opened with a synopsis of the case, in which several references were made to what the Defendant had admitted, referring me to the Admissions in the Main Trial Bundle. For that reason, the Admissions were one of the first documents in the case that I read. (3) The Admissions were a formal legal document filed by the Defendant in the proceedings, governed by CPR 14. They have a clear prominence and relevance to the HRA Declaration, based on the Agreed Five Heads. They materially assist in enabling observers and commentators to "understand the decision" which the Court has made, as with SKB's particulars of objection in SmithKline (§22(5) above). They are also a formal acknowledgment of ways in which the Claimant was badly let down by the Defendant. That is an important part of her story, in her case, which has led to a judicial determination by a Court. The Claimant has given a legitimate reason. The open justice principle and its purposes are engaged and promoted by access, which will enable a person reading the skeletons better to understand. There is (or need be) no breach of anonymity. No cogent reason has, in my judgment, been identified. There is no problem of proportionality. In a fact-specific balancing exercise, the purposes of open justice and potential value of the information decisively outweigh any risk of harm to the maintenance of an effective judicial process or the legitimate interests of others, and the granting of access will not be impracticable or disproportionate. (4) If I had conducted a SmithKline Hearing (§41 above) and if, at the hearing, a member of the press or public had asked for a copy of the Admissions (to which I was going to refer when reading out Recital [4]), I would have allowed the parties' Counsel to make observations. But had Mr Feeny made submissions along the lines of those filed on the satellite issue, I would have allowed access, there and then.

Document (v) the Agreed Joint Psychiatric Statement

47.
Document (v) is the Agreed Joint Psychiatric Statement of the expert psychiatrists. This is a 9-page document. It is 9 pages from the 850-pages of expert evidence that was included in the Main Trial Bundle. I am satisfied that it is justified as appropriate, in the exercise of the Court's inherent jurisdiction, having regard to the open justice principle and the interests of justice, to record that both parties have permission to make use of the Agreed Joint Psychiatric Statement. Here too, I am satisfied that it is necessary. My reasons are as follows. (1) I read the Agreed Joint Psychiatric Statement and relied on it in my judicial act of determining that it was appropriate to make the HRA Declaration. I specifically singled it out (Recital [6]) from the "evidence filed by the parties". I specifically referred to it as one of the materials to which I had had "regard" in being satisfied that it was appropriate to make the HRA Declaration (Reason (3)). (2) This was expert evidence which was relevant to issues of condition, prognosis and treatment, all of which were directly relevant to quantum if I was going to be determining quantum. In the event, that aspect of the case was compromised, and I recorded the figure agreed between the parties. (3) However, this evidence was

also directly relevant to the HRA Declaration. One of the statements of an area of agreement in this Joint Statement says this: “But for the abuse by PD, and the inactions of the Defendant Trust, we are agreed that UXA would have been significantly improved by end of 2016; manifest as a gradual reduction in the level of self-harm and numbers of inpatient admissions, which would have enabled her to move into a recovery and rehabilitation phase”. Another says: “We agree that the abuse perpetrated by PD made UXA’s pre-existing condition worse, increased her pre-existing vulnerability, prevented her from getting the treatment she needed and impeded her recovery”. These contents of the agreed expert evidence were directly relevant to Agreed Head (3) (Recital [12]) and relevant to my consideration of whether – as I reasoned – “the severity of the consequences and risks have appropriately been recognised by the parties as meeting the relevant legal thresholds in relation to the Convention rights” (Reason (3)). (4) Document (i) made reference to this material in the Claimant’s synopsis of the case, and, like the Admissions, it was one of the first documents I read (marking up the two passages to which I have just referred). (4) The Joint Statement is a formal legal document which was required for the assistance of the Court (CPR 35.12(3)), with a clear prominence and relevance to the HRA Declaration, based on the Agreed Five Heads. It would materially assist in enabling observers and commentators to “understand the decision” which the Court has made. It involves an acknowledgment from both experts, including the Defendant’s. It is an important part of her story, in her case, which has led to a judicial determination by a Court. The Claimant has given a legitimate reason. The Defendant has not suggested that parts of the Report should be excluded. The open justice principle and its purposes are engaged and promoted by access. There is no breach of anonymity. No cogent reason has, in my judgment, been identified. There is no problem of proportionality. In a fact-specific balancing exercise, the purposes of the open justice and potential value of the information decisively outweigh any risk of harm to the maintenance of an effective judicial process or the legitimate interests of others, and the granting of access will not be impracticable or disproportionate. (5) If I had conducted a SmithKline Hearing (§41 above) and if, at the hearing, a member of the press or public had asked for a copy of the Joint Statement (to which I was going to refer when reading out Recital [6]), I would again have allowed the parties’ Counsel to make observations. I would have wanted to know whether the Claimant (who plainly has a legitimate interest in relation to an Experts’ Joint Statement about her) was objecting to access to a report about her, and I would have addressed the implications for any objection of the anonymity and its continuation. Had Mr Feeny made submissions along the lines of those filed on the satellite issue, I do not think I would have allowed access there and then. I think I would have wanted to deliberate on the issue further, probably with skeleton arguments. But, having done so and having received submissions from the parties along the lines of those which have in the event been made, I would have permitted access to it for the reasons I have given here.

Document (viii): the NICHE Report

48.
Document (viii) is an 80-page Report dated 17 March 2017 which occupied pages 1799-1879 of the Main Trial Bundle. The Appendices started at page 1880 and the Claimant has confirmed that these are not included within the application on the satellite issue. NICHE is Niche Health and Social Care Consulting, a consultancy in Manchester. This document is in a materially different position from the others which have been discussed above. That is for these reasons. (1) Although the Substantive Order refers to my having had regard to “materials including” documents which I specifically named, it makes no reference to the NICHE Report. Given that the Substantive Order goes to some lengths to identify relevant materials specifically, this can be said to be conspicuous. (2) The NICHE Report is a disclosed document to which CPR 31.22 applies. Since there has been no hearing, the relevant power

is CPR 31.22(1)(b), by which the Court can grant permission to a party to use, for purposes other than the proceedings, a disclosed document. CPR 31.22(1)(b) has been said to require the party seeking it to "demonstrate cogent and persuasive reasons" for the grant of permission: see Marlwood at §30. (3) The NICHE Report is said by the Defendant to have been marked as "highly confidential". I proceed on the basis that the Defendant owns the document, and that it would attract confidentiality of a general kind, but nothing approaching 'public interest immunity' or 'commercial confidentiality'. The Defendant's Note (16.11.21) said of the NICHE Report: "the Claimant does not need to rely on CPR 31.22", that being because "she was provided with a copy of this Report before the issue of these proceedings without any condition of confidentiality". (4) If I had conducted a SmithKline Hearing (§41 above) and if the Claimant had made a SmithKline application (a) (§22(3) above) for a ruling as whether the implied obligation had been released, I would have allowed the Defendant to make representations. If, at the hearing, a member of the press or public had asked for a copy of the NICHE Report, I would have allowed the parties' Counsel to make observations. In either such situation, had Mr Feeny made submissions along the lines of those filed on the satellite issue, I would not have allowed access there and then. I have would have wanted to deliberate on the issue further, probably with skeleton arguments.

49.
I am satisfied that the Claimant has demonstrated cogent and persuasive reasons for the Court to grant permission pursuant to CPR 31.22(1)(b), and I will grant permission. My reasons are as follows. (1) I had read parts of the NICHE Report, but not the entirety of the 80-pages. Document (ii) – the Claimant's Further Submissions – referred to the NICHE Report some 13 times, in the context of the Claimant's analysis of the evidence in support of the Agreed Five Heads (Recital [12]) which were the basis of the HRA Declaration. As the Defendant's submissions on this satellite issue recognise, the "conclusions in the [NICHE] Report" are "reflected in the Defendant's admissions in this litigation. There is a link, with evidential value, between the NICHE Report and matters accepted by the Defendant, on which the HRA Declaration is based. (2) If there had been a SmithKline Hearing (§41 above), the correct analysis, in my judgment would have been this: I would have pre-read a document, to which Counsel's skeleton argument refers, that skeleton argument having been deployed at the hearing. In my judgment, that would have been sufficient to trigger CPR 31.22(1)(a). The open justice principle should not be undermined by my decision to make a determination without a hearing. This is a strong factor in support of the grant of permission for the purposes of CPR 31.22(1)(b), at least in the circumstances of the substantive determination without a hearing in the present case. (3) The NICHE Report was commissioned by the Defendant into the circumstances of this case, including those which are the subject of the Agreed Five Heads. It was described as an "independent serious incident investigation into the care and treatment of [the Claimant] and the care provided by her care coordinator". The Report contains "findings" and "recommendations". (4) I accept that the rationale of CPR 31.22 reflects the compulsion and intrusion constituted, as a matter of principle and policy, in the disclosure of documents. That is a weighty factor. On the other hand, in the specific circumstances of the present case I do not accept that disclosure of the NICHE Report was an intrusive compulsion. In my judgment, the NICHE Report was in the nature of material put forward positively in the proceedings by the Defendant, and relied on in relation to points of substance as well as part of the defence to the claim of an investigative breach. (5) In my judgment, it would be unjust and unfair if the Claimant – found by a judicial act to have been the victim of breaches of the HRA by the Defendant – were precluded from being able make use of the detailed "independent" Report commissioned by the Defendant into her experiences and the lessons to be learned from them. That injustice and unfairness is exacerbated if and to the extent that this position is the consequence of the Court's decision to determine the HRA Declaration without a hearing. (6) The Claimant has

demonstrated legitimate reasons, engaging the public interest, for seeking access to the NICHE Report. Her request is targeted and proportionate. This is the only disclosed document, and the only document not specifically referred to in the Substantive Order, in respect of which permission is sought. Only the Report and not the Appendices are the subject of the application. The NICHE Report, on any view, is a significant document in these proceedings. The open justice principle is engaged by an observer being able to understand the case and the context in which my determination was made. (7) The Defendant has not persuaded me that there is any legitimate confidentiality or privacy concern, relating to the NICHE Report or any part of it, which is capable of outweighing the strong reasons why – in the interests of justice and the public interest – the Claimant should be able to use the NICHE Report. She has been found to be the victim of HRA breaches by the Defendant and it is right and just that she should have unrestrained access to a Report which featured prominently in proceedings leading to a judicial determination to that effect, commissioned into her case and into how she was treated, and commissioned by the Defendant authority who the Court has been held to have breached her human rights. On a fact-specific balancing exercise, the purpose of the open justice principle and the Report's potential value in advancing that purpose decisively outweigh any risk of harm from its disclosure to the maintenance of an effective judicial process or to the legitimate interests of others.

Defendant's application to vary the anonymity order

50.
In its submissions on the satellite issue, the Defendant requests that I should now "vary" paragraph 6 of the anonymity order (see §8 above), to read:

... a non-party may not inspect or obtain a copy of any document on or from the Court file (other than this order duly anonymised as directed) without the permission of a Master or District Judge. Any application for such permission must be made on notice to the Claimant and the Defendant , and the Court will effect service...

The Defendant submits that it should have "equal procedural rights to the claimant" and wishes to facilitate "the people named in those documents" being "given the right to be heard". The Defendant does not maintain its previous suggestion that paragraph 6 should be varied to require that notice be given not only to it but also to "anyone named in a court document which is subject to the application for disclosure". The Claimant resists this course, submitting as follows: that the anonymity order was "self-evidently intended to protect the Claimant's identity and that of her child"; that no application for anonymity was made by any member of the Defendant; and that paragraph 6 of the anonymity order "does no more than is set out in CPR 31.22(1)(b)".

51.
In my judgment, it is not appropriate to vary the anonymity order in the way sought by the Defendant, and I decline to do so. I have reached that conclusion for the following reasons. (1) The Anonymity Order squarely protects the Claimant (and her daughter). That is because an application for anonymity was made to the Court and the order was shown to be necessary. The Anonymity Order properly includes a restriction on untrammelled access to documents from the court records, pursuant to CPR 5.4C(4), to protect the Claimant (and her daughter) as a "party" (as well as being a "person identified in a statement of case"). (2) CPR 5.4C(6) provides as follows: "Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the statement of case, or to obtain an unedited copy of the statement of case, may apply on notice to the party or person identified in the statement of case who requested the order, for permission". Paragraph 6 of the Anonymity

Order faithfully reflects this position; nothing more, nothing less. (3) There is no question of “equal procedural rights” to be “heard”, on the part of any person “named” in a document. The principled focus of paragraph (6) reflects the principled focus of CPR 5.4C(6). It applies to any party or person named in a statement of case who has made an application to the Court for an order restricting access. The Claimant did that in July 2017. No person connected with the Defendant, and no person about whom the Defendant may have any concern, did that or has done that. (4) If there is any party or person named in a statement of case in respect of whom it is considered that there is justification for a restriction (CPR 5.4C(4)) on access to documents from the court records, an application could be made at any time, and still can be made at any time. If there is justification for the restriction, there will be justification for the protection of notice (CPR 5.4C(6)).

Order

52.
The parties were able to agree the substance of an order reflecting this judgment, it having been circulated to them in draft. My Order: (i) included as a recital “the Court being satisfied that it is justified as appropriate and necessary, in the exercise of the Court’s inherent jurisdiction and having regard to the open justice principle and the interests of justice, that both parties have permission to make use of the documents set out below”; (ii) ordered that “the parties have permission to use” the documents listed as seen in the Proposed Operative Paragraph (see §6 above) “for the purposes of the proceedings herein, including to disclose the same to third parties (including media organisations)”; (iii) had as a further recital “the Court noting that, save for the Defendant’s application to vary paragraph 6 of the anonymity order, which anonymity order only protected the identity of the Claimant and her daughter, no application for anonymity has been made by a non-party”; (iv) recorded that I refused that application by the Defendant to vary paragraph 6 of that Order; and (v) awarded costs to the Claimant.