Neutral Citation Number: [2019] EWCA Civ 1335

Case No: B4/2019/0630, 0636, 0637 & 0639

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 4 July 2019

Before:

LORD JUSTICE PATTEN
LORD JUSTICE LINDBLOM
and
LORD JUSTICE PETER JACKSON

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IN THE MATTER OF J (CHILDREN)

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Transcript of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS
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Ms D Eaton QC and **Mr S Jarmain** (instructed by Charles Russell Speechleys) appeared on behalf of the **Respondent** father
Mr PJ Kirby QC and **Ms R Kirby** (instructed by Sears Tooth) appeared on behalf of the **Appellant** mother
Mr B Williams, QC and **Mr G Callus** (instructed by Stewarts) appeared on behalf of the **Appellant** grandfather

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Judgment

(Approved)

LORD JUSTICE PETER JACKSON:

1. This is an appeal from orders for costs made on 27 February and 1 March 2019 against those responsible for a notorious child abduction.

2. The background has been fully set out in a previous judgment of this court on 8 May 2018 ([2018] EWCA Civ 1372) and in the judgment of Mostyn J dated 25 January 2019 ([2019] EWHC 105 (Fam)). For present purposes, it is only necessary to record that in July 2018 two children, then aged five and three, who were allowed to travel to the Ukraine with their mother for the purpose of a holiday from which she promised to return them, were not returned. The children remain in the Ukraine in breach of repeated orders of the High Court. The judge found that the mother and her father, the children's grandfather, who he described as being deeply complicit, had acted in concert to obtain the consent of the father and the approval of the court for the holiday but that they had never intended to return the children. The background for these costs orders was therefore the grossest breach of trust perpetrated by individuals who appear to consider obedience to the law to be optional and disobedience affordable.

3. The permission for the holiday was contained in a consent order of 13 July 2018, to which I will refer in more detail below. When the children were kept, the father issued an application on 16 August 2018 to enforce their return. Several orders were made for that purpose. On 26 September he issued a further application seeking permission for the mother, her husband and the grandfather to be publicly named in connection with the case. That application was granted on 15 January 2019.

4. The costs arising from these two applications were dealt with by the first costs order. The judge ordered the mother to pay the father's costs on the standard basis and the grandfather to be jointly and severally liable for half of that liability. He refused a separate application by the father for an order relating to the costs of the children's guardian, who had been appointed in October in connection with the publicity application.

5. The second court order arose from applications made in January 2019 by the mother and grandfather for the redaction of Mostyn J's judgments of 27 April 2018 and 25 January 2019 and this court's judgment of 27 April 2018. Those applications were refused on 1 March 2019, when the judge ordered the mother and the grandfather were

to be jointly and severally liable for the costs of the father and of the media organisations.

6. The mother and the grandfather now appeal from both costs orders. There are three broad grounds of appeal: (1) the judge had no power to make any order for costs because of the terms of the order of 13 July 2018; (2) if that is not so, he took the wrong approach to making a costs order in a case concerning children; (3) argued by the grandfather only, that he should not have been ordered to be jointly liable for the costs of the media.

7. In this case the judge was called upon to exercise a principled discretion under Rule 28(1) of the Family Procedure Rules 2010, which provides that the court may at any time make such order for costs as it thinks just. This court will be very slow to disturb any order for costs and will only do so where a relevant error of principle has been demonstrated so that the order is shown to be wrong. It will not interfere with the trial judge's discretionary decision in any other circumstances. That is the context in which the grounds of appeal must be considered.

8. **The first ground.** The order of 13 July runs to four pages. It arose from an agreement between the parties following mediation and was approved by the court. It supplemented an earlier child arrangements order made by the judge on 27 April 2018. It was based on a solid acceptance that the children would live with the mother in London and have regular contact with their father. It was focused on the arrangements for these children, with their international background, to be able to travel abroad for holidays with both parents. In the light of the history, it was particularly focused on the arrangements for them to visit the Ukraine. It allowed the mother to take them there for a holiday between 13 July and 16 August 2018. But that was subject to the condition that she should provide the sum of £1 million to her solicitors, which was to be released to the father's solicitors in the event that she failed to honour the children's return.

9. The relevant paragraphs of the order are these:

> "4. The following conditions should apply to the summer holiday arrangements:
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> (a) By no later than 4 pm on Wednesday, 11 July 2018 the mother

> shall pay into the client account of Charles Russell Speechleys LLP the sum of £1 million. This sum shall be by way of security for the father's legal costs and incidental expenses of legal proceedings in the event that the mother fails to make the children available to spend time with him in accordance with paragraph 3 herein or to return the children to the jurisdiction of England and Wales by 23.59 BST on Thursday, 16 August 2018 (the 'security fund').
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> […]
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> (d) In the event the children are not made available to the father by the mother in accordance with paragraph 3 of this order or returned to the jurisdiction …Charles Russell Speechleys LLP shall by 10.00 BST on Friday, 17 August 2018 give irrevocable instructions to transfer the security fund to the client account of Sears Tooth Solicitors …Those funds shall be used for the sole purpose of discharging the father's legal and other incidental costs of legal proceedings incurred by the father directly or by Sears Tooth Solicitors on his behalf in securing the return of the children to this jurisdiction. The father and/or Sears Tooth Solicitors will produce documentary evidence of payments to Charles Russell Speechleys LLP as soon as possible after expenditure or incursion."

10. The security fund as it was described was duly provided, and, when the children were not returned, duly released to the father's solicitors. Although it might seem to most people to be a very lavish security, it is to be seen in the context where these parents have in the course of the past two years apparently spent over £3.3 million in litigating about their children, the mother's costs alone amounting to some £2.1 million.

11. At all events, based upon these paragraphs in the order, Ms Eaton QC and Mr Jarmain for the mother and Mr Williams QC and Mr Callus for the grandfather seek to assert that the parents made a contract whose effect was to prevent the judge from making any order for costs against their clients. They point to the words "shall be used for the sole purpose of funding the father's legal … costs" as making it clear that the father was to meet his costs from the security fund and only from the fund. They submit in effect that the parties contracted out of the court's costs jurisdiction at least until the £1 million ran out (we were told this moment has been reached as a result of the costs of these appeals).

12. Mr Kirby QC and Ms Kirby for the father submitted the consent order could not have the effect of ousting the court's jurisdiction under the rules. They described the

argument as deeply unattractive and amounting to the proposition that, having forfeited the million pounds, the appellants are entitled to conduct themselves however they wish with no further costs repercussions.

13. The judge did not accept the appellants' arguments. In his judgment of 27 February 2019 he said this:

> "6. The nature of the agreement that was reached between the parties was not just that this fund would be created but that it would be made available for the father to fund in the first instance all of his legal costs. However, it was implicit in the agreement that the costs incurred would be reasonable, and for this purpose documentary evidence of payments would be produced. It was also implicit that unreasonable costs would be reimbursed by the father to the fund.
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> 7. The agreement does not provide for any machinery by which the question of reasonableness or unreasonableness of the costs can be determined. Nor does the agreement state explicitly that the father cannot seek an order for costs against the mother or, for that matter, her father. Nor does it say that were he to seek an order for costs and to obtain an order for costs, that the father could not enforce those costs against such assets other than the security fund as he thought fit.
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> 8. It does not say for example that if the father obtained an order for costs against the mother or the maternal grandfather, that he was required in the first instance to enforce that order against the security fund and was prohibited by agreement until that security fund was exhausted from enforcing it against some other asset. It does not say for example that if he could identify a bank account of the maternal grandfather, that he could not enforce an order for costs against the maternal grandfather against that bank account.
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> 9. Therefore I do not accept the argument that the father is contractually bound only to enforce any order for costs that he obtained against the fund and is only entitled to enforce an order for costs should he obtain one elsewhere once that fund is exhausted. However, I do accept that it is implicit within the agreement that has been reached, and would be implicit by operation of general law any way, that the father can only charge reasonable costs whether against the security fund or otherwise and that unreasonable costs are not chargeable. He does not have carte blanche to incur unreasonable costs by virtue of this agreement. Therefore I reject what might be termed the double-payment argument, and in my judgment, provided the legal principles are established, there is no insuperable impediment placed in the way

> of the father seeking the relief that he does before me by virtue of this agreement."

14. In my view the judge's analysis on this point is plainly correct. The order provided for a security fund or a fighting fund, whatever one calls it. It did not disable or suspend the normal powers of the court. As a simple matter of logic, the fact that a fund can only be used to meet a specific purpose does not mean that the specific purpose can only be met by using the fund. Had the parties wanted to try and make the provision of the security fund a substitute for the normal powers of the court, they would at least have had to make that explicit. Even had they done so, it is questionable whether the court should have approved an agreement to fetter its powers in this way. I further consider this ground of appeal is sterile. No one is suggesting that the appellants should pay twice. The father cannot enforce the costs order against any other asset belonging to the appellants to the extent that he has already been reimbursed for the same sums from the fund. For these reasons, I conclude that the first round of appeal is without merit.

15. **The second ground.** It is argued that the judge took the wrong approach to making a costs order in proceedings of this kind. He should, it is said, have followed the approach laid down by the Supreme Court in decisions in *Re T (Care Proceedings: Costs)* [2012] 1 WLR 2281 and *Re S (A Child)* [2015] UKSC 20, which explained that orders for costs in children cases are unusual and are in general confined to cases where the conduct of a party has been reprehensible or unreasonable.

16. This is how the judge dealt with that matter:

> "10. The law in relation to costs in children's proceedings is very familiar. Section 51 of the Supreme Court Act and Part 44 of the Civil Procedure Rules taken together disapply the principle of costs following the event, and in Children Act proceedings the principle that has been evolved by the judges is that an order for costs is only payable if the conduct of a party in the litigation has been demonstrated to be unreasonable. This judge-made rule mirrors the rule for financial remedy proceedings which is contained in the Family Procedure Rules at FPR28.3(11). However, the rule in financial remedy proceedings of no orders for costs unless unreasonable conduct is demonstrated does not apply to enforcement proceedings, and in my judgment there should be a read-across to Children Act proceedings to the same effect. I do not think that demonstrable misconduct needs to be shown in an application for costs where the subject matter of the proceedings

> has been enforcement litigation in children's proceedings. In a sense, and in enforcement proceedings, whether the issue is about money or children, the condition precedent of misconduct is already demonstrated because, eo ipso, somebody is in breach and somebody is having to make an application to enforce their legal rights.
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> […]
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> 12. In this case the mother by 17 August had fallen into blatant breach of the order of 13 July and has remained in blatant breach of it since, as found in my detailed judgment of 25 January 2019. Although his culpability is considerably less, the maternal grandfather is also guilty of complicity in the breach of the mother in defying the authority of the court and inflicting significant damage on these children. That each of them may to a greater or lesser extent have conducted themselves in the enforcement litigation reasonably or, rather, not unreasonably, does not detract from the starting point that they have brought this litigation on themselves by their unreasonable conduct.
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> 13. The fact that during the course of the enforcement litigation certain points were advanced by the father and were not successful [it would be said on behalf of the maternal grandfather by Mr Callus that the scale of lack of success by the father has been significant]. But the fact that points have been lost along the way does not detract from the fact that it was the misconduct of the mother, aided and abetted by her father, that has caused this enforcement litigation which has been lost by them. They opposed it both tooth and nail and they have lost the application. In my judgment, in such circumstances it is reasonable for an order for costs to be made against them, although in the proportions which I will shortly identify."

17. The appellants now contend that the judge wrongly took as his starting point the proposition that misconduct is inherent in enforcement proceedings and that a parallel is to be drawn with financial proceedings. They assert that in circumstances where they were not guilty of any significant litigation misconduct, and where the father had not achieved success in every respect, an award of 100 per cent costs was "extraordinary". Overall they argue that the costs order inappropriately penalised them for conduct outside the litigation rather than litigation conduct. Ms Eaton rightly made no attempt to excuse the mother's conduct for the purpose of her submissions on this appeal. Mr Williams however sought to emphasize that any conduct for which the grandfather might be criticized was of a limited kind and not such as to justify the costs orders that

were made against him. As a tailpiece, both appellants complain that the judge did not give the parties an opportunity to deal with his legal formulations.

18. In my judgment there is nothing in these arguments. The judge's treatment of the matter at paragraphs 12 and 13 is broadly unassailable. In paragraph 10 he correctly set out the general "no order" approach. In my view the analogy that he drew with financial proceedings in paragraph 11 was not of assistance. The same can be said of his observation about enforcement proceedings being of themselves a demonstration of misconduct. I would not agree with either proposition as a statement of principle, but, insofar as the judge may have considered they were, it is clear that they were superfluous to his decision. They were unnecessary passing observations that do not show his overall approach to be wrong. He clearly appreciated the normal rule and the need to establish departure from it. In this case departure was comprehensively demonstrated by misconduct that was integral to the litigation. The decision to make an order for full costs against the mother and half costs against the grandfather was unexceptionable. I would also reject the attempt by the grandfather to minimize his responsibility by suggesting that it related only to proceedings that he had briefly brought in the Ukrainian court to prevent the children returning to England. The judge's finding was that the grandfather had been complicit in the abduction from the start. That finding is not open to challenge on this appeal. Likewise, I am not impressed by Mr Williams's submission that his client had committed no significant litigation misconduct as being a relevant consideration. That is not the point in circumstances where the entire litigation was a direct result of the course pursued by the appellants. Insofar as the primary responsibility rested with the mother, that was appropriately reflected in the differentiation between the order in her case and the order in the grandfather's case. Nor would I accept that the parties did not have a fair opportunity to put their cases. The fact that the judge at one point expressed himself less than aptly is not a basis for interfering with his decision.

19. Stepping back, I consider that there is nothing remotely surprising let alone extraordinary about the orders made in this case. Indeed, I would go so far as to say that I find it difficult to envisage any proper alternative. The costs were incurred in an attempt to recover a situation created by the flagrant flouting of a court order. The orders were not intended to penalize but to compensate. It was an obvious case for

departure from the normal rule. That rule is intended to promote respectful cooperation between parents, something that the appellants have egregiously dishonoured.

20. **I turn then to the third ground.** Mr Williams challenges the grandfather's joint liability to pay the costs of the media under the second costs judgment. He points to a general practice whereby the media as interveners and/or interested parties are usually not subject of orders for costs in their favour or against them, on the basis that important issues of open justice should be considered in a non-partisan manner. I would accept the general thrust of that submission as applicable to the general run of cases where the media becomes engaged by whatever means in decisions about the extent to which information can and cannot be publicized. Often these situations will arise as a result of events that are in no way the responsibility of one or more of the parties. Here, however, the grandfather had aided and abetted the abduction and retention of his grandchildren and had deployed massive legal force in an unsuccessful attempt to prevent his own identification. In such circumstances, the judge's decision to award the media their costs is one that in my view cannot be criticized, and this ground of appeal also fails.

21. The arguments that we have read and heard descend to a much greater level of detail than does this judgment, but I have addressed the essential features of the matter, which lead me to the clearest conclusion that I would dismiss these appeals.

22. For his part, the father has issued a late application for permission to cross-appeal out of time, seeking to challenge the judge's decision to award costs on the standard rather than indemnity basis and also his decision not to make an order for costs in favour of the guardian, with the result that the security fund has been reduced by approaching £200,000. This is because the guardian was appointed on the basis that her costs would be met from the fund. Since 4 June 2019 they are now to be met by the parents equally. The father complains that it is unfair that he should in effect be responsible for the guardian's costs between October and June as a result of payments being made from a fund that was established for his protection.

23. I would refuse permission to appeal out of time for these reasons. Firstly, the notice was not issued until 28 June in relation to a decision taken on 27 February. Mr Kirby QC accepts that there is no good reason to explain why it was not issued in time.

Secondly, the real mischief that the father complains about arose from the judge's decision in October to appoint the guardian at the expense of the fund, that being in effect a variation of the July order. So the appeal is in one sense as much as nine months out of time, not three. Thirdly, the merits of the proposed grounds of cross-appeal are anything but compelling. The judge was not asked to order costs on the indemnity basis, and he gave reasons for making the costs orders on the standard basis. He also gave reasons for declining to make an order in favour of one party at the behest of another, albeit that the circumstances are unusual. The father's concerns about this aspect of the outcome are not unreasonable, but they do not show any fault in the judge's order or warrant an extension of time for appealing. That disposes of the father's application.

24. I would lastly add for the avoidance of any possible doubt that the orders of the court providing for the return of these children to this country, the jurisdiction of their habitual residence, remain in full force. Any submission to the contrary made elsewhere would be entirely false. From the perspective of the English court, orders have been made that provide a solid foundation for the operation of the reciprocal international child abduction conventions that are so necessary to prevent and remedy the consequences of hugely damaging events of the kind that have occurred in the case of these children.

LORD JUSTICE PATTEN:

25. I agree.

LORD JUSTICE LINDBLOM:

26. I also agree.

Order: Appeal dismissed

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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