Neutral Citation Number: [2020] EWHC 1167 (Fam)

Case No: 2019/0019

ON APPEAL FROM THE FAMILY COURT
District Judge Greensmith
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2020

Before :

MR JUSTICE FRANCIS

- -

Re D (A Child) (Appeal out of time)

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- -

Francesca Wiley QC and Laura Briggs (instructed by **Setfords Solicitors**) for the **Appellant**
Alex Taylor (instructed on a Direct Access basis) for the **First Respondent**
Will Tyler QC and **Charlotte Worsley** (instructed by **Switalskis Solicitors**) for the **Second Respondent**

Hearing dates: 21st, 22nd & 23rd January 2020

- -

Approved Judgment

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

.....

MR JUSTICE FRANCIS

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on 14th May 2020

This judgment was delivered in open court. The judge has given leave for this version of the judgment to be published. The anonymity of the child and members of their family and their geographical location must be strictly preserved.

All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Francis :

1. *The Appeal:* On 15 November 2018 Mr K ("the father") issued a notice of appeal against the decision of District Judge Greensmith (now His Honour Judge Greensmith) dated 28 May 2015. The District Judge made a finding that the father had sexually abused his daughter, the child, D, born in 2009. On account of the substantial delay in pursuing this appeal, the father also applies for relief from sanctions and for permission to appeal out of time. His application is opposed by the child's mother, Ms E ("the mother"). It is obvious from this minimal chronology that this is a very stale appeal indeed and that exceptional circumstances would have to pertain for the court to contemplate granting permission. The child is represented by her Guardian, who fully supports the granting of permission to appeal out of time and allowing the appeal.

2. *My decision:* In spite of the very considerable passage of time, I have come to the clear conclusion that I must grant relief from sanctions, grant permission to appeal out of time, allow the appeal and remit the matter for re-hearing. The delay in this case is wholly exceptional and nothing in this Judgment is intended to alter the clear and long established principles relating to relief from sanctions and appealing out of time. I have decided, however, that the District Judge's findings are so unsafe and their consequences so serious that I cannot allow them to stand.

3. *Re-hearing:* As the matter will now be the subject of a re-hearing, nothing said by me in the course of this Judgment should be seen as an indication of my view as to whether or not the father sexually abused the child. As Mr Tyler QC and Ms Worsley, counsel for the Guardian, correctly observed in their written presentation:

> "*There are a number of possible outcomes of any re-litigation. Among these are:*
>
> *i. that the index allegations are not true and were made, encouraged, coached or exaggerated as a result of abusive adult behaviour;*
>
> *ii. that the allegations are not true, but were not the result of any appropriate adult manipulation;*
>
> iii. *that the allegations are true and so the findings are wholly or substantially upheld.*".

4. I also agree with Mr Tyler's observation, and it is obviously the case, that "*Findings as at (i) or (ii) will have extremely complicated ramifications for the child; albeit with a different resonance, a finding as at (iii) may also raise difficult legal and practical questions.*" If, contrary to the findings made by the District Judge, the father did not sexually abuse the child, it is in my judgement wholly wrong for the child to grow up believing her father to be her sex abuser. Moreover, it is wholly wrong for the father to be so labelled if he is not.

5. Mr Taylor, counsel for the mother, has urged me in the strongest terms not to extend time for permission to appeal and not to reopen the fact-finding process. Mr Taylor's lengthy and comprehensive written and oral submissions concentrated heavily on what I referred to as the "micro" issues, as well as the "macro" ones. As I pointed out to him during the course of the hearing, the central issue in this appeal has been to consider the

defects alleged in respect of the District Judge's Judgment and the issue of relief from sanctions, rather than the minutiae which may be said to be evidence in support of the findings. For his part, and incorrectly in my judgement, Mr Taylor criticised Mr Tyler, for the Guardian, for not paying enough attention to the micro issues. In so doing, and with respect to Mr Taylor's comprehensive mastery of the facts, he misunderstood his task by concentrating on the detailed analysis of the evidence. My task has been to concentrate on the errors in the Judgment that the father alleges.

Relevant chronology up until the order the subject of this appeal

6. The factual background is exhaustively set out in a 19 page chronology produced by Ms Wiley QC and Ms Briggs on behalf of the father. Mr Taylor has produced a detailed response to this chronology, much of which is in issue between the parties. I only deal here with those parts of the chronology which it is necessary for me to identify for the purpose of this Judgment. My task at this appeal hearing has not been to determine factual issues between the parties.

7. The mother and father, both British citizens, met abroad in 2008 and continued their relationship when they returned to the UK later that year. The child D was born in 2009 and is now 10 years old. The relationship between the parents was short-lived and they separated in January 2010, just weeks after D was born. In March 2010 the father instructed solicitors, as the parents were unfortunately unable to agree arrangements in respect of D. The mother objected to contact, alleging that the father was abusive, aggressive and unable to care for a young child. The father says that the mother declined mediation and so he issued Children Act proceedings during the course of 2010. It is important that I stress that it has not been my task during this appeal to consider where the truth lies between the different accounts respectively given by the mother and the father.

8. On 15 December 2010, overnight contact was ordered following a court hearing. A lot of consternation followed, which resulted in an incident in May 2011 when the police were called to the maternal family home, the maternal family apparently refusing to make D available for contact. There was a further court hearing in August 2011 when further contact was directed. In 2012 there was a hearing before the lay justices when a final order was made for overnight staying contact on alternate weekends, increasing as D reaches 3 to 4 years of age. The father says that the mother remained highly resistant to contact.

9. In August 2013, a reference was made to X Local Authority in response to an allegation by the mother that the father had sexually abused D. The father last saw D on 19 August 2013, when she was only three and a half years old. That is almost seven years ago.

10. D was examined at the "safe" centre and it is reported that nothing emerged that was suggestive of sexual abuse. The local authority moved to a section 47 investigation, during which D is said to have made no allegations against her father.

11. On 19 September 2013, the father made an application to enforce the contact order made in January 2012. On 25 September 2013, D was interviewed by the police. D apparently made no allegations against her father but the mother provided (her own) typed notes of allegations in support of her case. D was interviewed again in October

2013. She made no allegations against the father. In November 2013, the police decided to take no further action in respect of the mother's allegations.

12. Later that month, the mother relocated despite the father's opposition to any reduction in contact. In December 2013 (and this was not known to the father nor to the District Judge at the time of the fact-finding hearing) the mother contacted the health visitor and provided a report that D was the victim of sexual abuse by her father. It is an unfortunate feature of this case that a great deal of documentation has only recently been disclosed. For example, in June 2019 the father and his advisers saw, for the first time, what purported to be a typed diary document received from the police back in 2013/2014. It appears to have been prepared by various maternal family members and is said by the father's advisers to contradict handwritten entries before the court in 2014. The Guardian told me through Mr Tyler, and I accept, that the disclosure of the new material had a significant impact on the Guardian's decision to support this appeal. Although now is unlikely to be the correct time, it seems to me that an enquiry must follow at some stage as to how it was that essential material was not produced until years after the hearing under appeal. The late production of important material has been a hideous interference with the progress of justice in this case. The financial cost is immense and the human cost incalculable.

13. Leaving out some of the less significant aspects of this chronology, I next move forward to February 2014, when the appointed social worker from X Local Authority wrote stating that, during the course of her investigation and assessment, there had been nothing to substantiate the allegation that the father had touched D inappropriately. She added her recommendation that contact between D and the father should be promoted. The same social worker, on the 28 February 2014, wrote to the new social services team in the following terms:

> "*Allegations were made against D's dad of sexual abuse, however the allegations following police and court enquiries and four different professional bodies talking to D, were deemed to be unfounded and D did not disclose any details of sexual abuse. The mother states that D is still displaying sexualised behaviour, however this has not been witnessed by the various professionals, only by maternal relatives*".

Worryingly, I am told that this communication was also not available to the District Judge when he conducted the fact-finding hearing. Again, I am unclear as to the reasons for the omission of this centrally important communication.

14. On 6 May 2014, the mother renewed her application for transfer of the proceedings and sought to re-timetable the case. The case was listed for a four day composite fact-find hearing and welfare hearing with days 1 to 3 reserved for the fact-finding and the 4th for welfare. A Scott Schedule was filed by the mother with 20 numbered allegations. Allegations 1 to 19 related to things that D had allegedly said had taken place. Allegation 20 asserted that "from the above it can be found that the father has sexually abused D during contact".

15. Between 17 and 20 June 2014, a fact-finding hearing took place before the District Judge and he handed down his Judgment on 20 June. The District Judge found allegations 1 to 19 proved. In respect of the critical allegation, number 20 (set out

above), the District Judge found that he was "not satisfied that it was proved", despite feeling that the father's evidence was "lacking". However, the District Judge indicated that he was very concerned about D's presentation during the ABE interview that he had viewed and he ordered a section 37 report.

16. On 20 August 2014, a hearing took place on notice at which the District Judge expressed himself to be disappointed with the lack of progress in relation to contact and he directed that the mother make D available for such supervised or other contact with the father as the officers of Y Local Authority shall agree. It seems that the mother refused to allow any contact to take place following this order.

17. In September 2014, the NSPCC wrote to the mother informing her that they must close the case in respect of D, explaining to her that the NSPCC cannot undertake sexual abuse work when it has not been found as fact that abuse has taken place. I am told that this letter was also not before the court at the 2015 hearing. I can only repeat my anxiety at the lack of such important documentation at the relevant hearing.

18. On 16 October 2014, D's Guardian made an application for an expert assessment by a clinical child psychologist (Dr G) to assess D, who, according to the mother, had apparently been exhibiting further sexualised behaviour.

19. Anonymous calls were made to children's services during November 2014, suggesting that the father presented a sexual risk to D. On 24 November 2014, the mother contacted social services saying that D had made "more allegations". The father did not discover this until he saw documents received in 2019 after I made an order for their production.

20. On 9 December 2014, social services raised a concern that this is "a difficult case" and that D has "still not disclosed to any professional and these disclosures have always been to family members". The father, again, only discovered this when the papers were received in 2019.

21. On 16 January 2015, the mother filed a further statement in the Children Act proceedings. I remind myself that the father had not, by this time, seen D since August 2013. The mother said that D had made a number of further "disclosures" of which Dr G must be made aware. Dr G's report was due on 26 January, i.e. 10 days later.

22. On 20 January 2015, Dr G met with the father and, apparently, repeatedly referred to D's "disclosures of sexual abuse by her father". This was the only meeting between Dr G and the father.

23. Dr G's first report was dated 12 February 2015. In that report, Dr G refers to "disclosures" of sexual abuse perpetrated by the father. I remind myself that D had made no disclosures of sexual abuse in the proper sense and that the only allegations which the mother says were made were made by D to members of the maternal family.

24. The next hearing was due on 2 March 2015. This was a further fact-finding hearing where the District Judge was to be asked on behalf of the mother to make a finding that the father had sexually abused D, a finding that the District Judge had declined to make at the earlier hearing, as set out above.

25. On 24 February 2015, the father's solicitor sought exceptional funding from the Legal Aid Agency. The application was refused. It is not my place to question or criticise the LAA's decision, but I do pause to observe that the consequences of this decision are manifest. Had the father been represented at this hearing it is, in my judgement, likely that the errors made by the court at the hearing would have been avoided.

26. On 27 February 2015, presumably the day when the application for exceptional funding was rejected, the father's solicitor informed the parties and the court by email that his client could not afford ongoing representation and raised very serious concerns about the way that the case was transpiring. In particular, the father's solicitor set out in this email, "firstly there appears to be a genuine issue as to whether Dr G has proceeded on a misapprehension of the findings made in June 2014 and if so there may need to be consideration as to whether another expert is appropriate/necessary". That observation by the father's solicitor was apposite and drew attention to the issues which have caused this appeal to succeed.

27. On 2 March 2019 the father appeared in person and sought an adjournment on account of his difficulties with funding and representation. This application was refused. The Guardian and the mother, both represented, applied for further questions to be put to Dr G and the mother sought permission to file evidence and a schedule setting out her new allegations. The matter was set down for a further composite fact-finding/welfare hearing between 27 and 29 May 2015.

28. On 8 May 2015, the father's solicitor wrote on his behalf saying that he intended to withdraw his applications for direct contact and that there be indirect contact and that any significant information be shared. The stated reason for this was that the father was unable to continue to afford legal representation. I am not clear whether the District Judge failed to respond to the letter or whether he responded negatively but, in any event, what is clear, and agreed, is that the father's solicitor attended on the first day of the listed fact find/final hearing, 27 May 2015. The solicitor asked for permission to withdraw the father's application to enforce the contact order of 2012. The application was unsuccessful and the District Judge determined that the hearing should continue. Given the outstanding factual issues I do not criticise the District Judge for declining the father's invitation. Plainly there was, by now, more at stake simply than the father's application to enforce the contact order, albeit that was the only application actually before the court.

29. Having been unsuccessful in the application, the father's solicitor left the court and apparently took his bundle with him. The father was left representing himself. He was given a piece of paper and a pen plus a court bundle that he says he had never seen before. The father informed the court that he is dyslexic and did not feel able to deal with the case himself, given that he had only had 30 minutes to prepare his "cross-examination" of Dr G. (For the purposes of the present application, the father has provided an expert report dated 28 October 2018 confirming the diagnosis of dyslexia.) In the circumstances, it seems to me that the prospect of a lay witness being able effectively to cross-examine an expert witness is highly unlikely.

30. I have considered the actions of the father's former solicitor very carefully. On the face of it, it seems to me to be remarkable that an officer of the court would leave his client in the situation that he did, even if without funds. I received a letter and formal statement from him on 2nd May 2019. No party sought to cross-examine the solicitor, who

conceded in his statement that the factual position outlined in the father's application for relief from sanctions was correct to the best of his recollection. Although I am concerned that the father was left without representation (or a bundle) in respect of such serious allegations, I do not think that it would be right now to name or blame the solicitor concerned and I do not do so. I set out what happened as only part of the relevant chronology.

31. On being informed by the father that he was dyslexic and that he had not prepared any cross-examination of Dr G, I am told that the District Judge indicated that the mother's counsel could conduct the cross-examination of Dr G on behalf of the father as well as the mother. I have to say that I find this to be a remarkable prospect. Whilst, of course, the mother's counsel was entitled to, and properly did, cross-examine the instructed expert, it is difficult to understand how the mother's counsel could have cross-examined on behalf of the father. The mother was asserting that the father had sexually abused D. The father was vehemently resisting and defending that allegation. Their positions could not have been more opposite. It was open to the District Judge to adjourn so that a special advocate, or an amicus to the court, could have been instructed. The District Judge could have put questions himself. He could have discussed the questions in advance. I do not think that it could ever be right in such circumstances to expect counsel for the opposing party to cross-examine in the way that was suggested. The father's solicitor, before he left, said to the District Judge, "but he would have to put a case that is expressly contrary to his instructions", in response to the suggestion that the mother's counsel conduct cross-examination for the father. The District Judge replied, "But that's just testing the evidence, isn't it?".

32. The evidence heard in June 2014 was reconsidered in the light of Dr G's interpretation and analysis. The judge made all of the findings sought by the mother including, crucially, that the father had sexually abused D. This is the finding the subject of this appeal.

Delay

33. FPR Part 30 applies to appeals to the Family Court. It is common ground that the 21 day period for filing a notice of appeal in this case expired on 18 June 2015. The father's Notice of Appeal was filed on 15 November 2018 and the application is therefore three years and five months out of time.

34. Variation of time is governed by FPR 2010 Rule 30.7, which provides that an application to vary the time limit for filing an appeal notice must be made to the appeal court. In their written presentation dated 9 December 2019, Ms Wiley and Ms Briggs properly recognise that "in the present case the appellant is very significantly out of time (3½ years) and well outside the 21 days provided filing of the notice of appeal under Rule 30.4(2)(b) and did not seek permission to appeal, further, he acknowledges he failed to apply for an oral renewal hearing of any permission application within the seven days established by rule 30.3(60)". Accordingly, the father needs to apply to the court to extend time to comply with those provisions by invoking the jurisdiction established by rule 4.1(3)(a). In considering such an application the court must have regard to FPR 2010, Rule 4.5 which provides:

> "*4.5.(1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply*

imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction.

(Rule 4.6 sets out the circumstances which the court may consider on an application to grant relief from a sanction.)

(2) Where the sanction is the payment of costs, the party in default may only obtain relief by appealing against the order for costs.

(3) Where a rule, practice direction or court order—

(a)requires a party to do something within a specified time; and

(b)specifies the consequence of failure to comply,

the time for doing the act in question may not be extended by agreement between the parties."

35. Rule 4.6 FPR 2010 provides:

"*4.6.(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including—*

(a)the interests of the administration of justice;

(b)whether the application for relief has been made promptly;

(c)whether the failure to comply was intentional;

(d)whether there is a good explanation for the failure;

(e)the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol$^{(GL)}$*;*

(f)whether the failure to comply was caused by the party or the party's legal representative;

(g)whether the hearing date or the likely hearing date can still be met if relief is granted;

(h)the effect which the failure to comply had on each party; and

(i)the effect which the granting of relief would have on each party or a child whose interest the court considers relevant.

(2) An application for relief must be supported by evidence."

36. Mr Taylor, on behalf of the mother, has properly taken me through the provisions of Rule 4.6. Dealing, first, with the interests of the administration of justice, he not unreasonably asserts that it cannot be in the interests of justice for the 21 day time limit to be extended to three years and five months. He asserts forcefully that to do so would be to render the limit so flexible that its effect would be lost. He says that there is a real risk of "opening the floodgates" and that the time limit would be so nugatory that no litigant would be able to feel secure in the outcome of any case, even years afterwards. He correctly asserts that the court should interpret the rules in accordance with the overriding objective of "enabling the court to deal with cases justly, having regard to any welfare issues involved".

37. Mr Taylor also asserts on behalf of the mother that the father's solicitor said, when seeking to withdraw his application for a Child Arrangements Order, that the father was very clear in saying that he had no intention of revisiting these issues of his own volition in the future. Mr Taylor says that it cannot be in the interests of justice to consider an appeal so out of time when the appellant, in 2015, took issue with the finding and not the orders. In other words, says Mr Taylor, the father got the order that he wanted, which is that no provisions have been made for him to see or spend time with D. In answer to this, unsurprisingly, the father asserts that there is a gulf of difference between his withdrawing his application for a Child Arrangements Order and the District Judge making a positive finding of fact that this father sexually assaulted his daughter. I agree that there is a gulf of difference between these two events and it is necessary for me to take some time to examine the reasons for the father's significant and, on the face of it, unacceptable delay.

38. It is also, with respect to Mr Taylor, hardly correct to describe the father as "getting the order that he wanted". What the father wanted was to enforce the contact order and he pursued this for years. Eventually, he withdrew his application so, whilst it may be technically correct that he "got what he asked for", but it would be wrong to say that "he got what he wanted".

39. Rule 4.6(1)(b) requires me, when considering the application for relief from sanctions, also to consider whether the application for relief has been made promptly. Plainly it was not.

40. Next, pursuant to rule 4.691)(c), I must consider whether the failure to comply was intentional. In this regard Mr Taylor, on behalf of the mother, draws my attention to the remarks of the District Judge after giving the welfare Judgment on 28 May 2015 when he said:

> "*Also I need to say as part of the Judgment that Mr K asked if he could appeal against the order and it has been explained to him that he will require permission to appeal and he was invited to ask that permission at the conclusion of the Judgment, that he did not because he did not stay for the Judgment to be handed down. However it was explained that he could ask for permission from a circuit judge within 21 days and he said he would take legal advice*".

Accordingly, I am constrained to agree with Mr Taylor when he asserts on behalf of the mother that the father was aware of the 21 day rule. By this time the father was, of

course, a litigant in person, but Mr Taylor properly refers me to the notes to the Family Court Practice 2019 which state that:

> "*It has been repeatedly said that the court should not accept that the mere fact of being unrepresented provides good reason for not adhering to the rules*".

I have also, in particular, been properly referred to the words of Lord Sumption in *Barton v Wright Hassall LLP* [2018] UKSC12 when he said:

> "*The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disrupted if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent.*"

41. In a statement dated 20 November 2018, the father attempted to explain the delay. This has been helpfully condensed by the father's legal team into a document entitled "chronology as to delay". The father asserts, and I am prepared to accept, that between May 2015 and May 2016 he made repeated telephone calls to his former solicitors seeking advice on appeal. I am told that, on 1 June 2015, i.e. only three days after the Judgment, the father's partner began preparations for cancer treatment later that month at a hospital. Between 18 and 21 June she engaged in further preparation for treatment and, on 22 June, she was admitted for treatment for cancer which had by then spread. It was during the middle of this phase, namely on 18 June, that the time limit for lodging the notice of appeal expired. I was provided with his partner's medical records, and accept for the purposes of this appeal without making any findings, that between the beginning of June 2015 and, at least, the end of 2018, the father's partner was undergoing significant and invasive treatment in respect of cancer.

42. For the mother, Mr Taylor forcefully asserts that the health and other problems experienced by the father and, more particularly, his partner, cannot, however serious, carry much weight. Partners becoming ill, he says, even bereavement, are commonplace and do not preclude applications to the court being made.

43. Moreover, says Mr Taylor a lack of available funds to secure legal representation cannot be a good explanation for failure to comply with the rules.

44. In July 2016, it is clear that the father's parents re-mortgaged their property to enable the father to pay his former solicitor's fees, at least in part, without which the solicitors were not prepared to give him any advice. Eventually, the father met with his former solicitor, and on 30 September 2016, he instructed his solicitors to file an appeal out of time.

45. How, then, did it take from 30 September 2016 until 15 November 2018 to file the notice of appeal? It is relatively clear from the father's statement that he sent a number of emails to his solicitors enquiring about the appeal. The first of these was on 6 October 2016, just six days after the father instructed his solicitors to file a notice of appeal. On 12 October 2016, the father's solicitor e-mailed saying that he would contact counsel's clerk for a fee quote for advice on appeal. The father responded by saying "time is against us so the sooner we can get the ball rolling the better chance we have". On 13

October the solicitor e-mailed counsel's clerk asking for a quote for and advice on appeal. The father chased on 28 November and then in December the father attended at his solicitor's offices asking for an update, to be told that they were still waiting to hear from Counsel's clerk. The evidence shows that, on 15 December, the solicitor chased counsel's clerk again. Things seem at this stage to have gone quiet, albeit that the father's partner was attending treatment for cancer. Eventually, on 13 March 2017, the father e-mailed the solicitor asking for an update and complaining about the delay. The father e-mailed again on 23 March. It was not until 8 June 2017 that the solicitors e-mailed the father informing him that they had contacted counsel's clerks in October 2016 and December 2016 and that they would chase again. Eventually, on 21 June 2017, the father e-mailed his solicitors to say that he did want to continue and invited the solicitors to keep chasing "because this is really important to me and my family". Thereafter, the father appears not to have heard further from these solicitors.

46. I have already set out above why it is that I feel that, after such a delay, it would not be appropriate for me to make findings against the solicitors, still less to name them. However, it is clear to me that the account given by the father is probably correct and it seems that he was probably very badly let down by this firm of solicitors. Of course, the mother fairly levels criticism at the father saying that he should have sought alternative representation or chased further. I agree in significant respects, but I have to balance the criticisms made by the mother of the father against the circumstances in which the father found himself. He, probably like the mother, was unused to dealing with lawyers and the legal process. He was having to support his partner through what must have been very harrowing cancer treatment.

47. Mr Taylor, for the mother, says that it is too simplistic to say that the subsequent delay was caused by legal representatives, and he says that since they were not actually at that time representing him, the father is responsible for when he contacted solicitors and what he chooses to request of them. I have considered very carefully the forceful arguments which Mr Taylor has put forward but, whilst I criticise the father for the delay, I do not find that the failure to comply was intentional within the meaning of 4.6(c) FPR 2010.

48. Paragraph (d) of rule 4.6 requires me to consider whether there is good explanation for the failure. This has, in reality, been covered by my analysis above. At this stage of the process I am prepared to accept that there is a good explanation for the failure. There will follow an analysis of the prospects of success of the appeal, if permission granted. Perhaps unusually, I have already set out the outcome of this application in the introduction to this Judgment but I shall return to this analysis below.

49. Paragraph (e) of rule 4.6 requires me to consider the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol. Ms Wiley, on behalf of the father, frankly concedes that "it is accepted that the father has not complied with the rules".

50. Paragraph (f) of rule 4.6 requires me to consider whether the failure to comply was caused by the party or by the party's legal representative. I have analysed this above and I agree with Ms Wiley's analysis, on behalf of the father, that "some (not all) of the delay has in fact been caused by the father's former solicitor and further the interplay between solicitor and counsel when the father instructed that he wished to pursue advice on appeal in 2016". In my judgement this is a proper, and frank, analysis of the

situation. It would be folly to pretend that the father is blameless in respect of the delay, and his legal team do not assert that he is.

51. Paragraph (g) of Rule 4.6 requires me to consider whether the hearing date or the likely hearing date can still be met if relief is granted. However, in this case, there are no extant proceedings and so this paragraph does not seem to apply to my considerations.

52. Paragraph (h) of Rule 4.6 requires me to have regard to the effect which the failure to comply had on each party. To date, there is no effect on the mother. Of course, if I give permission to appeal then the mother potentially is gravely affected by that decision, and of course I recognise that years of delay will have profoundly impacted on her as well. The failure to comply could, of course, also mean that the father has been incorrectly found to be a sexual abuser of his own daughter and his daughter may be growing up incorrectly believing her father to be a sexual abuser. If my analysis of the District Judge's findings leads me to conclude that his findings are unsafe, then the effect of failure to comply has been profound indeed, and, exceptionally, this may lead to the need for a re-hearing, however late in time that re-hearing is.

53. Paragraph (i) of Rule 4.6 requires me to consider the effect which the granting of relief would have on each party or a child whose interest the court considers relevant. This takes me back to the passage quoted at the commencement of this Judgment from Mr Tyler's skeleton argument. Potentially, it raises really difficult and profound issues. Mr Taylor, for the mother, has properly directed my attention to the contents of the impact report prepared by the Guardian dated 5 March 2019. This sets out that an appeal in 2019, as it then was, engenders risks to D, which would not have been present in 2015. Mr Taylor rightly says that I should attach weight to the matters set out in this report, which was written after consultation with both a social worker who was involved with D and a family assistance order and also the NSPCC worker who had assisted in therapeutic work.

54. I also agree with Mr Taylor that, if permission is granted and the appeal allowed, it is difficult to see how further litigation can be avoided. I recognise that this exposes the parties, and D, to further litigation. Mr Taylor referred me to *Re H (Children) (Care Proceedings: Appeals out of Time)* [2015] EWCA Civ 583 and I have considered all of the issues arising out of that case. I have considered the overall merits of the proposed appeal, although Mr Taylor asserts for the mother that, when considering whether to extend time, I should not look at the prospects of success of the appeal. I am unable to agree with that submission, given that I am required by r4.6 to have regard to "all the circumstances".

55. If, as is the case here, I am driven to the conclusion that the findings are unsafe, it is my judgement that, however difficult it may be, there needs to be a re-hearing. If a consequence of this is a finding that the father did not sexually abuse D, I recognise that, therapeutically, this is immensely difficult for D. If I have to balance evils, it is my judgement that, should it be the case after a further fact finding hearing, it is better for D to be informed then that her father did not abuse her, than to spend the rest of her life believing that he did. I repeat here what I have already said above, that I am not making findings as to whether the father did, or did not, abuse D. The decisions about D which will need to be taken in the new fact-find hearing reaches a different conclusion will, of course, be a matter for the Judge who conducts that hearing.

56. On behalf of the Guardian, Mr Tyler and Ms Worsley appropriately say that the tension in these cases lies in achieving the appropriate balance between (i) the undoubted interests in the finality of litigation and (ii) the obvious desirability of avoiding the injustice of allowing an erroneous finding to stand. They go on to state, and I agree, that both of these principles are particularly resonant when the welfare of a child is concerned. To allow delay to unsettle a long established status quo should usually be avoided, but to permit to persist a (possibly) false premise on which a child's welfare is determined will almost certainly be detrimental to that child.

The errors alleged in the Judgment

GROUND 1:

The Judge fundamentally erred in relying on any of the evidence of Dr G (child psychologist) rendering his findings from the fact-finding hearing of the 27 to 29 May 2015 unsafe and unreliable.

57. The nub of the complaint under this ground is that Dr G mistakenly considered that he was in a role to assess further the veracity of the evidence already evaluated by the judge; and to determine whether D had been sexually abused by her father. It is complained that the court then sanctioned this mistaken approach.

58. It is, correctly, asserted that no one brought the District Judge's attention to 3 significant cases, including the observations of Baker J (as he then was) in *A London Borough Council v K* [2009] EWHC 850 (Fam) said:

> "*… this case has, to my mind, demonstrated that veracity or validity assessments have a limited role to play in family proceedings. They are, so far as I am aware, unused in criminal proceedings in this country and I see strong arguments for imposing restrictions on their use in family cases as well… There is a danger in some courts, faced with difficult decisions, will subconsciously defer to the apparent expert. That danger has been recognised in a number of cases in which the court has emphasised the discrete roles of the expert and the court. In the case of the voracity expert, the danger is particularly acute. The ultimate judge of the voracity, i.e. where the truth lies, is the judge and the judge alone. He cannot delegate that decision to any expert. I acknowledge that a child psychiatrist….may be able to point out some features of a child's account that add or detract from authenticity… But in my experience, many of these features should be obvious to judges in any event. No expert, however experienced and however well briefed about the case, will be in a position to say where the truth lies. Only the judge sees and hears all the evidence."*

59. At paragraph 16 of his Judgment dated 28 May 2015, the District Judge said:

> "*the prime evidence in this case is Dr G. I need at this point to pause to explain the significance of the expert evidence, especially to Mr K, so that he can understand the manner in which the evidence is approached. I say that because Mr K who I remind myself is a litigant in person, has made a submission that he should not be judged on opinion evidence. I need to emphasise that Dr G is an expert witness and as an expert witness he is entitled to, indeed is required to, express an opinion and I am required to take note of his opinion and can only depart from his opinion if I have good reason for doing so."*

I agree with the submission made on behalf of the father that this section of the Judgment underscores the clear point made by Baker J and the serious error into which the judge fell in the present case. I also agree that, regrettably, there were no findings at all in relation to the mother's new and evolving allegations that it was said had surfaced after the earlier fact-finding hearing and only during the period Dr G was carrying out his assessment. I agree that it does not appear as though any of the new information was detailed or the subject of any forensic scrutiny at all.

60. I also accept the submission that, in failing to depart from Dr G's view that a child who declined to make any disclosures against her father to any professional or the police over the course of 18 months, in conjunction with a father who denied the allegations, was clear and cogent evidence D had been sexually abused, the District Judge fell into further error.

61. The court was also not referred to the important remarks of Ward LJ in ***Re M (Fact Finding burden of proof)*** [2013] 2FLR 874 at paragraph 881:

> "*that too, was the effect of the judge's view of the case: that absent a parental explanation, there was no satisfactory benign explanation, ergo there must be a malevolent explanation. And that is a leap which troubles me. It does not seem to me that the conclusion necessarily follows unless, wrongly, the burden of proof has been reversed, and the parents were required to satisfy the court that this was a non-accidental injury."*

62. I agree with the submission on behalf of the father that the difficulties in this case were compounded by the absence of any effective cross-examination of Dr G on behalf of the father, or indeed any party, as to the reasoning and methodology of his reports. I have already observed above that I cannot comprehend how it was that the District Judge took the view that it was appropriate, in the circumstances, for cross-examination of Dr G, on behalf of the father, being conducted by counsel for the mother. The mother was advancing a positive case that the father was, and had been, a sexual abuser and Dr G wholly supported this contention in his reports which were before the court. In this regard I am, I regret to say, critical of the District Judge when he said:

> "*… The expert is the Child's expert, not the mother's expert. Therefore the mother's counsel will be cross-examining the expert. Of course the father may form a conclusion that the mother's counsel will not be cross-examining in a way which is*

> *beneficial for him. I am satisfied, however that the court is capable of determining whether the expert has been sufficiently tested under cross-examination to enable the court to reach a conclusion which is fair and in the Child's interests."*

I am told that the application for a justice's clerk to cross examine on the father's behalf was also refused. So was the father's application for an adjournment, despite, as I have set out above, his solicitor having withdrawn on the morning of the hearing and despite the father informing the District Judge that he was dyslexic. Further, it is plain from the transcript of the hearing that day that the father was by now even without a court bundle.

63. I agree that points that should have been put to Dr G as a witness who was asserting that D's allegations were in fact true were not put. Cross-examining an expert such as Dr G requires skill and experience and, with the greatest of respect to the father, he did not have either of these necessary qualities.

64. On behalf of the Guardian, Mr Tyler asserts that "the substantive appeal (if proceeded with) is all but unanswerable. This is principally due to:

i) the judge's substantive treatment of the evidence of Dr G (which made his Judgment "wrong"); and

ii) the judge's procedural treatment of the evidence of Dr G (which represents a 'serious procedural irregularity' rendering the proceedings, as a whole, 'unjust')."

65. It is important to remind myself that, on 20 June 2014, the District Judge made 19 findings of fact establishing a long course of conduct in D, comprising both comments about her father and instances and patterns of concerning and sexualised behaviour. The District Judge did not, however, consider the evidence sufficiently cogent to make findings that D's father had sexually abused her.

66. Dr G was then instructed. The mother properly concedes that Dr G misunderstood the District Judge's initial findings. Dr G said, "I am mindful that DJ Greensmith has made findings of fact in respect of 19 of the 20 allegations detailed in the Scott schedule, effectively meaning that these allegations can now be regarded as disclosures". Dr G was plainly wrong in saying this. The District Judge found the fact that D had said the things attributed to her and behaved in the way described by others; he did not find that D's allegations had been true, nor that her behaviour represented the sequelae of proved sexual abuse.

67. The Guardian asserts through Mr Tyler that Dr G was also plainly wrong when he said, "from my perspective, I can identify four likely risks to D if direct contact between her and her father is resumed. The first being the continued risk of him repeating his past actions toward D, as described by her to her mother and maternal grandparents and found as a fact in the Judgment of DJ Greensmith". By letter dated 16 March 2015, Dr G was asked about these mistakes and responded on 20 April 2015, saying that his "understanding of the Judgment is consistent with that outlined in the above two bullet points" (i.e. an accurate description of the findings). Dr G went on to say that he would "respectfully suggest the court that my psychological assessment of D may have offered further opinion of direct relevance to the question of whether her father was indeed the

perpetrator of sexual abuse on D". He concluded by considering that "I think it is highly unlikely that there is an alternative explanation for the disclosures made by D and/or her behaviour".

68. Dr G was never cross-examined about his misunderstanding of the Judgment, nor his ostensibly inaccurate response to the query raised in relation to it. No mention was made of these issues by the District Judge in his Judgment. Indeed, the District Judge said:

> "The prime evidence in this case is the evidence of Dr G. I need at this point to pause to explain the significance of expert evidence, especially to Mr K, so that he can understand the manner in which the evidence is approached. I say that because Mr K, who I remind myself as a litigant in person, has made a submission that he should not be judged on opinion evidence. I need to emphasise that Dr G is an expert witness and as an expert witness he's entitled to, indeed he is required to, express an opinion and I am required to take note of his opinion and can only depart from his opinion if I have a good reason for doing so."

Later, the District Judge said:

> "My analysis of the evidence I have considered over the past two days is as follows. As stated previously, for the court to depart from the advice of an expert court has to have a good reason for doing so. I can find no reason at all to depart from the opinion of Dr G and agree with his conclusions. The disclosures that D has made are of an adult nature. It is, in my judgement, impossible for a child of her age to fantasise to the extent of making the disclosures she has made to her mother. Quite simply the evidence which the court has before the court of Dr G and which is accepted by the court is the cogent evidence which was lacking in June."

69. The Guardian, through Mr Tyler, makes the following submissions, with which I agree:

i) it was incorrect for the judge to have characterised Dr G's evidence as having been "the prime evidence in this case";

ii) it was incorrect for the judge to have directed himself, twice, that he could depart from an expert's view only "if I have a good reason for doing so";

iii) there is no mention at all of even the possibility of Dr G having come to the case with a culpably inaccurate view of the findings already made.

70. I agree with Mr Tyler that, in the light of the above, it is difficult to see how the finding can survive the approach taken to Dr G's evidence by the District Judge. The District Judge's approach was incorrect both in what was explicitly said (i.e. the significance and presumed accuracy of an expert's evidence) and in what was not said (i.e. exposure

of or any reference to the hugely significant misunderstanding of Dr G in relation to the proven factual substratum on which assessment was required to be built).

GROUND 2:
The judge further erred in ordering that counsel for the mother should undertake the cross-examination of Dr G and in suggesting the mother's counsel was a more neutral party to undertake such a task. The procedure adopted overall at the hearing in 2015 was such as to be unfair to the appellant.

71. In my judgement it was incorrect and plainly wrong to suggest that, in a case such as this, counsel for the mother could undertake the task of cross-examination of Dr G on behalf of the father. Moreover, the father had not prepared any cross-examination of Dr G and was given very little time in the deed to do so. Had Dr G's evidence been less central, the District Judge's approach may have adequately met the competing factors due for consideration when applying the overriding objective to achieve a fair result. However, in my judgement, the procedure adopted was irregular to a degree which caused injustice within the meaning of part 30, FPR 2010. No evidence was heard in relation to various key matters, for example the fundamental misapprehension as to the findings made. No challenge was made in relation to the limitations of the role of the veracity expert and no exploration was made as to possible other reasons for D's presentation with the expert, for example alienation.

72. Ground 3 asserts that the District Judge erred in failing adequately to apply and then consider the three-stage process for re-opening the fact-find hearing of 2014. I do not find that it adds much, if anything, to the grounds already considered.

73. Ground 4 asserts that fresh evidence obtained during the disclosure process is such as to undermine the original findings, rendering them unsafe. I have said much above about evidence that has been disclosed extraordinarily late. As I explained, the Guardian substantially changed her position as a consequence of the new material, which will doubtless form an important part of the re-hearing.

The test on appeal

74. Part 30 FPR 2010 deals with the applicable rules in relation to appeals. This appeal is, of course, an appeal against a decision of a District Judge. However, because that District Judge has since been promoted to Circuit Judge and because this appeal raises fundamental issues in relation to timing and in relation to the treatment of expert evidence, the view was taken that it should be referred to the High Court.

75. Rule 30.3(7) provides:

> "*permission to appeal may be given only where -*
> *(a) the court considers that the appeal would have a real prospect of success; or*
> *(b) there is some other compelling reason why the appeal should be heard.*"

76. Rule 30.12.(3) provides:

> "*The appeal court will allow an appeal where the decision of the lower court was -*
> *(a) wrong; or*
> *(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.*"

77. For the reasons which I have set out above, I am satisfied that there are compelling reasons why this appeal should be heard, that there is a serious risk that the decision was wrong and that there was a serious procedural irregularity in the proceedings in the lower court.

78. It is important that I record that none of the advocates who have appeared before me in this appeal appeared at any part of the hearing before the District Judge.

79. Accordingly, I grant the father permission to appeal out of time, I allow the appeal and I set aside the finding by the District Judge that the father sexually abused his daughter D. The matter must now be remitted for re-hearing and in my judgement this re-hearing should be by a High Court Judge of the Family Division.