

ENGLAND AND WALES / JUDGMENT

G (Children), Re

COURT

IN THE COURT OF APPEAL (CIVIL DIVISION)

BEFORE

LORD JUSTICE McFARLANE

and

SIR STANLEY BURNTON

IN THE MATTER OF G (CHILDREN)

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

The Appellant Father appeared in person
The Respondent Mother appeared in person via video conference

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IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM

(HHJ WADDICOR)

BRIGHTON COUNTY COURT

Case No: B4/2012/

2886

Royal Courts of Justice

Strand

London WC2A 2LL

Tuesday, 9

th July 2013

Before:

LORD JUSTICE McFARLANE

and

SIR STANLEY BURNTON

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The Appellant Father appeared in person

The Respondent Mother appeared in person via video conference

JUDGMENT

Lord Justice McFarlane:

1. This is an appeal brought by the father of two still relatively young children, C and L. C is a boy who is now aged 8 and L is a girl aged 6. The appeal relates to a decision made by HHJ Waddicor, sitting in the Brighton County Court on 18 October 2012 at the conclusion of what had become very long- running proceedings under section 8 of the Children Act 1989.
2. The issue before the judge for determination was stark. The father sought what would be regarded as a generous and open arrangement for contact to the children. The mother sought an order for no direct contact, and indeed the question before the judge included, certainly by the conclusion of the hearing, whether or not there should be a bar on any further applications to the court under s.91(14) of the Children Act. 3. 4. In the event, having heard evidence I think over three days and having reserved judgment for a week, the judge decided very firmly, and for reasons which she set out in substantial detail in her judgment, that the mother's position was the one that represented the best interests of the children. She therefore made an order which refused direct contact between the father and the children, and imposed a s.91(14) order for a period of five years. In addition the judge went on to order that the father, who was a litigant in person before the court, should pay the mother's costs "following a detailed assessment of her costs". The mother was legally aided throughout the proceedings. The father sought by his notice of appeal, which was issued on the 2nd November 2012, to challenge the entirety of the judge's determination. The application for permission to appeal came before Thorpe LJ on 25 April 2013, and for the reasons that he shortly sets out in his judgment of that day, Thorpe LJ felt that there was no reasonable prospect of the father's comprehensive attack on the judge's determination succeeding. He therefore refused permission to appeal generally, but did give permission to appeal solely against the costs order. Thorpe LJ, in the course of his judgment, said that such

an order would be highly unusual in Children Act proceedings. Also, he noted that the mother was publicly funded and the father had apparently no, or limited, financial means. Thorpe LJ therefore questioned whether, at the very least, the order should have included a term such as “not to be enforced without leave.” So this morning Sir Stanley Burnton and I have heard the father’s appeal on that limited basis. 5. The father appears in person before us, although he tells me, and I readily accept, he has attempted to obtain legal representation, and the mother appears also in person via a remote video link. 6. 7. 8. 9. The context in which the family court has to consider orders for costs is one which is to a degree different from that which applies in ordinary civil litigation. The family court, under the Family Procedure Rules, is exempt from Rule 44.3(2) and (3) of the Civil Procedure Rules 1998 (parts 43 and 44). So the rule that costs normally follow the event doesn’t apply to family proceedings. Indeed it is out of the ordinary for a family court to make an order for one party to proceedings in relation to a child to pay the costs of the other party irrespective of the result of the proceedings. But it is established by case-law that in some cases the family court does have jurisdiction to make such an order. The leading case, despite its age, remains *R v R (Costs: Child Case)* [1997] 2 FLR 95. It is a Court of Appeal decision. In the judgment of Hale LJ as she then was, the relevant legal landscape is described, and the court goes on to hold that where a party is seen to have acted unreasonably in relation to the proceedings then the family court does have a jurisdiction to order that party to pay some or all of the costs. That decision has been followed and endorsed in a number of cases, in particular *Re F (Family Proceedings: Costs)* [2008] EWCA Civ 938. So the task that the father has to mount this morning before this court is to persuade us that the judge was in error in concluding that his conduct in these proceedings came within the category of unreasonable litigation conduct, enabling the judge to exercise this unusual aspect of the costs jurisdiction. It is not my intention to labour this judgment by setting out extensive detail of the range of adverse findings that the judge made against this father. Both of the parties who are particularly interested in this litigation, namely the mother and the father, are well aware of the criticisms that the judge made. But, by way of summary, I say this. First of all, the starting point for the round of litigation that the judge was engaged in concluding was a consent order for contact which had been made before a district judge in August

2009. That order, as the judge recites, almost in terms established the very framework for reasonable contact that the father was 3¼ years later trying to re-establish before Judge Waddicor at the end of the last year. Only two months after that order had been made, the father launched his applications to reopen the matter, and those were the applications which after three years the judge came to determine. It is right that the initial application made by the father was modest in order to discharge provisions in the original order relating to the payment of nursery fees and fees at the contact centre, he having lost his employment at that time. But matters were soon to escalate and develop in the way the judge describes and in a way which, as her findings show, step by step, were generated by the father’s actions both in court and out of court. 10. The adverse findings relate in part to the judge holding that the father made a number of allegations against the mother, one of

them of serious conduct, which were groundless and which had been fabricated by the father. SMITH BERNAL WORDWAVE 11. 12. Separately, the father had an interview with a NYAS officer, who had been appointed as the Children's Guardian. The officer met the father in April 2011, but by August 2011 the father was alleging that that officer had presented racist observations and comments during that interview, and he made a formal complaint to NYAS in relation to the NYAS-appointed Children's Guardian. The judge found that there was absolutely no basis for those allegations by the father, and she also found that the father did not make them promptly after the April meeting with the NYAS, but only after the NYAS officer had made his first report, which was adverse to the father. That was the trigger, the judge found, for the father then raising the spectre of racism. The judge found that the father was obsessed with the mother and obsessed with the financial circumstances of the couple following separation, and this had driven him on. She makes a number of further adverse findings against him in relation to his involvement in the choice of schools for the children, for his reporting of the mother to the police following what the judge considered to be a minor incident at a contact session, and in short she considered that the length of the proceedings, and the fact they had been driven to consider matters of detail at every turn, had been caused by the father's actions and that he was engaged in a course of action designed to manipulate and harass the mother by using the proceedings as his weapon of choice. 13. The judge's conclusion therefore, as I have indicated, on the merits of the case, were to make the orders refusing direct contact and prohibiting further applications. 14. In relation to costs, the judge went on at paragraph 72, 73 and 74 to set out her reasons: "I am dealing with an application for costs. It is made by the mother against the father for the costs which she has incurred with the benefit of public funding in this protracted litigation which began life in October 2009. Mr Bergin has stressed that this is not an application made with any pleasure by the mother. It is not therefore a vindictive application. But Mr Bergin properly has to be mindful of the public purse, and the Legal Services Commission in funding the mother's litigation has been put to enormous expense. So I look at what was behind all of this. SMITH BERNAL WORDWAVE

73. The father says he should not have to pay anything. He tells me that notwithstanding the judgment, which has come down heavily against him in terms of being untruthful, he maintains that he has told the truth all the way through and has simply wanted to do right by his children and see his children, and he feels that he had not alternative but to bring the application. I reject the father's submissions about what prompted the litigation. It is almost unbelievable that in August 2009 this father had an order by consent that guaranteed him regular contact with his children. He says he had to apply in October 2009 because had had lost his job and did not have any money. In my judgment, it was not necessary to launch these proceedings. But beyond that the father has used these proceedings as a vehicle for getting at the mother. At every step of the way he has criticized her and has made allegations about her and he has completely disregarded the interests of the children.

74. I am conscious that the father says he is of He lives in rented limited means. accommodation and he is in receipt of statutory benefits. So it may be that any order for costs could never be enforced. But the question of enforceability is separate. I am satisfied that the case brought by the father had absolutely had no merit. The application followed on a compendious order that gave the father everything he wanted bar calling it a shared residence order. In the three years since his application the father has gone out of his way to make spurious allegations which the court and others have had to investigate and he has abused the court process by using it as a vehicle to make the mother feel insecure and vulnerable. I am satisfied that, unusual though it is, an order for costs is entirely appropriate and the order will be that the father shall pay the costs of the mother throughout this application from the date of issue. Those costs are to be subject to a detailed assessment and the question of enforcement of costs will be determined separately.” SMITH BERNAL WORDWAVE 15. 16. 17. It is apparent to me, in reading those paragraphs, that the judge had three basic reasons in mind in making the costs order that she did. First of all, towards the end of paragraph 73, she finds that it was “not necessary to launch these proceedings”. Secondly, she finds that the father has “used these proceedings as a vehicle for getting at the mother.” In the same context, later in paragraph 74, she finds that “he has abused the court process by using it as a vehicle to make the mother feel insecure and vulnerable.” Thirdly, she finds that there was “absolutely no merit” in the case brought by the father. So despite noting, as she does, that he has limited means, lives in rented accommodation, and is in receipt of statutory benefits, and it may be that the order for costs could never be enforced, she nevertheless goes on to make the order that is now the subject of this appeal. Although the judge does not refer to the case-law that I have just made reference to, my reading of her judgment is that it sits plainly within the jurisdiction that Hale LJ described, and which has been endorsed by courts subsequently. This was a finding by the judge that the father had acted unreasonably both in starting the proceedings, but more importantly, in the way he had conducted himself throughout the proceedings. It therefore is plain to me that she, as a matter of law, was justified in considering an order for costs, and I can see no error in her exercise of discretion in deciding to deploy that jurisdiction and make an order in this case. In the course of his submissions to us, the father has, almost inevitably, had to take us back to the detail of the judgment and the particular episodes that the judge relies upon in coming to the global adverse view about him that she describes. We sitting here, considering an appeal which just relates to the issue of costs, are tied by the findings of fact that the judge made, and more particularly the findings of motivation that the judge made. She sat and heard the case. She was in a position to form those findings and to come to those conclusions about the father’s motivation, and because there is no appeal now before us in relation to those matters, those are the starting blocks and the building blocks from which we have to consider the exercise of her discretion on costs. Against that background, despite hearing what the father says about the particular incidents, in my view the father cannot succeed in his appeal on the first limb, which is that the judge should not have made an order for costs against him in any event. The second limb in the appeal is that the judge failed to take account of his means and failed to take account of the level of costs that he

would be expected to pay. He says, and I readily again accept what he says, that no costs schedule was produced by the lawyers acting for the mother for him to see what it was that he was being asked to pay and for the judge to see what it was he was being asked to pay. He is right to raise that matter with us. He also points out the burden that this costs order would have upon him were it ever to be enforced against him. Given his current means, it would be devastating for him, and he says that he could never get SMITH BERNAL WORDWAVE 18. his life back on track if he had to face a bill of this sort. He says that would not only have an impact on him but also, either indirectly or directly, adversely affect his ability to support the children and in other ways that relate to the children's welfare. Insofar as the absence of a costs schedule is concerned, the judge provided for that circumstance, because her order is plain that there has to be "a detailed assessment of her costs" before the costs order becomes a reality. It therefore is the case that there has to be a process of what in the old days would be called "taxation" of the mother's costs, adjudicated upon it if necessary, to decide what the reasonable level of costs should be. So the only question is whether we should in some way accept the steer given by Thorpe LJ in granting permission to appeal in requiring the judge's order to include some phrase such as "not to be enforced without leave". I am not attracted by that course. The detailed assessment provisions will protect the father from facing a bill which is unreasonable in terms of the elements of the costs schedule itself. The question of enforcement will be for any subsequent court to deal with, on the facts as they then are, as would be the case in any ordinary civil litigation. I therefore do not agree with the view that Thorpe LJ had apparently formed at the permission stage that the judge was in error in not putting in a phrase about enforcement. 19. For the reasons that I have therefore variously given, I consider that the father's appeal should be dismissed. Sir Stanley Burnton: 20. I agree. Order: Appeal dismissed SMITH BERNAL WORDWAVE

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