Neutral Citation Number: [2019] EWHC 1513 (Fam)

Case No: 2018/0201

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2019

Before :

MR JUSTICE WILLIAMS

- -

Between :

SD	**Appellant**
- and -	
AFH	**1st Respondent**
- and –	
OMD	**2nd Respondent**
(Through his Guardian)	

(Appeal: Coercive and controlling behaviour: Inference or speculation)

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- -

The Appellant represented himself
Evelyn Bugeja (instructed by **Harrison Clark Rickerbys Solicitors**) for the **1st Respondent**
Dewinder Birk (instructed by **Cafcass**) for the **2nd Respondent**

Hearing dates: 5th - 6th June 2019

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Approved Judgment

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

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MR JUSTICE WILLIAMS

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family 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 Williams :

Introduction

1. The proposed appellant SD (the father) seeks permission to appeal against the decision of HHJ Plunkett, dated 14 November 2018. That decision reflects the outcome of a judgment that was circulated in draft on 30 October but handed down formally on 14 November. By that judgment, HHJ Plunkett made findings of fact to the effect that:

    i) The father demonstrated controlling and coercive behaviour prior to the end of June agreement.

    ii) The father continued to demonstrate controlling and coercive behaviour, in far more significant ways, up to and including an assault on the mother (pushing her to the ground) on 14 September 2018.

    iii) The father's behaviour served to undermine the mother; it served to undermine her ability to care for the child and it directly involved O (and indeed his half-brother) to their direct emotional detriment in high level confrontation. That is inexcusable.

2. Those findings were made in the context of cross applications by the mother, AFH, for orders in relation to the parties' little son OMD (now aged just 2).

3. The father lodged an appellant's notice on 4 December 2018 seeking permission to appeal against those conclusions. The grounds of appeal, set out in a composite 'grounds of appeal and skeleton argument' are as follows:

    HHJ Plunkett was wrong both in law and in fact to make the findings against the appellant where there is a real risk of violation of both the child's and the appellant father's article 6 and 8 rights and making findings based on suspicion or doubt, exceeding reasonable inference and not discharging the burden and standard of proof. The judgment demonstrates clear evidence of procedural failures (including but not limited to inadequate allocation of time and disclosure of evidence), the making of findings based on inference of causation through correlation with subsequent behaviours tantamount to 'suspicion' and not fact; exceeding reasonable inference on suspicion; and bias/discrimination. Fundamentally, the findings cannot be made on the evidence available or on the literal interpretation of the terms claimed therein.

4. That general ground is broken down within the Skeleton argument into 8 more distinct grounds, to which I shall return in more detail later. On 21 February 2019, Mrs Justice Gwynneth Knowles gave directions for the application to be listed for an oral permission with the appeal to follow immediately if permission were granted. The

father was charged with criminal offences in part arising out of the incident that took place on 14 September 2018. He was acquitted of assaulting the mother but I understand was convicted of a breach of the non-molestation order. Further evidence was disclosed by the police within those proceedings including a witness statement from a passer-by and further CCTV footage. On 23 May 2019, the father issued an application seeking to adduce new evidence in addition to that which was referred to in ground 4 (5). That evidence included evidence given by a witness, AB, the passer-by, to the effect that the father was being defensive and the mother was being aggressive on 14 September, the mother's own testimony as to her having wanted to promote contact and a further text message from March 2018 relating to her desire to maintain contact. On 23 May 2019, I made an order directing that that application be determined at the commencement of the appeal. During the course of the hearing, the father also referred to further CCTV evidence which had been either disclosed in the criminal proceedings or given in evidence at those proceedings, which he asserted showed a clearer view of the incident in which the mother was pushed to the floor.

5. For reasons which I have not delved into, the appeal bundle went astray and I was provided with a further copy on the morning of the hearing. Both the father and the mother filed amended or supplemental skeletons which reached me on the day of the hearing together with a copy of the detailed agreement that was at the centre of the first finding of fact made. I was also provided with the 400+ page trial bundle and a memory stick with relevant audio and CCTV recordings on it. The mother's team helpfully provided a case summary and a chronology. The Guardian also attended the appeal and filed a succinct skeleton argument supporting the dismissal of the appeal. I was able to read the appeal bundle and substantial parts of the trial bundle and to listen to various parts of the digital recordings prior to the commencement of the hearing. Subsequently I have read and listened to or watched more of the evidence that was before HHJ Plunkett.

6. At the hearing the father represented himself. I understand that he is a qualified barrister and his presentation reflected this. He was articulate and confident and was well able to put his points. The mother was represented as she was at the hearing at first instance by Miss Bugeja, counsel. The child was represented by Miss Birk.

7. At the commencement of the hearing I indicated to the parties that having undertaken substantial reading in advance, I did not propose to deal with permission or the application to adduce further evidence as preliminary issues but rather to deal with all matters together. All the parties agreed to this approach and so I heard submissions for about 3 hours. Of this, the father's submissions took up about 2 hours and those of the mother and the Guardian about one hour. As per the order of Knowles J of 21 February 2019, I reserved judgment until 6 June.

Background

8. Paragraph 2 of the judgment of HHJ Plunkett sets out the recent history and I do not intend to repeat it all here. Suffice to say that the child was born in May 2017 and the mother and father separated in spring 2018 before he was one year old. The mother has a child by a previous relationship. The father continued to see the child and his stepson following the separation. The father also has 2 children from an earlier relationship. Proceedings between the father and the mother of his 2 older sons have been ongoing for some time and the 2 boys are represented by the Guardian in those proceedings.

9. By June 2018 the parties were in communication regarding the arrangements for the child. Some of their exchanges are recorded in text exchanges which the father submits to his witness statement, although I understand from the father that there is a huge amount of material that is not within the bundle. By late June it appears the parties had reached some form of agreement although its terms are hard to discern. His Honour Judge Plunkett having considered all of the material and heard the oral evidence concluded that an agreement described as a 50/50 agreement had been achieved. The terms of the agreement are far from clear. I was provided with a copy of a 7-page contract that the father provided to the mother which he said recorded the agreement. The text messages suggest that the mother never signed or returned this. The circumstances in which this 'Agreement' was reached were central to the first 'fact' which HHJ Plunkett was considering. It is clear from the father's evidence and also his submissions to me that he views the agreement as being the key to the entirety of the litigation.

10. On 1 July 2018, a handover of the child took place at a petrol station. The father maintains that the combination of the agreement and a variation to it meant that he was due to look after the child from 1 July until 13 July. This was a combination of an agreed variation, his allocated time under the agreement and a further variation which provided for him to care for the child whilst the childminder was on holiday. The mother's case was that he was due to have the child until Tuesday, 3 July (which also happened to be the father's birthday), that the child was to return to her until 9 July and that the father would then care for him until 13 July. That appears to be consistent with the text messages of the 1 and 2 July but, more importantly, is consistent with the audio recording of the handover on 1 July in which the father appears to agree that the child will be returned on Tuesday evening. Earlier during that conversation, he had said that she would not get the child back without a court order, which had led to a dispute in which it appears she was standing in front of his car trying to prevent him leaving until he confirmed that he would return the child on Tuesday. In the event the father did not return O on the Tuesday. The text exchanges on 3 and 4 July illustrate the dispute progressing. Interestingly, the father appears to assert in those messages that there was not an agreement because the mother had not signed the agreement. In any event, by 12 July the child had still not been returned to her and so she made an application to court for his return. That order was made on 12 July together with a prohibited steps order which prevented the father from removing the child from the care of the mother or his childminder or nursery until further order. The father did not comply with it and on 13 July the mother applied for and was granted a recovery order. On the same day the father issued an application to set aside the return order alleging that there were safeguarding concerns regarding the mother's care of the child. The recovery order was granted and the child was returned to her care.

11. On 17 July at the return date of the mother's and the father's applications directions were given. The prohibited steps order remained in place albeit in varied terms. A FHDRA was listed for 29 August 2018. Contact was to be as agreed between the parents. There were some concerns as to the father's behaviour at that hearing but HHJ Plunkett does not appear to have relied to any extent on that he describing the hearing as being "rumbustious." On 24 August the father applied for a variation of the order of 17 July, in particular for permission to adduce further evidence. At the FHDRA the matters were transferred to the Worcester family court and listed before HHJ Plunkett on 6 September.

12. As recorded at paragraph 2(k) of his judgment, at that point the mother was offering some time for the child to spend with the father, he sought an immediate return to a 50/50 shared care arrangement in accordance with the 'agreement'. It seems clear at that point that HHJ Plunkett was seeking to ascertain whether it was appropriate to find some consensual way forward. When HHJ Plunkett would not make that order, the father said he would withdraw his application and would have no contact. The father then left court. The father's position is that there was no basis at that stage for HHJ Plunkett declining to reinstate the shared care arrangement that had existed prior to July and that his frustration at the injustice of the failure to reinstate a full relationship between himself and his son boiled over leading to the position he then adopted. An order was made which provided that the child would live with the mother and the father's applications were dismissed he having been given permission to withdraw them. The net effect of that order together with that of 17 July was that the prohibited steps order remained in place alongside a live with order in favour of the mother.

13. The father plainly regretted his impetuosity because he issued a fresh application on 7 September 2018 seeking child arrangements orders to provide a 50-50 shared care arrangement, to remove the prohibited steps order and to provide for a section 7 report. His application was listed for hearing on 25 September 2018.

14. On the 12, 13, and 14, the father attended at the mother's home. The father maintains that this was at the mother's invitation. On the 12th, the mother's solicitor contacted the father and asked him not to go but he did. On the 13th he attended and there is a recording of their conversation. Even if the mother had initially invited him to attend it is clear from the recording that the mother wished him to leave, asking him to do so some 31 times, calling the police and activating a panic button. The father left before police arrived but went to the childminder's home. As noted by HHJ Plunkett, the existence of the prohibited steps order meant that he had no business in going there.

15. On 14 September the father attended the mother's home as she was about to leave to take her older son to school. As she was getting them in the car the father offered to hold O. The CCTV images show the father holding O and walking away from the mother's home towards his car. The mother stands in front of him walking backward seeking to block his progress. Over a period of 10 minutes they moved to and fro between the mother's home and the father's car. At one point by the father's car the mother falls to the ground. The mother says she was pushed by the father. The father says that she was seeking to aggressively take O from him and that he fended her off and she thus fell to the ground. He says that his actions were in self-defence of himself or another. Eventually the police arrive and O is returned to the mother. The father was arrested. That led to the mother making an application for a non-molestation order which came before Recorder Peel QC on 18 September 2018. He made those orders and provided for a return date on 25 September; the same day that the father's applications were listed.

16. At the return date on 25 September it was plain that a fact-finding would be required in compliance with PD12J before the court could determine child arrangements. HHJ Plunkett recorded the 3 central points as being:

    i) Whether the applicant had perpetrated coercive and/or controlling behaviour towards the respondent, leading to an alleged agreement at or around the time the parties separated in June 2018.

ii) Whether the applicant continued to exhibit coercive and/or controlling behaviour up to and including September 2018.

iii) Whether the applicant was violent to the respondent on 14 September 2018.

17. Those would appear to be appropriate and well focused allegations of facts, which were plainly relevant to the determination of the nature of the relationship that it would be appropriate for the child to have with the father. If the agreement was truly consensual and reached as a result of the parents free will, that would be a weighty factor for the court to consider in determining where the child's best interests lay. Not because an agreement or a contract is binding but because competent parents are generally best placed to determine what is in their children's interests. However if the agreement was reached as a result of pressure or coercion being exerted by one parent upon the other the agreement would be of little if any value to the court in determining what was in the child's best interests. Secondly, the existence of coercive or controlling behaviour would not only inform the court as to whether to place any weight on the agreement but would also inform the court as to the impact on the alleged victim and the child of future child arrangements and whether spending time with arrangements were appropriate and if so how they would need to be formulated in order to ensure that the alleged victim and child were not exposed to the emotional abuse that might accompany further coercion or control. In relation to allegations of violence, it hardly needs to be reiterated the potential impact of violence upon the victim and the child. The wisdom contained within the report of Doctors Sturge and Glaser prepared for Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence) [2000] 2 FLR 334 remains as valid now as it ever was. Furthermore, it has been endorsed by the courts on many occasions and is reflected within the scheme contained within FPR PD12J.

18. HHJ Plunkett gave detailed directions for the holding of a fact-finding hearing for 17 – 18 October 2018; that to also consider the non-molestation application. Plainly the allegations were as relevant to the Family Law Act 1996 application as they were to the child arrangements order applications. An order was made for disclosure of material from the Gloucestershire police together with detailed case management directions for the provision of other evidence. HHJ Plunkett rightly addressed the issue of how questions would be put to the mother, the father being a litigant in person. He provided for a list of cross examination questions to be provided by the father. He noted that consideration would be given to special measures.

19. The fact-finding hearing came before HHJ Plunkett on 17 – 18 October 2018. HHJ Plunkett was provided with a bundle for the hearing. This contained some 450 pages of documents including the parties witness statements and exhibits, Cafcass and local authority information, a transcript of a hearing on 17 July, medical information and police disclosure. It is clear from the judgment and reference is made within it that the judge had immersed himself in the documentary evidence. Also provided to the court were audio and video clips obtained from the police and from the mother, which either recorded conversations between the father and mother or in respect of the incident on 14 September showed CCTV video imaging of the incident. Some of this was played in court and it appears that the judge listened to other parts out of court. The parties submitted Skeleton Arguments in advance of the hearing. At the commencement of the two-day hearing the issue of missing disclosure from Gloucestershire police was raised. Both parties agreed that the absence of such disclosure should not prevent the hearing

going ahead given the delay that would have been caused. I note that the father told the court he had some 97 recordings of the mother which were on his dictaphone in the custody of the police. HHJ Plunkett heard oral evidence from the mother. He put questions to her which had been drafted by the father. The father also gave oral evidence and it seems was asked questions (I assume quasi-in-chief) by the judge and was then cross-examined by counsel for the mother. The evidence was given over 2 days totalling some 5.5 hours. At the conclusion of the hearing the judge gave the parties the opportunity to file written submissions. Both the father (10 pages) and the mother (9 pages) did so.

20. The draft judgment was circulated on 30 October. It runs to some 12 pages. The judgment focuses on the facts. In particular it contains an analysis of the father's character and the mother's character, a recitation of the recent history and an analysis of the facts. On 6 November HHJ Plunkett made the child a party to proceedings and on 14 November 2018 the judgment was formally handed down in relation to fact-finding and the extension of the non-molestation order. The findings made were in slightly different terms to those set out in the order of 25 September 2018 in that the second and third were amalgamated into one and a finding was made in terms of the impact of the father's behaviour on the mother.

21. I shall return to consider particular aspects of the judgment later.

22. The appellant's notice was issued on 4 December 2018, within the period of 21 days permitted by the rules. Mrs Justice Knowles gave directions on 21 February 2019.

23. I understand that the proceedings have continued at first instance with the provision of a psychological assessment of the father. I have not read that. The existence of tandem proceedings concerning the father's two older children and the making of a section 91 (14) Children Act 1989 order has led to both sets of proceedings now being heard by Mr Justice Keehan. HHJ Plunkett granted the father's appeal against the refusal of DJ Khan to give him permission to make an application for a child arrangements order within the currency of the s91(14) order, which decision was, in turn, successfully appealed and the s91(14) order was reinstated by Mr. Justice Keehan.

Appeals against findings of fact

24. The FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for procedural irregularity. Permission to appeal may be granted where the appeal has a realistic prospect of success or where there is some other compelling reason.

25. In Re F (Children) [2016] EWCA Civ 546 Munby P summarised an approach to appeals,

> *22. Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they hpave won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts,*

the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."

23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):

> *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*

It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".

26. Lord Hoffmann also said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372:

"*If I may quote what I said in Biogen Inc v Medeva Plc [1997] RPC 1, 45:*

'... [S]pecific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'

First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc v Medeva plc [1997] RPC 1:
'The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon

him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'

27. So far as concerns the appellate approach to matters of evaluation and fact: see Lord Hodge in *Royal Bank of Scotland v Carlyle* [2015] UKSC 13, 2015 SC (UKSC) 93, paras 21-22:

"21 But deciding the case as if at first instance is not the task assigned to this court or to the Inner House … Lord Reed summarised the relevant law in para 67 of his judgment in Henderson [Henderson v Foxworth Investments Ltd [2014] UKSC 41, [2014] 1 WLR 2600] in these terms:

"It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

28. See also the Privy Council decision in Chen-v-Ng [2017] UKPC 27

Recent guidance has been given by the UK Supreme Court in McGraddie v McGraddie [2013] 1 WLR 2477 and Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600 and by the Board itself in Central Bank of Ecuador v Conticorp SA [2015] UKPC 11 as to the proper approach of an appellate court when deciding whether to interfere with a judge's conclusion on a disputed issue of fact on which the judge has heard oral evidence. In McGraddie the Supreme Court and in Central Bank of Ecuador the Board set out a well-known passage from Lord Thankerton's speech in Thomas v Thomas [1947] AC 484, 487-488, which encapsulates the principles relevant on this appeal. It is to this effect:

"(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

29. Thus it is clear from appellate courts of the highest level, that on an appeal from a first instance judge in relation to fact-finding, this court should not interfere unless compelled to do so by the identification of clear and substantial errors in the process of the evaluation of the evidence and the drawing of conclusions of fact from that

evidence. The nature and depth of the analysis to be conducted in any particular case and the level of detail that might be expected will depend upon the particular facts of the case and the circumstances in which the judge is considering it.

The Grounds of Appeal

30. The itemised grounds are set out within the composite grounds and skeleton argument; the most recent version of which is dated 3 June 2019. That substantially adds to the original skeleton albeit the majority of the additions relate to ground 7 (8) and are contained within the third skeleton argument that the father filed with the first instance court on 17 October 2018. In his oral submissions the father emphasised particular aspects of those contents. In particular he emphasised that following the separation in or about March 2018 that the mother had supported contact between himself and the child, and indeed his stepson. He contended that this provided the foundations for the discussions which led to a freely reached agreement in late June 2018. He submitted that the mere fact of agreed time with arrangements in that period taken together with the contents of the text exchanges, illustrated on their face value that the mother was acting entirely of her own volition and without any pressure or duress. He submitted that if the court accepted that this was the starting point his later behaviour could be differently characterised because it would then all be a result of his legitimate frustration at the mother resigning from a perfectly proper agreement.

31. The grounds and the essential arguments the father advanced in support of them are in summary as follows:

    i) Ground one: failure to discharge the burden and/or standard of proof.

    The essential argument advanced by the father is that the conclusion that the June agreement was a result of coercive and controlling behaviour was not an outcome that could be established on the evidence relating to that agreement. The father submits that the entirety of the text exchanges between the parties, which led to the agreement, demonstrated that that was not a conclusion that could be properly reached on that evidence, bearing in mind the burden of proof and the need for the court to act on evidence not inference or speculation. He submitted that there is absolutely no evidence of coercion within the texts at all, they are entirely reasonable and simply cannot be read in a way that allows an inference of coercion to be drawn.

    ii) Ground 2: the court made a finding based on suspicion or doubt.

    The essential argument is that in respect of the finding that the father demonstrated coercive and controlling behaviour prior to the end of the June agreement, that this was a result of inappropriate speculation or suspicion. The father refers to the leading authorities such as Re-B (children) [2008] UKHL 35, and submits that the reliance by HHJ Plunkett upon subsequent events in order to interpret or frame events prior to the June agreement amounted to reliance on suspicion or speculation which went far beyond reasonable inference. The father submits that the methodology used presents a real risk of injustice or an unsafe finding when contrasted with the considerable volume and cogent evidence from the mother herself that a true agreement was reached. In particular he contended that if there had been a step change or inflexion point in his behaviour after the

agreement had been reached that later behaviour could not rationally be deployed to infer what his behaviour had been prior to and in the course of the conclusion of the agreement.

iii) Ground 3: findings were made contrary to the literal definition of the terms.

The essential argument the father advances is that the conclusion that the judge reached that the father demonstrated coercive and controlling behaviour and used violence were not supported by the evidence. In respect of coercion and control he submits that the words he used could not fall within a literal interpretation of coercion or control. He raises further arguments that in respect of aspect of the findings, no evidence was submitted (i.e. in respect of the conclusion the father had no justification for attending nursery) and that in other respects, undisclosed evidence would have shown some of the mother's assertions to be erroneous (for instance whether she tried to take the child from the father on 14 September). The father submits there has been an absence of balance and a cherry picking of the mother's evidence.

iv) Ground 3 (4): inadequate allocation of time and procedural defects.

The father submits that this was an exceptional case, (as noted in the order of 14 November) and inadequate time was devoted to it. The case was given a 2-day time estimate but only 1.5 hours were available on day one and 4 hours on day two due to other listings. Together with issues of nondisclosure and abbreviation of examination of witnesses by a litigant in person amounts to a procedural irregularity.

v) Ground 4 (5): new and compelling evidence.

The essential argument is that HHJ Plunkett was wrong to proceed with the hearing when there was outstanding disclosure from the police. Subsequent disclosure revealed a witness to events on 14 September 2018 whose evidence (including "going aggressively at a man carrying a child") was contrary to the mother's evidence and to the finding. He also referred to CCTV evidence which had not been available to the court but which became available during the criminal trial which showed a better view of events by the father's car when the mother was pushed to the ground.

vi) Ground 5 (6): the judge erred in fact in his analysis pertinent to the relevant issues.

This again relates to the conclusion reached in relation to the agreement in June 2018 that the mother had no alternative but to agree as a result of control and coercion. The father submits that the judge failed to properly consider the contrary position. He also refers to the fact that the judge did not analyse the mother's inconsistency in her position. In particular he referred to what appeared to be a shift in her position as between the conversation on Sunday, 1 July and her text message of 2 July.

vii) Ground 6 (7): the judge demonstrated subconscious bias in his analysis.

The father's essential submission is that the 'total absence of any of F's evidence or reference thereto within the judgment or forensic analysis' demonstrates bias. He also submits that the knowledge the judge brought to bear from the "brother" case imported bias. The father submits that the judge's criticism of the father in relation to the terms of the agreement was unfounded given it was based on a Cafcass document. The father also submits that the judge was biased in that he allowed the mother to submit recorded calls as evidence but when the father wish to submit recorded calls he was warned by the judge that it was a criminal offence. The father also submits that the judge failed to take into account the father's frustration in relation to the failure to uphold the agreement and the fact that he was involved in litigation regarding the "brother" case.

viii) Ground 7 (8): procedural defectiveness of the non-molestation order.

The amended skeleton deploys a raft of procedural arguments in respect of the non-molestation order. In particular the father submits that there was a failure to comply with the duty of full and frank disclosure in respect of the urgent without notice application. The father referred to the mother's initial statement in which she said that she almost reached an agreement as demonstrating that she had failed to be full and frank when she subsequently accepted that she had reached an agreement. He highlights other areas of non-compliance and submits that the authorities demonstrate that a failure to be full and frank or to comply with the procedural requirements should lead to a discharge of the order. He also submits that the without notice order did not meet the criteria of urgency or without notice. Originally the central argument in this respect was that the process was defective and a breach of the father's and the child's article 6 and article 8 rights because the effective return date was not until 5 weeks after the original ex parte order and was then rolled up with the fact finding. Lastly the father sets out a very detailed analysis of the law relating to service of non-molestation orders and their effectiveness. He asserts that the cumulative effect of the breaches created a real risk of injustice for the father and the child and breach their article 6, 8, (and 10?) rights. He submits that they render the non-molestation order unenforceable and it should therefore be discharged.

32. On behalf of the mother, Miss Bugeja's skeleton contains a ground by ground rebuttal of the appeal by reference to aspects of the evidence that the judge considered in his judgment and his discussion and conclusions. She submits that the appeal has no realistic prospect of success and that permission should be refused. However her overarching submission is that the process adopted was entirely appropriate for a case with the limited facts at issue in the subject case, that the very experienced judge read and heard the evidence and submissions and delivered a concise and well focused judgment which applied the proper approach to fact finding and which is unassailable.

33. Miss Birk on behalf of the child made common cause with Miss Bugeja.

Discussion

Ground one: failure to discharge the burden and/or standard of proof.

Ground 2: the court made a finding based on suspicion or doubt.

Ground 5 (6): the judge erred in fact in his analysis pertinent to the relevant issues.

34. The central thrust of the father's submissions during the oral hearing was to focus on his contention that the evidence unerringly demonstrated that the agreement reached in late June was one reached as a result of the free exchange of views and the uninfluenced decisions taken by each party. From that he says all else flows. If the agreement itself was the result of a genuine and untainted exchange between the parties, then the mother's behaviour is that which should be criticised and the father's behaviour becomes understandable.

35. Leading on from this one of the father's main themes is that the judge's conclusions as to the circumstances in which the agreement was reached were pure speculation because it was illegitimate to import much if any inference into the pre-agreement facts from the post agreement events. Thus his argument was that if one took away any inference from the post agreement events and focussed purely on the texts which illustrated the circumstances of the agreement then he could establish that the agreement was the product of free will. If he can establish that, then his argument ran – that his later behaviour was understandable and could not be characterised as coercive or controlling. The events of 14 September then became understandable and his actions, including fending the mother off, could not properly be characterised as an assault.

36. Although the authorities the father relies on are principally aimed at the threshold in care proceedings the general point holds good that the court must act on established facts not on suspicion, speculation or doubt. Where in my view the father falls into error is in failing to understand the very wide range that evidence can take. To focus purely on the words in texts as he does is far too blinkered and literal an approach. A judge in a family case of this sort is looking at a far broader palette of evidence which includes texts, oral evidence, written evidence, hearsay evidence from other sources, emotions which emerge either from the witness box, from audio recordings, the dynamic which exists between individuals, body language and a host of other evidence. All of that material is processed in order to determine the facts. The court can properly draw conclusions from later events; see in a slightly different context Re G (Care Proceedings: Threshold Conditions) [2001] 2 FLR 1111. Whilst of course the father is right that the court must not act on suspicion or pure speculation drawing inferences is an essential part of the judicial task. Clearly the dividing line between legitimate inference and inappropriate speculation is sometimes blurred and judges are entrusted with the task of deciding on which side of the line it falls.

37. The judgment records at paragraph 3(e) that the overwhelming majority of the underlying facts were not in dispute; it was often a matter of perception. This was emphasised during submissions to me where the father accepted that he had pushed the mother and that she had fallen to the ground on 14 September 2018. His position was that this was in essence self-defence rather than that it had not happened. He said that the mother had exaggerated aspects of her injuries and had downplayed her behaviour but the central fact of the incident was not disputed.

38. It is clear that the recordings of the conversations between the parties and the CCTV footage were given considerable weight by HHJ Plunkett. At paragraph 8(a) he describes that even to a judge of long-standing they were shocking. Having listened and watched them myself I echo that view. They clearly fed into the analysis of the parties' characters that the judge set out in his judgment, although the evidence of the parties

both documentary and oral and their attitudes in court also plainly fed into his analysis. That analysis of their characters plainly also fed into (rightly) his evaluation of the evidence that he had read and heard. In cases of coercion and control the evaluation of parties' characters and the dynamic that exists between them are likely to be an important part of the evaluation of the evidence. Whilst the father may be right in asserting that in understanding his position and his frustration the court had to bear in mind preceding events there is no escaping the behaviour that the father has been guilty of and as is so vividly recorded. Whether it was the result of legitimate frustration or not such behaviour is unacceptable. As it happens in this case the behaviour was linked to the fact that events were not occurring as the father desired them to; he was losing control of events. Thus as events moved more and more beyond his control so his behaviour seeking to regain control escalated.

39. One of the father's central submissions was that the text exchanges between the parties leading up to the agreement as to child arrangements demonstrated quite plainly that the mother had entered into the agreement of her own free will and that there was no evidence of coercion. To the contrary, the father submitted that there were examples within the text messages of the mother making alternative proposals which were more generous to the father than he had proposed. The father submitted that had HHJ Plunkett taken this into account, he could not have reached the conclusion that there was control and coercion prior to the child arrangements agreement being reached. In evaluating the circumstances in which that agreement was reached, the judge clearly drew upon the evidence as to subsequent events in order to illuminate the likely dynamic that underpinned those exchanges. He was also aware that there was a huge amount of digital material which had not been put before him which might have illustrated the dynamic interplay between the father and the mother. The father submits that using the subsequent evidence to illuminate the issue of pre-July coercion is illegitimate as it fails to take account of the context in which the later behaviour took place. Whilst I can accept that there might be some merit in that in respect of behaviour long after the event or low-level behaviour, I do not accept that premise in respect of recent behaviour or behaviour which is unarguably controlling or coercive. The judge had a recording of the hand-over on 1 July 2018 when the father having got the child into his car and being on the point of driving off told the mother she wouldn't get him back without a court order; the context being that the father was plainly demonstrating possessive or jealous behaviour about his belief that the mother was in another relationship. There was thus a very close temporal nexus between an unchallengeable example of controlling or coercive behaviour on 1 July and the reaching of the agreement in late June. There was thus no step change in the behaviour or inflexion point which would render the use of evidence of events post July in support of the pre-agreement conditions inappropriate. There was clearly a continuum which made it entirely appropriate to draw inferences as HHJ Plunkett did.

40. However, the texts which were put in evidence by the father himself on their face do not support the father's contention that this was an agreement reached of the mother's own free will and without any coercion by him. Some, individually read, show evidence of the father being over-bearing, confidently mis-stating the law (to his own advantage), implicitly threatening court if the mother did not accept his agreement, being insistent. The mother's responses refer to his behaving in a 'vile' way over her accidentally opening his post, objecting to his abusive texts and verbal outbursts when they meet. They are of course contemporaneous and produced by the father. Thus, far from

demonstrating the father's case, they were consistent with the mother's case that she had felt overwhelmed and dominated by the father at the time. HHJ Plunkett did not in fact rely on them in this way - although he might have – but they simply show the father's inability to see things in any way other than his own. Far from supporting his case that the judge failed to give them due weight in the scales which weighed against coercion they support the judge's conclusions. It seems fairly obvious that the judge did not feel the need to rely on them because the other evidence so clearly showed the controlling and coercive nature of the father's behaviour.

41. The father also criticised the supposed inconsistencies in the mother's evidence. Of course, significant inconsistencies and lies may indeed indicate a lack of honesty on the key issues. However in respect of the critical evidence relating to the allegations these were corroborated by the audio and visual recordings. In respect of the alleged inconsistency the father relied on in oral submissions this is simply not borne out. During the digital recording the mother refers to the child being returned on Tuesday which the father appears to agree to. In her text on 2 July she refers to the child being returned tomorrow which is of course the same.

42. Thus in respect of grounds 1, 2 and 5, I am quite satisfied that HHJ Plunkett properly applied the burden and standard of proof and that the evidence before him fully justified the conclusions that he reached. Inferences that he drew were properly open to him and were not based on suspicion or doubt.

Ground 3: findings were made contrary to the literal definition of the terms.

43. Until I saw the father's skeleton of 17 October 2018 I was not entirely sure what the thrust of this ground was. I questioned during the course of the hearing what the phrase in the judgment at paragraph 4(j) '*controlling and coercive behaviour within the common meaning of those words*' meant. Miss Bugeja submitted that the judge was plainly referring to the definition given within paragraph 3 of PD 12 J. I note from the father's skeleton of 17 October 2018 that he included a section at paragraph 5 which referred to the Oxford English dictionary definition of coercion and control. When the father refers in his current skeleton to the behaviour not falling within the literal interpretation of the words he seems to be referring to the OED definition rather than the PD12 J definition. The definition in PD12 J is as follows:

'*Coercive behaviour' means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim.*

'Controlling behaviour' means an act or pattern of acts designed to make a person subordinate and or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

44. The father's reference to some forms of words that he used on certain occasions which did not cross the threshold into coercive or controlling behaviour does not address the other evidence which the judge set out in relation to what the father said and how he behaved on 1 July, or 13 or 14 September.

45. The judge found that the coercive and controlling behaviour at the time of the agreement was at a lower level than that which emerged later. That finding is consistent with the

picture which emerges from the text exchanges and from the evidence of each of the parties and from the obvious escalation which emerges from the audio and visual recordings.

46. The dividing line between behaviour which can properly be characterised as coercive or controlling and within PD12J and behaviour which does not cross that threshold is not a bright line. The PD12J definition by its own terms makes clear that to amount to coercive or controlling behaviour the behaviour will be well outside that which is acceptable within a relationship. The evidence in this case plainly demonstrated that the father's behaviour was outside those fairly broad parameters of acceptable relationship based behaviour. In respect of the behaviour surrounding the reaching of the agreement in June it may have been towards the lower end of the spectrum of behaviour within PD12J but within it, it plainly was. By September it had progressed along the spectrum. There is no merit in the father's contention that his behaviour could not properly be characterised as controlling or coercive behaviour within the statutory definition.

Ground 3 (4): inadequate allocation of time and procedural defects.

47. The father's reliance on this being an exceptional case and so justifying more extensive court time to explore the allegations is to misunderstand the use of that phrase in its proper context. The case became exceptional as a result of the findings that the judge made which in the judge's view made it necessary to instruct a psychologist to assess the father. In many cases of domestic abuse such would not be necessary. This was therefore an exception because the evidence tended to suggest that the father's psychological state would be key to the future decision-making. In itself the allegations of coercion and control and of one incident of assault were sadly not exceptional in any sense. Nor was any other aspect of the case in terms of the evidence. The 2-day time estimate that was allocated was an entirely proper time estimate and plainly allowed adequate time for each party to give evidence. In addition to the 5.5 hours of in court time, the judge must have spent several hours in advance reading the bundle and spent several hours afterwards digesting the lengthy submissions of the parties and writing his judgment. The contention that the nondisclosure of evidence undermines the validity of the process is unsustainable having regard to the fact that the father did not seek any adjournment.

Ground 4 (5): new and compelling evidence.

48. The father accepts that the question of outstanding disclosure was raised at the outset of the hearing and that HHJ Plunkett invited him to consider whether he wanted to apply for an adjournment to await that material or to proceed. The father accepts that he chose to proceed because he was concerned about the delay. In those circumstances no criticism can be made of the judge for proceeding. The father is an intelligent and articulate qualified barrister who is far better able than most to undertake the sort of evaluation of whether to adjourn or whether to proceed than most other litigants in person. The evidence relating to the events of 14 September does not seem to me to be of such relevance that it would potentially alter the outcome. Whilst I accept that it was not available at the time neither the evidence of the passer-by or the CCTV material is of a quality that would potentially alter the findings. The evidence of the mother and the father as to the 10-minute CCTV recording make very clear indeed what was happening. The father had, in breach of the prohibited steps order, taken the child from the mother's control and to any objective observer was trying to remove him from her

care by taking him to his car. The mother was plainly trying to prevent him albeit only by standing in his way and trying to block his progress. Any passer-by without the knowledge of the background might well have interpreted his behaviour as being the more passive and hers as being the more assertive or aggressive. If one bears in mind the background that the father had removed the child from her care for 13 days and that a recovery order had been required in order to secure his return and that 7 days before the father had in a fit of pique withdrawn his applications only to reinstate them the following day, the passer-by's evidence easily fits with this picture. Moreover, the father himself accepts that in fending the mother off in her attempts to recover the child she ended up falling to the ground. Given that she was quite properly seeking to secure the return of her son from the father, who was acting in breach of a prohibited steps order, the father's behaviour plainly amounted to a push. His acquittal in the Crown Court is not inconsistent with the finding on the balance of probabilities that he had pushed the mother to the ground.

Ground 6 (7): the judge demonstrated subconscious bias in his analysis.

49. It is clear from the judgment that HHJ Plunkett had very much in mind the father's account and the mother's account. He refers to both throughout and identifies that one of the tasks he had to undertake was to establish which of their perceptions was closer to objective reality. The simple fact that he preferred the mother's account does not mean that he ignored the father's account. It is clear he took both into consideration. However the evidence in support of the mother's position, in particular the CCTV recordings, persuaded the judge that ultimately the position was very clear. There is no obligation on a judge to rehearse the evidence that he has read and heard in a separate section of his judgment. Some judges do this, others do not. What is important is that all of the material is evaluated and it is quite clear from the judgment that HHJ Plunkett did this. The suggestion that HHJ Plunkett was in some way biased because of his involvement with the "brother" case does not withstand any scrutiny. Not only is there no indication of the judge importing any adverse view he had reached from those proceedings into these but more importantly HHJ Plunkett had in fact allowed the father's appeal in the "brother" proceedings and so if anything, one might have thought he was disposed towards the father rather than against him. The terms of the agreement plainly were drafted by the father albeit he might have cross referred to Cafcass or other documents. The terminology adopted is not that of Cafcass nor is the contractual nature of the document. However it is very similar to the approach apparent in the father's skeleton arguments. HHJ Plunkett's criticism of the father's focus on the agreement or strict compliance with a contract was justified. As was apparent within the hearing before me, the father is preoccupied with securing his rights and compliance with the contract rather than focusing on his little son's best interests. Finally, I note that the judge specifically did acknowledge that there was an argument that the father's behaviour was a product of frustration.

Ground 7 (8): procedural defectiveness of the non-molestation order.

50. The father's summary of the law in relation to these issues demonstrates the extent of his familiarity with procedural issues. However what he omits is any reference to the court's ability to waive defects in compliance with procedural rules where it is just so to do. The father's approach prioritises technical compliance over substantive justice;

thus inverting the courts actual approach. On the basis of the findings that were made by HHJ Plunkett, the criteria for making non-molestation orders were plainly satisfied. Even if the procedural defects had been so fundamental, or had the mother been so dishonest in her application for a without notice order, the court would very probably have made a non-molestation order of its own motion, even if it had felt it was appropriate to discharge the earlier without notice order on the basis of fundamental failure to comply with the rules. However the father does not, in my view, get close to establishing a failure to be full and frank in disclosure. The fundamental basis of the mother's application was that the father had refused to return the child to her care over a period of about 12 days. What she said about nearly reaching an agreement might technically be in conflict with what she subsequently said about having reached an agreement, but the difference is more illusory than real when one considers that the terms of the agreement were so uncertain and the father's position as to the existence of the agreement has itself altered. Thus I do not think that the father has established that there was such a fundamental failure to comply with rules that the case is even within the territory where the court might consider discharging the original order for non-compliance.

51. I do not consider there is any merit in the father's argument about the return date. What of the father's arguments on service etc? The matter returned to court on notice within 7 days and thus was compliant with the required procedure. The fact that a fully contested hearing could not be held for 5 weeks is irrelevant. The purpose of the early return is to enable the court to hear both sides and consider on an interim basis what further orders are appropriate. If the respondent is able to establish that the orders are without foundation or unnecessary then the orders will fall away. On the other hand, if the evidential foundations for or against an order need to be tested then inevitably the court will list a further hearing to determine factual disputes. In the meantime it will make such interim orders as are appropriate. There is no foundation to the assertion that the process adopted was in any way a breach of the article 6 or 8 rights of the father or child.

52. Putting to one side the fact that most of these arguments relate to matters which postdate the making of the on notice non-molestation order, the father's argument is misconceived. Issues which go to the enforceability of such an order would be a matter that might properly be raised were the father to be charged with a breach of the order; they do not go to the validity of the initial order. I suppose it might be conceivable that an order that were so woefully flawed by the process adopted to apply for it, the evidence underpinning it, the wording of the order and the process adopted to serve it might justify an application to discharge the order. However that is not the case here where the process was appropriate, the evidence justified the order, the order is broadly framed in the correct terms and where a process server effected service. Again the father's arguments focus on form rather than substance. There is no merit in any of his arguments.

Conclusion

53. Having regard to that analysis the father has not persuaded me that there is any merit in any of the grounds of appeal that he has advanced. On full analysis it is clear to me that none of the grounds had any realistic prospect of success and nor is there any other compelling reason to grant permission to appeal and so I refuse permission to appeal. In relation to the father's application to adduce fresh evidence whilst I am satisfied that

it was not available for the hearing I am not satisfied that it would have an important influence on the result of the case and so I refuse his application for permission to adduce fresh evidence. The result is that this appeal is at an end and the proceedings at first instance before Mr Justice Keehan will proceed on the basis of the findings made by HHJ Plunkett.