Re J (Children) [2009] EWCA Civ 1350 (26 October 2009)

Case No: B4/2009/0466

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM WANDSWORTH COUNTY COURT

(LOWER COURT No: FD07P1795)

(HIS HONOUR JUDGE KNOWLES)

Royal Courts of Justice

Strand, London, WC2A 2LL

26th October 2009

B e f o r e :

LORD JUSTICE WARD

and

LORD JUSTICE WILSON

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IN THE MATTER OF J (Children)

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Miss Deborah Eaton QC and Miss Elizabeth Selman (instructed by Parsonage & Co) appeared on behalf of the Appellant Mother.

Miss Mariana Hildyard QC and Miss Louise MacLynn (instructed by Penn Legal) appeared on behalf of the Respondent father.

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HTML VERSION OF JUDGMENT

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Lord Justice Wilson:

This appeal raises a question about the proper approach of the court to an application for costs by one parent against the other at the end of a bespoke fact-finding hearing within contact proceedings, at which potentially significant allegations are made by one parent against the other, are denied by the other but are found proved.

A mother appeals against an order made by Her Honour Judge Knowles sitting as if in the Uxbridge County Court, on 13 February 2009. The circuit judge's order was to dismiss the mother's appeal against an order made by District Judge Wicks on 19 March 2008 and, indeed, to order that the mother pay the father's costs of the appeal. On 18 and 19 March the district judge conducted a fact-finding hearing into allegations by the mother, within an application for contact made by the father, that during the marriage he had perpetrated acts of violence towards her, including in the presence of

one or other of the two children of the marriage, and indeed had to a limited extent been violent towards the older child. At the end of that hearing the district judge gave a judgment in which, to a significant extent but not entirely, he found proved the mother's allegations. When, however, the mother sought an order for costs of the fact-finding enquiry against the father, he refused the application and made no order as to costs. It was against his refusal to make an order as to costs that the mother unsuccessfully appealed to the circuit judge.

The mother is now aged 35 and the father is now aged 38. He serves in the British Army. They were married in May 2004: it was the mother's first marriage and the father's third marriage. By that time the older child had been born: he is a boy, R, who was born in August 2003 and is thus now aged six years and two months. In 2005 the father began a tour of duty in Germany and the family moved there. It was there that the younger child was born: she is a girl, E, who was born in May 2005 and is thus now aged four years and five months. The marriage came to an end in February 2007, when, taking the children with her, the mother left the parties' married quarters in Germany and returned to England. A few months later the father was transferred back to England. The parents now live in close proximity in West London.

Following the father's return to England the mother refused to allow the father to have other than supervised contact with the children at a contact centre. Through solicitors, she alleged that there was a substantial history of domestic violence on his part which suggested that he might be a risk to the children. There was a combative, and as we can now see, a thoroughly inappropriate response by the father, through his solicitors, as follows:

"In conclusion, please advise if you are instructed to accept service of documents in relation to the abovementioned application that we propose to make for contact forthwith if there is not an immediate resumption of contact. Given the serious nature of the allegations that your client would made, we would have no hesitation in perusing a claim for costs if we are forced to make an application based on allegedly false allegations made by your client with mal fides." [sic]

The father duly applied to the court for an order for unsupervised contact, including staying contact, and in his application he reiterated that the mother was making up allegations of domestic violence against him. In the light of the mother's allegations a district judge set up the fact-finding hearing which District Judge Wicks conducted on 18 and 19 March 2008. Both parties were represented at that hearing by junior counsel; and neither party was in receipt of public funding. For use at that hearing, statements by various family members were filed on behalf of each parent; but the only witness who gave oral evidence in addition to the parents was one of the mother's sisters. There was however further significant documentary evidence, not least an entry by an army GP in Germany following his attendance on both parties on the day prior to the mother's departure for England. The GP noted:

"SPITS IN WIFE'S FACE AND HITS HER. PHYSICALLY AND VERBALLY THREATENING A LOT OF THE TIME. INITIALLY TRIED TO SUGGEST WIFE IS MAKING IT UP. WHEN QUESTIONED COULD PROVIDE NO EXPLANATION TO WHY SHE WOULD …… ADMITTED IT WAS TRUE."

At the fact-finding hearing the mother made 20 allegations against the father. In his judgment the district judge failed to address one of them and ruled that five of them had not been established to his satisfaction. It may be important, however, to note that the district judge did not make a positive finding that those five allegations were untrue, still less, of course, that they had been fabricated by the mother. Of the 14 allegations which were established, it is necessary to make a sub-division. It appears not to have been the fault of the father that his statement in answer to the mother's allegations was filed and served only 13 days prior to the hearing. In that statement he made limited admissions but denied other of the allegations; and in cross-examination he made a few further, limited admissions. Thus it is necessary to sub-divide into three parts the 14 allegations which were established: namely, into one allegation which was established only to the extent of an admission by the father; into four allegations which had been the subject of a partial admission by the father but which were established to the more serious extent alleged by the mother; and into nine allegations which the father had entirely denied but which were nevertheless established.

Of the four findings in the second part of the sub-division, I refer to three:

(1) The mother established that, in the presence of R and while she was pregnant with E, the father put his hands around her neck and threatened to strangle her. The father had admitted only putting his hands on the mother's shoulders and shaking her gently.

(2) The mother established that in May 2006, when R was aged two, the father smacked him, thereby causing a bruise on his bottom, threatened to punch the mother's face and pushed her in an aggressive manner. The father had accepted only that he had smacked R because R had kicked him in the face. The district judge's finding was not only that the father had threatened and punched the mother but, inevitably, that the smack had been inappropriate.

(3) The mother established that in February 2007 the father spat in her face, pushed her against a wall and later slapped her across the head. The father had admitted only that he had spat in her face.

Of the nine findings in the third part of the sub-division, I refer to six:

(1) The mother established that, when R was aged six months, the father showed him his clenched fist and said "If you don't be quiet, you'll get one of them".

(2) The mother established that at Easter 2006 the father grabbed her face and threatened to kill her.

(3) The mother established that in May 2006 the father lost his temper with R, then aged two, and shouted at him.

(4) The mother established that later that month the father hit R in such a way as to leave marks.

(5) The mother established that in August 2006, after she had discovered a lump in her left breast, the father grabbed the breast, called her an "old cow" and said that he hoped that she would get cancer.

(6) The mother established that, on an unspecified date, while she was holding E, whom she was or had been feeding, the father threw a remote control at her; that it hit the mother, only narrowly missing E's head, and that the mother thereupon threw the remote control away albeit that, in so doing, she smashed a picture.

The district judge's findings are entirely at odds with the tone of injured innocence struck by the father at the beginning of his written statement, as follows:

"Initially I cannot understand why what was once such a loving family unit has been reduced to what it is today a broken family embroiled in Court proceedings which I believe are doing nothing but fuelling a fire between my Wife and I. I love my Wife and adore my children and would do anything to return to how we used to be. I am not a violent aggressive individual and certainly not the man I am being accused of being through the evidence provided to the Court by my Wife and her 'supportive witnesses'. I would never intentionally hurt anyone save through the execution of formal Orders from the British Army …"

We have the transcript of the submissions made in respect of costs by counsel to the district judge following his substantive judgment. Miss Selman, on behalf of the mother, founded her application for costs on the basis that, notwithstanding that the hearing had been in the context of the father's

application for contact and that it was rare to make an order for costs in proceedings under the Children Act 1989 ("the Act"), the hearing had been a fact-finding inquiry into allegations which had properly been made by the mother, had to a significant extent been denied by the father and yet had been the subject of positive findings. Miss MacLynn, on behalf of the father, resisted the application on the basis that it was very unusual for a court to make an order for costs in proceedings under the Act, that the fact-finding hearing had been part and parcel of her client's overall application for contact and that a number of the mother's allegations had not been established.

The district judge's judgment on costs was nothing if not brief. He said:

"I am not going to make an order in this case. I think the parties had a right to come to court and in those circumstances I am not going to make an order for costs."

In dismissing the mother's appeal against the district judge's refusal to make an order for costs, following submissions made to her by the same junior counsel on both sides, the circuit judge properly reminded herself that it was indeed unusual to make an order for costs in proceedings under the Act; and she properly referred to the decision of this court most relevant to the appeal, namely Re T (Order for Costs) [2005] EWCA Civ 311, [2005] 2 FLR 681. I will refer myself later to that decision in [15] below. In the event the circuit judge distinguished the case of Re T on the basis that this court had there distinguished between "legitimate litigation over reasonable disagreements" and "irrational conduct which prolongs unnecessary litigation" and that the stance taken by the father at the fact-finding hearing was not "irrational conduct which [had prolonged] unnecessary litigation".

Two passages in the circuit judge's judgment encapsulate her reasoning. She said first:

"The mother argues in any event that the fact-finding element of the father's application has to be looked at effectively in a different light from the welfare aspect of it. I say straight away that I do not accept that compartmentalised approach. The question of what is in the best interests of the children and their welfare being paramount can, I believe, as a matter of law, only be ascertained by having such a fact-finding hearing as part and parcel of the whole process."

The judge said, second:

"Whilst therefore I accept that the remarks by the district judge in refusing the application for costs were extremely limited …, nonetheless, those words encapsulate the finding that the parties had a

right to have the evidence tested. There is no suggestion by the district judge that the father acted unreasonably in giving evidence before him and the findings, I repeat, were not so clear cut and overwhelming that I get any sense that the district judge was saying or even suggesting that the father was lying throughout the whole of his evidence or that his stance had been unreasonable in having his evidence put before the court."

It is my clear view, in accordance with the submission made to us on behalf of the father and contrary to the submission made to us on behalf of the mother, that the circuit judge concluded that the district judge's exercise of discretion had not been flawed and thus that she should not interfere with it. It is not -- in my clear view -- a case in which, instead, she accepted that the discretion had been improperly exercised by the district judge and then proceeded to exercise her own discretion to refuse to make an order for costs against the father. Her prior analysis of the proper treatment of the mother's application for costs can in my view be construed only as a prelude to her conclusion that the district judge had conducted a proper exercise of his discretion.

I am, however, of the opinion that the district judge failed adequately to exercise his discretion and that therefore the circuit judge herself fell into error in not recognising his failure and in not proceeding to exercise the discretion herself. For the district judge entirely failed to engage with Miss Selman's submission that the nature of the fact-finding hearing contained a feature which was relevant to costs and which differentiated it from a conventional hearing under the Act in which both parties submit rival proposals for the optimum arrangements for a child. For the district judge to say merely that he thought that the parties had a right to come to court was, with respect, to say nothing. Of course they had a right to come to court. But at whose expense? He should at least have adverted to the nature of the enquiry, the seriousness and relevance of the allegations made by the mother, the extent to which the father admitted them, and, most importantly, beyond what the father admitted, the extent to which they had been found proved, as well, of course, as the extent to which they had not been found proved. I am unable to accept the submission on behalf of the father this afternoon that, by inference, the district judge must be taken to have weighed these matters because they had so recently and eloquently been pressed upon him by Miss Selman.

In London Borough of Sutton v Davis (Costs) (No 2) [1994] 2 FLR 569 I sought to explain the reason behind the general proposition that it was unusual to make an order for costs in children cases. I said, at 570H - 571C, as follows:

"Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the child from

participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them. The proposition applies in its fullest form to proceedings between parents and other relations; but it also applies to proceedings to which a local authority are a party … But the proposition is not applied where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable."

Re T, cited above, is an example of a case in which an order for costs was nevertheless made in proceedings under the Act. In October 2002 the parents had reached an agreement in relation to the contact which the father should have to the three-year-old son of the family, who was then residing with the mother. But implementation of the agreement soon faltered; and the mother raised allegations of domestic violence against the father which, so she submitted, should lead the court to vary the terms of the agreement recently reached. At what was called a fact-finding hearing in December 2002 a circuit judge largely rejected the mother's allegations and in effect directed implementation of the arrangements previously reached. Soon afterwards the mother made allegations of sexual abuse against the father; so contact was thereupon suspended and then took place only under supervision. At a hearing in May 2003 the circuit judge made directions for a further fact-finding hearing into the new allegations to take place before her in August 2003 but, at that hearing, following a report from a child psychologist which in effect recommended the rejection of the mother's allegations and that contact should again become unsupervised, the mother decided not to continue to seek to establish the allegations of sexual abuse. Following a later hearing, at which the residence of the son was transferred from the mother to the father, the circuit judge directed that the mother should pay the father's costs of the three hearings in December 2002 and May and August 2003. The mother's appeal to this court against the order for costs was dismissed. In a judgment of the court Wall LJ explained that the circuit judge's exercise of her discretion in relation to costs had been unimpeachable. It had been, so this court held, legitimate for the circuit judge to have observed that the mother's unreasonableness related "both to the welfare of the child and to the conduct of the litigation"; that, in the light of that dichotomy, she would determine the father's application for costs by reference to what was fair in all the circumstances; that the mother's allegations which led to the hearing in December 2002 and her wholly unwarranted allegations of sexual abuse which led to the two hearings in 2003 had all been raised unreasonably; and that it would be an affront to justice to expect the father to pay the costs of defending himself against them.

In this court today leading counsel enter the proceedings on both sides, together with the junior counsel who appeared in both courts below; and most generously all four counsel give their services to their clients pro bono. Miss Eaton QC, on behalf of the mother, relies upon Re T as a demonstration of the fact that, even in proceedings under the Act, an order for costs is sometimes appropriate; and she relies in particular upon the fact that all of the three hearings in respect of which the mother was ordered to pay the father's costs were fact-finding hearings or related thereto. On the other hand Miss Hildyard QC, on behalf of the father, is able without difficulty to distinguish the facts of Re T; to point to the stress laid by this court in Re T upon the fact that the mother had made a series of false allegations in order to withdraw from an agreement about contact so recently reached; and to assert that, as the circuit judge herself said in the present case, the attribution to the mother in Re T of

"irrational conduct which prolongs unnecessary litigation" could not readily be applied to the father in the present case.

In my view the enquiry necessary to a valid exercise of the court's discretion in relation to the costs incurred before the district judge should start with an acknowledgment that the mother's allegations were allegations of violence of some seriousness both towards herself and, in particular, that they included allegations of limited violence even towards R, at age two, and towards the mother in the presence of one or other of the children, indeed in one case, of placing even E, a baby, in some danger. This was not a borderline case for the setting up of a fact-finding hearing: it was -- as it would now be considered -- "necessary" to set it up, within the meaning of paragraph 13 of the President's Practice Direction on "Residence and Contact Orders: Domestic Violence and Harm", 14 January 2009, although of course it was not in force -- nor was its predecessor -- at the time when this fact-finding hearing was set up. With respect, I disagree with the circuit judge's refusal to accept what she called a "compartmentalised approach". The order for a bespoke fact-finding hearing was surely to consign the determination of the mother's allegations into a separate compartment of the court's determination of the father's application for an order for contact. It went almost without saying, although the circuit judge chose to say it, that the optimum outcome of the contact application could be determined only by reference to the findings made at the fact-finding hearing; but the effect of the direction for a separate fact-finding hearing was that the costs incurred by the mother in relation to that hearing can confidently be seen to be wholly referable to her allegations against the father. There was, in that sense, a ring fence around that hearing and thus around the costs referable to it. Those costs did not relate to the paradigm situation to which the general proposition in favour of no order as to costs applies.

I accept that the father's stance at the fact-finding hearing was not "irrational". Such is a point of distinction between the present case and that of Re T; but it would be wrong to consider that the discretion in relation to costs is so fettered that an order can be made only against a party whose conduct has been irrational. Such was an adjective no more than apt for the description of the mother's conduct in Re T. Nor do I regard the circuit judge's defence of the district judge's order as fortified by her observation that the district judge did not suggest that the father was "lying throughout the whole of his evidence". Of course he was not lying throughout the whole of it: he had made admissions in his statement and in cross-examination he made further admissions. As it happens, I find it hard to conceive that, in respect of the nine allegations which were established in the teeth of his denials, it could reasonably be said that the latter were the product of mistake or lapse of memory on his part. I see no basis for Miss Hildyard's submission this afternoon that it is unreasonable to expect the father to have admitted the allegations which he chose to deny. But the district judge saw no reason to analyse what lay behind the father's false denials of those nine allegations; and I do not consider that a proper exercise of the court's discretion is dependant upon such an analysis.

I am well aware that, in most disputed cases in relation to children, whether in private or in public law, parties justify their proposals for the future arrangements for the child by reference, at any rate in part, to past events, of which another party or other parties will often present a different version. Thus, to a greater or lesser extent, issues of historical fact arise in probably the majority of these proceedings. I would be concerned if our exercise of discretion in relation to the mother's costs in this case today were to be taken as an indication that it was appropriate in the vast run of these cases to make an order for costs in whole or in part by reference to the court's determination of issues of historical fact. In my view, however, the mother's costs of the hearing before the district judge fell into a separate and unusual category. The hearing was devoted exclusively to the court's consideration of serious and relevant allegations against the father of what can only be described as misconduct on his part. Over two thirds of the mother's allegations were true. Less than one third of them were not established yet were not found to be untrue. Of the true allegations, nine had been falsely denied by the father; and all but one of the remainder had been admitted by him only in part. I cannot accept Miss Hildyard's analysis that this case is an example of what she calls the "run of the mill" fact-finding enquiry in which the mother will exaggerate, and the father will minimise, almost, so she implies, in equal measure. Where, asks Miss Hildyard rhetorically, do you draw the line between those cases to which the general proposition against an order for costs applies and those in which an order for costs is appropriate? But under our system, even in this court, we do not have to draw the line. If we consider that we can confidently do so, we may well consider it fruitful to do so; but it is often unwise to do so. We have only to determine whether the case before us falls on one or other side of the line.

This case is in my judgment one in which a proper exercise of discretion on the part of the district judge did call for an order for costs to be made against the father. In the light however of the allegations which the mother undertook to establish but failed to establish, and of the limited admissions made by the father prior to the hearing, my view is that he should have been ordered to pay only two thirds of the mother's costs of and incidental to the fact-finding hearing. It follows that the mother's appeal to the circuit judge should have prevailed. We should hear argument about whether the father should pay the mother's costs of that appeal.

Lord Justice Ward:

I agree. So the appeal will be allowed and the respondent will be ordered to pay two-thirds of the costs before the district judge. We will hear argument about the costs before the circuit judge.

Order: Appeal allowed.