Re T (A Child) [2010] EWCA Civ 1585 (18 November 2010)

Case No: B4/2010/1523

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM KINGSTON-UPON-HULL COUNTY COURT

HIS HONOUR JUDGE DOWSE

LOWER COURT No KH08C09019

Royal Courts of Justice

Strand, London, WC2A 2LL

18th November 2010

B e f o r e :

LORD JUSTICE WILSON

LORD JUSTICE MUNBY

and

MR JUSTICE COLERIDGE

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In the matter of T (a child)

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Official Shorthand Writers to the Court)

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Mr Simon Hirst (instructed by Sandersons, Hull) appeared on behalf of the Appellants, the paternal grandparents.

Miss Janet Bazley QC and Miss Liz Shaw (instructed by Hull's Legal & Democratic Services) appeared on behalf of the First Respondents, the local authority.

Mr Gavin Button (solicitor-advocate, Williamsons, Hull) appeared on behalf of the Second Respondent, the father.

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HTML VERSION OF JUDGMENT

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Lord Justice Wilson:

Paternal grandparents appeal against the refusal of His Honour Judge Dowse, in the Kingston-Upon-Hull County Court on 7 May 2010, to make an order for costs in their favour against Kingston-Upon-Hull City Council ("the local authority"). The refusal of the order was made in the course of care proceedings brought by the local authority in relation to two of the grandchildren of the appellants, namely a boy who is now aged 13 and a girl who is now aged nine.

The proceedings are, I believe, still pending. The unsuccessful application of the grandparents for an order for costs was made in the wake of a mammoth judgment of the judge, running to 2719 lines set

across 81 pages. The judgment reflected the judge's conclusions following a bespoke fact-finding enquiry which had lasted for no less than five and a half weeks, spread unfortunately between February and December 2009.

The judge's enquiry was precipitated by allegations of sexual abuse and other abuse made by the grandchildren against a number of adults including, in particular, their father but also the grandparents. The grandparents were two of, I believe, eight adults who, prior to the start of the fact-finding hearing in February 2009, were joined as interveners thereto. There is a minor dispute before us between the grandparents and the local authority as to whether the grandparents actively sought to become interveners in the proceedings or whether they acquiesced in an application on the part of the local authority that they should become parties. I have always been of the view, perhaps only instinctively, that the term "intervener" is apt to describe an additional party joined on his own application and that the word "respondent" is apt to describe an additional party added otherwise than on his own application. I confess, however, that my researches this morning have failed to locate authority which supports my view. In truth the issue between the parties in this regard is of no consequence. The facts are that the grandparents became acquainted, I think initially by the police, that extremely serious allegations were made against them in care proceedings relating to the children and that it was clearly appropriate for the court to make them parties thereto in order to give them the widest opportunity to defend themselves against them. Although we have not seen the schedule of facts which the local authority requested the judge to find, it is agreed that the findings requested to be made against the grandparents were that they had been involved in causing physical, sexual and emotional harm to the children and had failed to protect them from abuse perpetrated upon them by the father and six of his acquaintances. This afternoon Miss Bazley QC, who represents the local authority in opposition to this appeal, agrees that, for example, were the allegations against the grandparents established in the care proceedings, it would be unlikely that they would be allowed anything other than supervised contact with any of their grandchildren.

The grandfather is aged 67 and is a retired fire-fighter. The grandmother is aged 63 and works part-time as a bookkeeper. They have exiguous capital and their income from pensions and from the grandmother's part-time work now amounts to about £25,000 per annum net.

The grandparents decided that they could not adequately defend themselves in person at the massive hearing which was soon to begin and that they should borrow from a building society in order to fund representation by one of the city's family solicitors. I assume that they own their house and that the borrowing was by way of mortgage upon it. At all events they borrowed £55,000 and the fees charged to them by the solicitors for advice and representation at the hearing amount to £52,000. The loan from the building society is repayable over 15 years at the rate of almost £6000 per annum. The difficulty which confronts the grandparents in making the necessary annual repayment needs no emphasis; they say, in my view convincingly, that, without the continued part-time earnings of the

grandmother stretching long into the future, they would have no reasonable prospect of making the repayment and of also maintaining themselves even to a fairly basic level in addition to making the repayment.

In the event, by the long judgment, the judge did not find any of the allegations against the grandparents to be established. Nor did he consign the grandparents to a pool of possible perpetrators of the acts of which they had been accused. On the contrary, he "exonerated" them. Their status as parties to the proceedings was thereupon discharged.

Such was the background to an allegation to the judge on behalf of the grandparents that the local authority should pay their costs of and incidental to the proceedings. By a short written judgment dated 7 May 2010 the judge refused their application.

It was and is common ground that it was appropriate for the local authority to invite the court to determine the allegations against the grandparents; and that the way in which they conducted them the way in which the local authority conducted themselves during that hearing cannot be criticised.

It was and is also agreed that, although many of the principles in relation to costs set out in CPR Parts 43 and 45 apply to costs in family proceedings by virtue of Rule 10.27(1) of the Family Proceedings Rules 1991, there is an important exception. The exception, provided by Rule 10.27(1)(b) thereof, is that the general rule in CPR 44.3(2)(a) that the unsuccessful party will be ordered to pay the costs of the successful party does not apply to family proceedings.

But, in reaching his decision, the judge went further. The judge referred to a decision of this court, as it happens one to which I contributed, in Re J (Costs of Fact Finding Hearing) [2009] EWCA Civ 1350, [2010] 1 FLT 1893. The judge cited it in order to extract from it what I have said in [14], as follows:

"14. In Sutton London Borough Council v Davis (No.2) [1994] 1 WLR 1317, [1994] 2 FLR 569, I sought to explain the reasons behind the general proposition that it was unusual to make an order for costs in children cases. I said, at 1319 and 570H- 571C respectively, 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 is 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.'"

The judge then quoted a passage to the same effect in the decision of Cazalet J in Re M (Local Authorities Costs) [1995] 1 FLR 533, at 541C-E, and concluded that, in that it had been reasonable for the local authority to pursue the allegations against the grandparents, the door to a successful application for costs on their part was not open. The judge ended with a postscript to the effect that it might be paradoxical that, had the grandparents been charged with offences in the criminal courts of an analogous nature, they might have been able to access non-means-tested public funding.

I am perplexed by the treatment of the decision of this court in Re J, cited above, both by and before the judge and indeed in this appeal. There was no mention of the decision in the skeleton argument placed on behalf of the grandparents before the judge; it was apparently the local authority which drew the judge's attention to it. There is no mention of it even in the skeleton argument presented to us by counsel on behalf of the grandparents this afternoon. In my view, however, had that decision been studied in any detail, whether by the advocates or by the judge, its significance to the despatch of the application before him would have been clear.

For, as the title attributed to it in the Family Law Reports indicates, the focus of my judgment, with which Ward LJ agreed, was the proper determination of an application for costs referable to a fact-finding hearing. The curiosity about the judge's reference to my judgment only in order to extract from it the quotation from my earlier judgment in the Sutton case was that I went on to suggest in Re J that the general proposition to which I have there referred did not apply to the costs of a fact-finding hearing.

In Re J a mother had raised allegations of domestic violence against a father which prima facie were relevant to his application for an order for contact with their children. A district judge conducted a bespoke hearing into in effect 19 such allegations. In the event he ruled that five of them had not been

established to his satisfaction. Of the remaining 14 allegations, one had been admitted by the father, four had been subject only of a limited admission on his part and were found established to the more serious extent alleged by the mother and the remaining nine had been entirely denied by the father but were nevertheless found to have been established. Both parents appeared before the district judge by counsel and solicitors whom they had instructed privately. At the end of the hearing the district judge refused the mother's application for an order for costs against the father on the basis that the parties had a right to come to court; and on the mother's appeal the circuit judge upheld the district judge's conclusion on the basis that the stance of the father in wishing his case to be placed before the court had not been unreasonable. On further appeal to this court, however, the mother secured an order that, in the light in particular of her establishment of most albeit not all of her allegations, the father should pay not all but two thirds of her costs incurred before the district judge. I said at [17]:

"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."

So in the present case the judge reached into Re J for the general proposition, which he then applied, but failed to discern, in particular no doubt because he was not aided to discern, that the decision in Re J suggested an exception to the general proposition in relation to bespoke fact-finding hearings.

In my judgment the exercise of the judge's discretion in the present case was flawed because he purported to apply the general proposition in favour of no order as to costs. In an energetic submission this afternoon Miss Bazley seeks to distinguish the facts of Re J from the facts of the present case. In particular she seeks to stress the distinction between allegations which are unsuccessfully defended by a private party, which was the case in Re J, and allegations which are unsuccessfully made by a local authority, as in the present case. I said in the Sutton case that the general proposition that there should be no order for costs in family proceedings applies in its fullest form to private law proceedings but also, albeit less so, to public law proceedings. Miss Bazley would, as it were, turn that on its head by her suggestion that, even if in certain circumstances, such as in Re J, the general proposition does not apply to certain types of proceedings in private law, it nevertheless continues to apply to public law proceedings.

Miss Bazley stresses that local authorities are generally in a difficult position in appraising whether allegations, particularly allegations made, as here, by children in video-taped interviews, are likely to be established. She suggests that they cannot confidently predict how strong the defence against those allegations will be when those charged with them enter the witness box. She suggests that, were the general proposition in favour of no order as to costs not to apply to this type of fact-finding enquiry, there might be a considerable disincentive to local authorities to raise allegations in care proceedings. Of course their professional duty to the children at the centre of the proceedings will ultimately dictate their decision in this regard. But, as in the course of the argument both my Lords pointed out to Miss Bazley, there is another side to that coin. Were the judge's order to be correct and were the general proposition in favour of no order as to costs in family proceedings to be engaged in this situation, albeit not in the Re J situation, there would be a considerable disincentive to those accused of serious matters in family proceedings to struggle to fund representation for their defence of them. Such might be, from a public policy perspective, just as detrimental as the disincentive upon local authorities which Miss Bazley has pressed upon us this afternoon.

Miss Bazley's second suggested ground of distinction between Re J and the present case is that in that case the father who had unsuccessfully defended himself against most of the allegations of domestic violence was found to have been actually lying in that regard. But I remind myself of the way in which, with Lord Ward LJ's agreement, I reasoned our conclusion in that case: and I am clear that the basic reasoning focussed not upon the losing father but upon the successful mother and upon the facts that she had made allegations which it had been appropriate for her to make in the context of the contact issue, that she had incurred considerable costs in making them and that by and large they had been found to be true.

It is in such circumstances that I do not accept the suggested distinctions between this case and Re J pressed upon us by Miss Bazley. I consider that, where in care proceedings a local authority raise, however appropriately, very serious factual allegations against a parent or other party and at the end of a fact-finding hearing the judge concludes that they have not established them, the general proposition is not in play. Neither of the reasons for the proposition which I ventured in the Sutton case fits such a situation.

It does not, however, follow that the judge should automatically have ordered the local authority to pay the costs of the grandparents. The general rule that costs should follow the event did not apply. Nor however did the general proposition that there should be no order for costs in proceedings relating to children. In truth the judge should have started with a clean sheet.

I apologise for including in this judgment reference to yet another previous judgment of my own. The trouble is that I have a reasonable memory of my own previous judgments. At all events I remember that in another recent decision, namely Baker v Rowe [2009] EWCA Civ 1162, [2010] 1 FCR 413, this court reached, albeit in another context, a conclusion analogous to that which I have just reached, namely that the judge at trial should have had before him a clean sheet: see [24] of the judgment, with which Ward and Leveson LLJ agreed. I proceeded to address the argument that, in that the general rule that costs should follow the event did not apply, more than substantive success was necessary before an order for costs could be made against the unsuccessful party. I said at [25]:

"I disagree. Even where the judge starts with a clean sheet, the fact that one party has been unsuccessful, and must therefore usually be regarded as responsible for the generation of the successful party's costs, will often properly count as the decisive factor in the exercise of the judge's discretion."

In my view the facts that the grandparents were faced with allegations of the utmost severity, that accordingly it had been reasonable for them to stretch their economy to the utmost in order to secure for themselves a professional defence against them and that in the event the result was an exoneration, were all matters which should have been of great, indeed in my view of decisive, importance to a judge who was about to write on a clean sheet.

When, in his judgment on the application for costs, the judge recorded his exoneration of the grandparents, he qualified it by reminding himself of a finding which he had made against the grandmother. In the substantive judgment he had said:

"I was constrained to warn [the grandmother] about the importance of telling the truth on oath whilst she was giving her evidence. She sought to mislead me about the reason for using expressions about policemen in her text messages. She told me that she referred to the term 'copper' because it was shorter than 'policeman' and she used the shorter term because she has arthritis in her fingers. I regard this as a nonsense since she could have said 'cop' or 'PC'. I pointed out that it was likely that the Bar would use this as an example of her not telling the truth. [Counsel for the local authority] in her closing submissions has fastened upon the point and asked me to say that [the grandmother] cannot be regarded as a reliable or truthful witness.

Although she made something of an apology in the witness box I was very surprised that [the grandmother] felt able to be, at the very least, flippant whilst the court was considering serious allegations of sexual abuse of these grandchildren, involving herself, her husband ... and her son ... These remain very serious allegations of sexual abuse of her grandchildren. Having heard the evidence she must know that these two grandchildren have sexual knowledge and perhaps experience way beyond their years. I hope she has reflected on her behaviour."

In his judgment referable to costs the judge summarised his finding set out above as having been that the grandmother had lied to him on oath on a comparatively trivial point and had apologised for so doing. Reprehensible though that lie certainly was, I cannot think that it would be rational to allow it to affect what would otherwise be the appropriate determination of the application for costs.

Confronted, as we are, with a flawed exercise by the judge of his discretion in relation to costs, its proper exercise falls to be undertaken by us today; and I propose to my Lords that the proper order is indeed that the local authority should pay the costs of the grandparents of and incidental to their intervention, albeit to be assessed on the standard rather than the indemnity basis in default of agreement.

By way of postscript I should add that Miss Bazley points out that the local authority wish to challenge the election of the grandparents' solicitor to remain in court throughout the five and a half weeks of the hearing. We are unable to form a view as to whether such was a reasonable or unreasonable decision for him to take on their behalf. Miss Bazley accepts that such is a point which she will be able to take before the costs judge who, in the absence of agreement, will determine the detailed assessment of the grandparents' costs.

Lord Justice Munby:

I agree so completely with my Lord and with his reasons that there is nothing I can usefully add.

Mr Justice Coleridge:

I agree. The local authority cannot be criticised for any procedural step they took in relation to the grandparents' involvement in this very difficult fact-finding exercise. However, by the same token, the grandparents cannot be criticised either. These very serious allegations were properly put before the court and properly challenged by the grandparents and, in the event, the grandparents were exonerated. In these circumstances it is only fair, in my judgment, that the public authority that

pursues such allegations meets the costs of the involvement by, for instance, the grandparents. I would therefore find, as my Lord, that in these circumstances the learned judge exercised his discretion wrongly and the appeal should be allowed.

Order: Appeal allowed