**Neutral Citation Number:** [2022] EWFC 65

**IN THE FAMILY COURT**
**Central Family Court**

Case No: ZC21P00820

First Avenue House

42-49 High Holborn

London WC1V 6NP

Date: 9th May 2022

**Before:**
**Her Honour Judge Harris**

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**Between:**

**R**

**Applicant**

**-and-**

**S**

**Respondent**

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Mr Alex Verdan QC and Ms Charlotte Baker of counsel *(instructed by Harbottle & Lewis LLP) for the Applicant*
Ms Deirdre Fottrell QC, Ms Eleri Jones and Ms Niamh Daly of counsel *(instructed by Payne Hicks Beach) for the Respondent*

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**JUDGMENT**

1. This is an unusual application made by Q, the father of the two children with whom I am concerned, R, aged 6 ½ and S, who is nearly 4. Ms Fottrell QC on behalf of the mother, T, describes it as unprecedented. The father by a C2 dated 30 March 2022 seeks, amongst other relief, the following orders:

> *"CCTV / video footage*
> *The applicant seeks an order for disclosure and inspection of footage from the respondent's household CCTV covering the following periods:*
> *3pm on Friday 11 February - 9am on Saturday 12 February 2022; and 6pm on Saturday 12 March to 7pm on Tuesday 15 March 2022.*
> *The applicant also seeks an order for the instruction of an expert to review, organise and verify that footage."*

The latter would involve editing the footage to include only the interactions of the children with the mother and any other adults, such as staff, in the home. Such an expert has been identified.

2. I heard the application at a short one hour listing on Friday 6 May 2022 so that the fact finding hearing commencing on 27 June 2022 for 5 days would not be jeopardised. The father was represented by Mr Alex Verdan QC and Ms Charlotte Baker, the mother by Ms Deirdre Fottrell QC, Ms Eleri Jones and Ms Niamh Daly. Given the shortage of time and the nature of the application I reserved judgment.

3. I am very familiar with this case having dealt with all hearings to date. I had the benefit of the court bundle, detailed Skeleton arguments on both sides with a helpful bundle of authorities. It is a high conflict contact dispute. The central issue concerns the arrangements for spending time with the children by their father: how often? Should they include overnight stays? Should the father be supervised or supported by a third party or parties and, if so, whom? PD12J is engaged as the mother asserts the father has been responsible for coercive and controlling behaviour as well as emotionally abusive behaviour towards her and the children. Significantly, there is no issue about a "lives with" order. The father conceded this should be made in favour of the mother and I made such an order by consent on 22 December 2021. The hearing on 27 June 2022 is listed as a rolled up fact finding and welfare hearing although the latter may not be achieved. Mr Verdan described the case as having unusual facts, for example, the extent of the security in the home: in my view it does not and shares many similarities with private law cases coming before the court with great, some may say, too great, regularity. The only unusual factor is the scale of the father's wealth.

4. The application comes on the back of recommendations made by the ISW in this case, John Power, in an interim report dated 21 March 2022. On 22 December 2021 I had directed that an ISW prepare a section 7 report. I appointed Mr Power, formerly a member of the High Court CAFCASS team, in the absence of agreement by the parties as to the

identity of the expert. The terms of his instruction are set out at paragraph 26 of his report on page C210 of the bundle.

> *"Having taken into account the factors set out in the welfare checklist at Section 1(3) of the Children Act 1989 please provide a report which addresses the following issues:*
> *1. (subject to their ages) the ascertainable wishes and feelings of R and S;*
> *2. the concerns of the parents with respect to the other;*
> *3. the ability of each of the parents to meet the children's physical and emotional needs;*
> *4. whether or not the physical and emotional needs of the children are being met by the current arrangements;*
> *5. whether or not the children have suffered, or are at risk of suffering, any harm;*
> *6. your recommendations as to the most appropriate future arrangements for R and S including:*
> *a. the time they spend with their father both during the school term and during the school holidays;*
> *b. whether the contact they have with their father should be supervised or supported and if so, by whom, and the availability and suitability of the proposed resources for that purpose (to include consideration of the father's wish for the current professional supervision to be replaced with support by the father's chosen nanny);*
> *c. recommendations for final child arrangements, including stepped arrangements with a view to a final order if possible;*
> *d. the Facetime calls between the father and the children.*
> *7. how the children would be affected by the change of arrangements as proposed and as recommended;*
> *8. what support, if any, is required to assist the family (or either parent individually);*
> *9. your comments on any other matters that you think are relevant."*

5. In my view, the terms of the instruction are possibly unnecessarily wide given the limited, albeit important, issues to be determined.

6. Mr Power produced a very detailed interim report of 53 pages dealing with the extension of interim "spending time" arrangements. He expressed concern about aspects of the presentation of the children, especially R, and recommended that a consultant clinical psychologist should be appointed *"to understand the dynamics at play across both households."* He considered the hearing in June may not be effective as a final hearing. The mother was very critical of the methodology and conclusions of Mr Power, in particular his approach to the PD12J issues which she considered he significantly underplayed. On 4 April 2022 I made an interim order accepting some of his recommendations. I considered the appointment of a psychologist, if it should happen at all, was premature in advance of a factual basis on which the expert should report. Ms

Mills QC, the father's then counsel, was critical of my approach to *"picking and choosing"* which recommendations of Mr Power I should accept and an application for permission to appeal is currently before the High Court.

7. The mother's home has 29 Google Nest cameras in almost every room which she says is for security reasons. The father suggests that the mother is preoccupied with knowing what is going on in the home at all times and spends many hours reviewing the footage. He also says she has used it as an evidence gathering device to support her case as to the father's behaviour towards her, the children and the family nannies. He says, and this is not denied, she also recorded Mr Power, without his consent. His skeleton argument for this hearing asserts she has adduced or otherwise exhibited recordings of 15 incidents, 13 clips from the Google Nest footage in the family home and 2 downloaded from her phone, one of which is a covert recording of the father. At a hearing on 15 September 2021, in the face of strong opposition from the father, I admitted a number of short video clips which did demonstrate the sort of abusive behaviour the mother complained of. They were of the type frequently presented to the court, extending over no more than a few minutes in total. Although I subsequently made directions for the mother to produce the footage from 15 minutes before and after the incidents she relied upon, I understand that footage no longer exists.

8. Mr Power also made the recommendation that a sample of Google Nest footage extending over 72 hours should be downloaded and suitably edited by an expert, to provide evidence of parenting of the children in the mother's home by herself and the nannies. John Power had made a similar suggestion in a contact note he produced after observing the children's time with the father in February. The father in fact sought for 5 days to be so downloaded but the mother advised the earlier footage had been wiped as per the system's operation.

9. Mr Power's recommendations on this issue are as follows:

> Paragraph 227 C248:
> *"It is very difficult to establish how the children are parented at their mother's home, the division of parenting and child care between T and the staff. It is not possible to ask the employed nannies because it would potentially compromise their employment. Ex nannies, being ex nannies, could be said to have an axe to grind. Nevertheless a former nanny observed that the surveillance worked both ways. Thus I think it might be useful to exploit the wall to wall surveillance systems and take a sample of footage from when the children are returned from spending time with their father, over the following 48 hours. For example the children were returned on Sunday March 12th at 19.00 so let's see the footage of how they are parented/cared for (nothing else) until Tuesday 14th evening, when they return from school and were put to bed. This could provide an evidence base for how the maternal house functions in terms of the delivery of parenting and child care but must be retrospective."*

Paragraph 277 C255

*"I think it essential to come to a better understanding of how the mother's household functions as the epicentre of primary caretaking, how this impacts on the children and how they have been impacted upon by their exposure to the arguments between their parents and their parents' relationship with staff. The mother's genuine anxiety about the children spending time with the father needs to be understood via the fact finding element of the combined hearing and the assessment of Dr Williams, if agreed. Future arrangements will need to be filtered through PD12J but in my assessment my interim proposals are risk sensible, gradualist and evidence based."*

Paragraph 275 C256

*"We need to know more about what both parents bring to parenting (paragraphs 199 and 200) and how that parenting is delivered across both homes and how the children's exposure to their parent's toxic relationship has impacted on them, and particularly the mother (her abnormal normal) and how that templates her concerns about the father and about the children spending time with him that is not highly regulated. Her anxiety is real, palpable, and deeply seated."*

Paragraph 284 C257

*"To aid Dr.Williams and me in understanding how parenting and child care are delivered in the children's home, their lived experience, I have, very controversially, suggested a retrospective sample is taken over 72 hours or less of the CCTV footage, that footage to be analysed by an independent body to extract these dynamics."*

10. I note Mr Power moves between saying *"I think it might be useful"* to *"I think it essential"* although the latter comment did not refer in terms to the obtaining of video footage.

11. The father submits the court must accede to the recommendation of a highly experienced expert, selected by the court. The mother says the father has leapt upon Mr Power's recommendation in an opportunistic way, and that this application must be viewed as an example of his coercive and controlling behaviour. She further submits the application raises important issues concerning her Article 8 rights. The father asserts she has, in effect, waived her Article 8 rights by her reliance on such material in support of her own case or in the alternative, when balancing the competing rights at play the balance falls in favour of disclosure and inspection.

**The legal principles**

12. Both parties agree that the relevant rules touching on this application are FPR Part 1 (overriding objective), Rule 4.1 (case management powers), Part 21 (disclosure and inspection), Rule 22.1 (power to control evidence) and Part 25B (experts).

13. I note in particular:
**Part 1.1 (2)(b)** dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
**Rule 4.1(3) The court's powers**
(b) make such order for disclosure and inspection, including specific inspection of documents, as it thinks fit.
**Rule 22.1 Control of evidence**
(1) The court may control the evidence by giving directions as to—
(a) the issues on which it requires evidence;
(b) the nature of the evidence which it requires to decide those issues; and
(c) the way in which the evidence is to be placed before the court
(2) The court may use its power under this rule to exclude evidence which would otherwise be admissible.

14. The mother's team also draw my attention to a document issued by the President on 5 May 2022: "**Fact-finding hearings and domestic abuse in Private Law children proceedings – Guidance for Judges and Magistrates**". This emphasises the need for robust case management and the fundamentals: relevance, purpose and proportionality.

15. Both parties agree that the relevant principles are set out in the case of **Dunn v Durham County Council [2012] EWCA Civ 1654, [2013] 1WLR 2305 paragraph 23**:

> *"What does that approach require? First, obligations in relation to disclosure and inspection arise only when the relevance test is satisfied. Relevance can include "train of inquiry" points which are not merely fishing expeditions. This is a matter of fact, degree and proportionality. Secondly, if the relevance test is satisfied, it is for the party or person in possession of the document or who would be adversely affected by its disclosure or inspection to assert exemption from disclosure or inspection. Thirdly, any ensuing dispute falls to be determined ultimately by a balancing exercise, having regard to the fair trial rights of the party seeking disclosure or inspection and the privacy or confidentiality rights of the other party and any person whose rights may require protection. It will generally involve a consideration of competing ECHR rights. Fourthly, the denial of disclosure or inspection is limited to circumstances where such denial is strictly necessary. Fifthly, in some cases the balance may need to be struck by a limited or restricted order which respects a protected interest by such things as redaction, confidentiality rings, anonymity in the proceedings or other such order. Again, the limitation or restriction must satisfy the test of strict necessity."*

16. This was endorsed in a family law context by MacDonald J in **R v Secretary of State for the Home Department (Disclosure of Asylum Documents) [2019] EWHC 3147 (Fam)**, a judgment subsequently approved by the Court of Appeal and Supreme Court.

17. However, I observe that the Dunn case is a civil case where the CPR prescribes a formalised code dealing with disclosure and inspection. The family courts have much wider discretionary powers as encapsulated in the FPR as just cited. That said, both parties agree that if the test of relevance is met, there is a need for a balancing of Convention rights, specifically the Article 6 rights of one party as against the Article 8 rights of the other.

18. In their Skeleton Argument, the mother's team submits strongly that the case for relevance of this material is not made out. This was less strongly pressed in Ms Fottrell's oral submissions. They assert this is centrally a dispute about the time, and manner in which, the father should spend time with the children. The issue of where the children should live as their primary home was settled by the consent order of 22 December 2021. The inference is therefore that the mother is able to provide satisfactory day to day care of the children. Mr Verdan submits that the mother's parenting is relevant to the children's relationship with their father, for example, the extent to which they are picking up any anxiety or hostility within the mother's household. Their behaviour as observed by Mr Power in contact raises questions as to how they are parented by the mother, as well as the father.

19. Initially I was attracted to the argument for lack of relevance, but on reflection I have concluded that it delimits the court's function too narrowly, particularly having regard to the terms of Mr Power's instructions.

20. I have therefore concluded that the recordings could potentially yield information of relevance to the court's welfare decisions.

21. In her oral submissions Ms Fottrell laid much greater stress on the breach of the mother's Article 8 rights and the proportionality of the disclosure. Mr Verdan submits that the invasion of her privacy is mitigated by the two stage approach he suggests, that the material is viewed in stage 1 only by the digital forensic expert responsible for editing the material and Mr Power, who will report upon what, if anything, is relevant to welfare issues in the material. Only then should a decision be taken as to whether it should be disseminated more widely to the parties and the court. He draws an analogy between a social worker observing contact and the court and the parties not seeing the underlying material. He further prays in aid the confidential nature of the proceedings.

22. Ms Fottrell in response says that the disclosure would be a gross, even grotesque, invasion of the mother's privacy exacerbated by the background of her allegations of coercive and controlling behaviour. Disclosure to a single person represents a breach of

the mother's Article 8 rights. She invites the court to consider the effect on any person if their private moments in their own home were exposed in this way. She asks rhetorically if this application were allowed, would any party with sophisticated security equipment as here be at risk of facing an application that their privacy would be invaded in this way? Further, she submits that it is difficult to conceive that either party, if he/she disagrees with the conclusions that Mr Power draws from the material, will not want to view it and want the court to view it.

23. It is submitted that this application has caused the mother great distress and the impact on her mental health could affect the children. Part of the mother's Article 8 rights is the preservation of her mental health as a precondition to the effective enjoyment of her right to respect for her private life. Mr Verdan rightly points out that there is no independent evidence of a deterioration of her mental health. I suspect had she adduced such evidence, it would have been said it relied solely on her self-report. Nevertheless, I have no doubt this application would have caused the mother significant distress adding to the pre-existing stress of these proceedings and the financial remedy proceedings but I can go no further than that.

24. In relation to the argument that the mother has in some way waived her right to privacy, she submits that the difference both in terms of quality and quantity of the material she has produced as compared to that which the father seeks to be disclosed is fundamental. She sought to disclose discrete episodes which illustrated the father's behaviour as submitted by her which extended in total over several minutes only. This is material of the sort which is commonly, if not routinely, produced to the court in private law cases whereas disclosure on the scale proposed by the father is wholly unprecedented.

25. She draws attention to the invasion of the privacy of the children and nannies within the home and suggests that in accordance with case law, in particular, the case of **Newman v Southampton CC and others [2022] 1 FLR 97**, that those third parties should be entitled to make representations before the court.

26. Mr Verdan submits that the father's right to a fair trial would be undermined if the mother were to be permitted to rely upon the material she has produced whereas he is disentitled to rely on similar material relating to her. Further, this is also material which the court appointed expert deems to be needed. Ms Fottrell submits that Mr Power has made no application himself to seek disclosure of the material. More significantly, she asserts that the father's case on breach of his Article 6 rights is simply not made out. *"There is no Article 6 issue engaged by this application."* She draws a distinction between this case and a case where material seen by the other parties and the court is withheld from one party – see, for example, **Re B (Disclosure to Other Parties) [2001] 2 FLR 1017 (FD)**. I stated at the outset of the hearing, I did not consider those cases provided any analogy to this situation.

27. Ms Fottrell submits that if there are no Article 6 rights engaged that there is no balancing exercise to be carried out and the court will simply need to examine whether any of the exceptions to Article 8 contained in Article 8.2 apply. She submits that none of the justifications under Article 8(2) apply in this case and that they fail because they are not necessary.

28. The mother's team also relied upon the case of **O'Brien v Chief Constable of South Wales Police [2005] 2 AC 534** as applied in family proceedings in the recent case of **R v P (Children: Similar Fact Evidence) [2021] 1 FLR 652** at **paragraphs 23 and 24** which provides helpful guidance on the approach to be taken to the admission of evidence which is legally admissible, ie has passed the test of relevance:

> *"[23] Lord Bingham stated the position in this way, at paras 3–6; '3. Any evidence, to be admissible, must be relevant. Contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome. Relevance must, and can only, be judged by reference to the issue which the court (whether judge or jury) is called upon to decide. As Lord Simon of Glaisdale observed in Director of Public Prosecutions v Kilbourne [1973] AC 729, 756, "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof ... relevant (ie logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable." ...*
>
> *5. The second stage of the inquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi is legally admissible, should be admitted. For the party seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, the importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole.*
>
> *6. While the argument against admitting evidence found to be legally admissible will necessarily depend on the particular case, some objections are likely to recur. First, it is likely to be said that admission of the evidence will distort the trial and distract the attention of the decisionmaker by focusing attention on issues collateral to the issue to be decided. This… is often a potent argument, particularly*

*where trial is by jury. Secondly, and again particularly when the trial is by jury, it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice: unless the former is judged to outweigh the latter by a considerable margin, the evidence is likely to be excluded. Thirdly, stress will be laid on the burden which admission would lay on the resisting party: the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increased cost and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections. … In deciding whether evidence in a given case should be admitted the judge's overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties."*

*[24] This analysis, given in a civil case, applies also to family proceedings. There are two questions that the judge must address in a case where there is a dispute about the admission of evidence of this kind. Firstly, is the evidence relevant, as potentially making the matter requiring proof more or less probable? If so, it will be admissible. Secondly, is it in the interests of justice for the evidence to be admitted? This calls for a balancing of factors of the kind that Lord Bingham identifies at paras 5 and 6 of O'Brien."*

29. I have also been referred to the case of **Re S (a child) [2016] EWCA Civ 495 paragraph 28 ii)** where the Court of Appeal considered the proper ambit of the enquiries to be made by a CAFCASS officer:

*"it is not the duty of a CAFCASS Officer, when preparing a report, to explore every aspect of a parent or a child's life or to investigate matters that are not in issue. The CAFCASS Officer will, aside from interviewing the parents and the child, usually make enquiries of the police, a child's nursery or school, health care professionals or social workers, if they have been involved with the family, but no more than that unless the court expressly requires other more extensive enquiries."*

30. The mother's team asserts that Mr Power can and should fulfil his remit in advising on welfare decisions in the usual way by interviewing the parties and relevant third parties, meeting and speaking to the children and making observations of the parents with the children, all of which he has done and will do further in the course of his investigations.

31. In relation to proportionality more generally, it is contended that this exercise is placing the coming fixture at risk, for example, in the need to consider representations on behalf of the children and nannies and the time spent at trial if there is a need to view some or all of this material even as edited. The digital expert has significantly reduced down the time needed and the cost incurred in a recent email which the mother's team takes issue

with. I note that the current assessment nevertheless speaks of 52 hours of review with 8 hours of administration and 16 hours of reporting, a total of 76 hours at a cost of £19,000 plus VAT. It is obviously unknown how long the edited footage would be. The fact that the father's wealth means that cost to him is of little import does not affect the proportionality of what is proposed.

32. An issue is also raised about breach of legal privilege as the mother confirms she spoke to her solicitors over the period in question. I accept the digital expert would view this confidential material but it seems to me the risk of the children being present when she was speaking to her solicitors should be slight. There are more significant and weighty concerns, in my view.

**My conclusions**

33. I am satisfied that disclosure on this scale would represent a gross invasion of the mother's Article 8 rights and is unprecedented. It is, as Ms Fottrell put it, "a big deal." There is a qualitative and quantitative difference between the disclosure permitted on the mother's application and that which is contemplated by this application which goes to the root of an individual's right to respect for his/her family life. Further, the balancing exercise must be carried out separately for each such application. I am satisfied that it is virtually inevitable that there will be wider dissemination than Mr Verdan posits in his two stage argument in such a high intensity dispute. I do not find the absence of such disclosure would impact on the father's Article 6 rights. In my judgment, Mr Power will be able to carry on his investigations in the conventional way and is able to produce a meaningful report on the material available. I have noted that he has veered between saying such evidence *"might be useful"* and was *"essential"*. He recognised his suggestion was *"highly controversial"* and he has not sought to progress it by application, although that may be because he was made aware of the father's application. Mr Power's views are worthy of high respect but I consider he has been mistaken on this occasion and has not considered the full implications of his proposal. I consider had he heard and read the legal submissions he may have changed his views.

34. As I accept the father's Article 6 rights are not compromised, I have to go on to evaluate whether there is an exception to the mother's Article 8 rights. I am satisfied that there is no exception to her Article 8 rights to privacy established under Article 8.2.

35. Fundamentally the issue is one of proportionality. Not only is there the unjustifiable intrusion into the mother's private life but there are also the children's and other adults' rights to be taken into account about which representations may be needed, jeopardising the trial fixture. There is also a risk that the trial might be derailed if such evidence were introduced e.g if there were arguments about the material which would require the court to watch it and hear submissions. The costs of the exercise are also disproportionate, regardless of the father's wealth. I do not take into account the allegations of coercive and controlling behaviour in reaching these conclusions as they are unproven. I do firmly

take into account the President's Guidance in The Road Ahead and the recent guidance referred to above about the need for robust case management and the focus on proportionality.

36. This application, if granted, would represent a fundamental departure in the way such cases are investigated. Whilst there may still be a case where such a departure would be justified I am not satisfied this is one of them.

Dated 9 May 2022