Neutral Citation Number: [2020] EWHC 861 (Fam)

Case No: 2019/0094

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2020

Before:

MR JUSTICE WILLIAMS

- -

Between:

Birmingham Children's Trust	**Appellant**
- and -	
K	**First Respondent**

- -
- -

Mr Christopher Butterfield (instructed by **Thomas Flavell + Sons**) for the **Respondent**
Mr Francis Wilkinson (instructed by **Birmingham Children's Trust**) for the **Appellant**

Hearing dates: 25 February 2020

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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.

....

MR JUSTICE WILLIAMS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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:

1. On 24 May 2019 HHJ Bush sitting in the Family Court at Birmingham made an order that

   'The Birmingham Children's Trust shall pay the Applicant Mother's and the Respondent Father's costs, which are to be assessed as detailed at paragraph 2 below.'

   That order was made following the delivery of judgment by HHJ Bush on that day which itself followed on from a hearing which had taken place in the afternoon of 3 May 2019. That earlier hearing was devoted solely to the parents' applications for the local authority to pay their costs but HHJ Bush was unable to deliver a judgment at the conclusion of that hearing and adjourned delivery of judgment to 24 May 2018.

2. On 31 May 2019 the Birmingham Children's Trust sought permission to appeal against that order. HHJ Bush refused that application and stayed the assessment of the costs pending the outcome of an application for permission to appeal to the High Court. She specified that the time limit for the purposes of an appeal was 31 May 2019.

3. On 10 July 2019 an Appellant's Notice was issued seeking permission to appeal against the order of HHJ Bush. Although it would appear that the Appellant's Notice was issued out of time the contents of the Appellant's Notice and grounds suggests that it was submitted either within time or within a short period thereafter. On 2 October 2019, following receipt of the transcript of judgment and amended Grounds of appeal and a skeleton argument I gave directions that the application for permission to appeal be listed for an oral hearing with appeal to follow immediately if permission was granted. I gave detailed directions for the preparation of the appeal. On 16 October 2019 following liaison between counsel's clerks and the clerk of the rules the appeal was listed for hearing before me on 25 February 2020.

4. The proposed respondents took differing stances in response to the appeal. The first respondent mother opposed the appeal and filed a skeleton argument on 18 October 2019. Early in 2020 the solicitors for the second respondent father indicated that they had reached an agreement with the proposed appellant and that they did not intend to oppose the appeal.

5. Today, 25 February 2020 I heard the application for permission to appeal. After hearing submissions from Mr Wilkinson for the proposed appellant ('the local authority') and Mr Butterfield counsel for the proposed first respondent mother ('the mother') I gave the parties my decision to refuse permission to appeal with short reasons and confirmed that a short written judgment would follow. This is that judgment. I am not giving permission to cite this decision because I did not hear full argument in respect of the legal issues raised having regard to the stance that the local authority took before HHJ Bush in respect of the law and my view that it was not open to the local authority now to raise some of the arguments that Mr Wilkinson sought to pursue. I accept Mr Wilkinson's point (agreed also by Mr Butterfield) that because there is no reported authority where a non-party cost order has been made against a local authority in respect of failures in relation to the provision of a section 7 report my judgment might if citable be relied upon in future as some sort of binding authority that section 7 reporters are by reason of that status alone within the reach of a non-party costs order. This is judgment is NOT authority for any such proposition. Because of the facts involved in this appeal full argument was not heard on the applicability of the non-party costs regime in respect

of section 7 reporters and thus it would be inappropriate for this judgment to be cited as authority. It may be that in another case where the legal arguments deployed by Mr Wilkinson on appeal have been made at first instance that such a case may become authority in this area.

6. The identities of the parties and social workers are anonymised.

Background

7. The appeal arises out of a private law dispute between the mother and the father. The mother sought an order that the child live with her and that she be given permission to relocate with the child to live in Canada. The father opposed that application and in turn sought an order that the child live with him.

8. At the first hearing on 7 March 2018 an order was made for the local authority to provide a section 7 report dealing with seven identified issues, the first of which was with whom the child should live and the second of which was the mother's proposal to relocate with the child. The local authority had previous involvement with the family, the child was apparently on a child in need plan and so it was felt that the local authority rather than Cafcass was the more appropriate provider of such a report. The local authority did not object to the order but they did in due course write to the court asking for an extension of time to file the report. This was granted and the listed dispute resolution appointment was put back.

9. The section 7 report was filed late, albeit only a few days late, and the author Ms X, attended the dispute resolution appointment on 19 June 2018. Directions were given for a final hearing listed for three days before HHJ Bush on 30 and 31st July and 3 August. This hearing was accommodated because the mother wished to travel to Canada over the summer vacation and temporary leave to remove was sought. The orders made up to and including 19 June clearly contemplate a rolled up hearing in which both fact-finding and welfare issues would be determined. Unfortunately shortly after this hearing Ms X fell ill.

10. On 30 July the matter came before HHJ Bush for final hearing. Ms X did not attend but a colleague Miss Z did. The court was informed that Ms X was ill and was likely to be off work until at least September. The order records that the father had been told that Ms X was ill on the preceding Friday, 27 June. The mother informed the court that she had not been told that Ms X was ill until she arrived at court. Both of the parents indicated to the court that the sought an order that the local authority pay the wasted costs of that days hearing as a result of the local authority's failure to inform the parties in good time that Ms X would not attend court. The final hearing was adjourned until 19 September. Further case management directions were given. These included a direction for the local authority to file an addendum section 7 report dealing with matters raised in recent contact reports relating to an alleged decline in the child's behaviour and allegations of coaching. Provision was made for Ms X or her team manager Ms Y to give evidence at the adjourned final hearing along with the author of the addendum section 7 report. Provision was also made for the local authority to file a statement in relation to wasted costs by 28 August 2018 and they were joined to the proceedings solely for defending the application for a wasted costs order. They were directed to attend on the afternoon of the third day of the final hearing in order to deal with that application.

11. It seems that Ms Y prepared a statement dealing with the wasted costs on 20 September 2018 [D45]. Self-evidently this was late and Mr Butterfield told me it was not in fact filed until after 1 October. For reasons which are unclear this statement was not included in the bundle of documents provided to HHJ Bush at the hearing on 3 May 2019 and does not appear to have been provided to the local authority's counsel as it is not referred to in his skeleton argument.

12. When the case resumed on 19 September Ms Y and Miss Z both attended. A transcript of their evidence was obtained. Ms Y gave evidence on the 19th, 20th and 21st of September. Ms Z gave evidence on 21 September. I am not sure whether the local authority attended on the third afternoon or whether by then it had become clear that the hearing would not be completed. The order records the following;

"*the court heard evidence from the team manager, [Ms] Y, on 19, 20 and 21 September 2018 and from the author of the addendum section 7 report, [Ms] Z on 21 September 2018. During the cross examination of Ms Y, Ms Y conceded that she had read none of the parties statements save, perhaps having glanced at the father's statement. The court therefore had to adjourn to enable her to read the parties evidence.*

Having read the section 7 report dated 15 June 2016 [error for 2018] and the addendum section 7 report dated 3 September 2018 and heard evidence from Ms Y and Ms Z the court has expressed the view that the quality of the social work evidence is so poor that the court is unlikely to be able to place any weight on those reports or Ms Y's and Ms Z's oral evidence. As a result the court considers that it requires a further section 7 report prepared afresh and independently of the local authority in order to assist the court to determine the parents respective applications.'

13. The transcript of evidence confirms these recitals. It is clear from the transcript that Ms Y had not prepared for the hearing by reading the statements or giving consideration to the issues that were identified in the original order for a section 7 report. The section 7 report addressed the question of relocation in the briefest of terms and did not deal with critical aspects of welfare related to relocation. Nor did it deal with critical issues relating to the competing 'live with' applications. Ms Y was clearly not prepared so as to be able to fill those gaps. Ms Z had been given a more discrete section 7 function and so her inability to answer questions relating to the relocation or the live with order is not surprising.

14. At the conclusion of the hearing HHJ Bush directed that Cafcass provide a section 7 report and gave detailed directions as to the issues it was to address and the material it was to consider. That included reading the transcript of the evidence of Ms Y and Ms Z. Further directions were given in relation to the possibility of a wasted costs order being made in respect of the local authorities responsibility for the costs thrown away as a result of the adjournment of the final hearing. That was to be heard at the conclusion of the adjourned final hearing on 19 December 2018. In fact that hearing was also ineffective because Cafcass were unable to allocate the case to the officer they had expected and so they were unable to prepare a report. The wasted costs application was adjourned. The order states that it was to be listed on 27 April 2019 but this appears to be a mistake as the final hearing was listed for five days from 29 April which would take the conclusion of the hearing to 3 May.

15. I was told that that part heard final hearing was also ineffective but the costs application was dealt with on 3 May.

16. For the purposes of that hearing the mother and the father filed a joint skeleton in pursuit of their application. The local authority instructed counsel who filed a skeleton. I directed that a transcript of that hearing be obtained and included within the appeal bundle. The local authority did not obtain it. Mr Wilkinson was unable to explain why. As a result I have been unable to supplement my understanding of what was said to the judge and what she herself said and thus I have to rely on the skeleton arguments and upon the judgment itself to identify the submissions that were made and how the judge responded to them. The transcript would of course form part of the penumbra. The skeletons filed by the mother and father on the one hand and the local authority on the other were in broad terms in agreement as to the relevant test to be applied in determining a non-party costs order. Both referred to the leading cases within the civil sphere and to the decision of Mr Justice Cobb in HB-v-PB otherwise known as Re OB (private law proceedings: costs) [2016] 1 FLR 92. The Local Authority Skeleton refers to Re T (Children) [2012] UKSC 36 and asserts that Cobb cited it as a useful reminder that costs should not be awarded against a party, including a local authority, unless there was reprehensible or unreasonable behaviour. I do not think that Cobb J was referring to Re T in that sense but rather in rejecting an argument that hard pressed local authority resources should (as in most children cases) be a bar to a costs order. In the local authority's skeleton argument the jurisdiction to make such an order was summarised by their counsel as

'*Drawing these threads together, in determining the application, the court will apply the wide discretion in rule 28.1 ("The court may at any time make such order to costs as it thinks just") guided by the principles set out which require it to consider whether there has been reprehensible behaviour or an unreasonable stance by the local authority that carry the case over the "exceptionality" threshold.'*

17. Mr Butterfield informed me that at the commencement of the hearing counsel for the local authority said that the parties were essentially agreed on the law. Mr Wilkinson was not in a position to demur from this because the transcript of the hearing had not been obtained. However I see no reason not to accept what Mr Butterfield says having regard to the contents of the skeletons which were submitted.

18. No submission was made to HHJ Bush that a local authority directed to provide a section 7 report was not sufficiently closely connected to the proceedings for a non-party costs order to be made against them.

19. The written submissions which followed that summation of the approach, focused on whether the factual circumstances justified the conclusion that there had been reprehensible behaviour (or fell short to the extent required). In respect of the hearing in July it was submitted that the evidence demonstrated that the local authority had done what could reasonably have been expected and that the hearing would have been ineffective in any event. In relation to the hearing in September/ October the court was asked to view the deficiencies in the evidence having regard to the fact that these were social workers not Cafcass officers, that both Ms Y and Ms Z were attempting to assist the court neither having been directed to prepare the principal section 7 report and that they did their best in overwhelming circumstances to assist the court. It was in the

context of those submissions that it was acknowledged that the written and oral evidence fell short of what was reasonably to be expected.

The Judgment

20. The transcript of the judgment shows that judgment was delivered over a period of about 25 minutes. The judge sets out the factual history which had led to the hearing that took place on 3 May. In this she includes her observations as to the significance of failures in terms of the process and her evaluation of responsibility for them. She then set out from paragraphs 23 to 30 a consideration of the law. That was plainly drawn from the skeleton arguments of the local authority and the parents. It is a somewhat fuller summary than was included within the local authority's skeleton. In paragraph 30 of the judgment she draws the legal test and the facts together. The test she applies is that propounded by the local authority's counsel namely cost should not be awarded against a party including a local authority in the absence of reprehensible behaviour. She says,

'*The behaviour of the local authority in this case was very bad. I do not know whether it comes within the category of reprehensible behaviour as understood by Mr Julian* [sic- I think Mr Julian Foster], *he did not give me any particulars of what he would regard as reprehensible, but it does come within the definition of slack, incompetent, lackadaisical, careless behaviour in which a local authority who were required to do a report in respect of the future of a child managed to derail (I appreciate through incompetence rather than deliberately) a very important case about the future of a child in which they have been involved as part of their child protection roles. As well as decision-making about the future of the children. I find that that does amount to reprehensible behaviour.*'

Appeals

21. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for procedural irregularity.

22. The test for granting permission [FPR 30.3(7)] is,

i) The court considers that the appeal would have a real prospect of success; or

ii) there is some other compelling reason why the appeal should be heard.

23. The court may conclude a decision is wrong or procedurally unjust where

i) an error of law has been made,

ii) a conclusion on the facts which was not open to the judge on the evidence has been reached Royal Bank of Scotland v Carlyle [2015] UKSC 13, 2015 SC (UKSC) 93

iii) a process has been adopted which is procedurally irregular and unfair to an extent that it renders the decision unjust: (has there been an unseemly rush to judgment) Re S-W (Care Proceedings: Case Management Hearing) - [2015] 2 FLR 136

iv) a discretion has been exercised in a way which was outside the parameters within which reasonable disagreement is possible; G v G (Minors: Custody Appeal) [1985] FLR 894,

24. The court must give a decision and explain the reasons for it so that the parties and the appeal judge may properly understand the basis of the decision. The trial court does not have to deal with every point raised and does not need to set out the law in detail provided it is evident from the decision that all relevant factors have been considered.

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 have 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):*
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> > *"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:

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, 45:

> *'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.'*

The Grounds of appeal

27. The amended Grounds of appeal filed by Mr Wilkinson on 16 September 2019 identify three grounds. The grounds are set out in lengthy narrative form (more Skeleton than Grounds of Appeal) and are supplemented by more detail in a skeleton argument which expands upon them. I shall summarise them rather than set them out verbatim.

Ground one

28. the process adopted by the court was unfair to the appellant

 i) the appellant was deprived of the opportunity to make effective submissions on the application which was unjust and as a result errors of fact and law were made.

 ii) The court was led to believe that the local authority had not provided a statement as directed on 30 July 2018 because it was omitted from the bundle prepared by the mother's solicitors.

 iii) The court found that the local authority had not notified the respondent mother that the section 7 report would not be attending on 30 July. There was detailed evidence available to the court not properly taken into account that both parties had been notified

Ground two

29. The judge wrongly found that there was reprehensible behaviour by the appellant.

 i) The absence of the social worker on 30 July 2018 was not the principal or only cause of the adjournment in that

  a) the social work team manager attended court and was prepared to give evidence

b) the father's application for a psychological assessment would, if granted have prevented the hearing being used as a final hearing

c) the local authority was not responsible for the decision to adjourn the final hearing

ii) to treat what the appellant did as reprehensible behaviour justifying an adverse costs order was wrong because

a) the unavailability of the allocated social worker was unpredictable as she had fallen ill.

b) The judge did not distinguish between litigation conduct and poor social work

c) the judge failed to identify what specifically was reprehensible.

d) The judge unreasonably criticised the social work manager for not having read the parents statements before giving evidence.

e) There are no individual shortcomings in the local authority's conduct which could be counted as reprehensible.

f) The local authority was not a party and had no representation. The judge applied standards appropriate to a represented party to an unrepresented party

g) the reprehensible behaviour was found to be the inadequacy of the original report but in fact it was full and detailed and based its conclusions on the authors assessment of disputed facts. The courts subsequently requested a further risk assessment based on its findings of fact which would have been required in any event. The need for a further report arose out of the emergence of further evidence relating to the finding of fact.

Ground 3

30. The judge was mistaken as to the law.

i) The judge wrongly referred to wasted costs

ii) the judge did not refer to the principal authorities on costs in children cases

iii) the judges references to authority contained a number of errors

The Mother's Response

31. The skeleton filed by Mr Butterfield on behalf of the mother took issue with a great deal of the factual assertions made by the local authority. In this respect Mr Butterfield was proven to be right in many respects; most obviously in respect of the assertion that the local authority had somehow been taken by surprise by the non-party costs hearing and had been unrepresented. However there were several other erroneous assertions in the Local Authority's appeal documents. In relation to the three grounds the mother's position broadly was as follows

i) Ground 1: there was no procedural unfairness as the local authority were fully represented at the hearing and the assertions as to the erroneous reference to a statement and the conclusions as to the notification given to the parties are wrong on examination of the evidence.

ii) Ground two:

a) the local authority's assertions are misleading having regard to the evidence

b) the findings on reprehensible behaviour were fully justified by the judge's detailed knowledge of the case and the judge's survey of events and their impact on the proceedings. Much of the criticism now made is directly contrary to the case that was put before HH J Bush.

iii) Ground three: the judges summary of the law showed she applied the correct legal principles notwithstanding some minor errors in references to authorities.

<u>Analysis</u>

<u>Ground 1</u>

32. At the outset of the appeal I invited Mr Wilkinson to consider whether ground one was still pursued given it was plain that the local authority had been represented on the hearing of the application and that the 24 May hearing was only for delivery of judgment. After some discussion he accepted that ground one which alleged procedural unfairness could not be pursued. It seems to me that this was inevitable. How the amended Grounds of appeal and skeleton came to be filed asserting that the local authority had not been given an opportunity to be heard on the application is beyond me. In relation to the point that the court was led to believe that the local authority had not provided a statement it emerged that the local authority themselves had not referred the court to this statement and it was not referred to in their skeleton argument for the costs hearing. The assertion that the judgment erroneously refers to the mother having not been informed in advance of 30 July hearing was one which the judge was perfectly entitled to reach. It is clear that she had seen the statement of Ms Y (which the local authority assert she wrongly found had not been filed) because she refers to the content of it. The reference at paragraph 28 of the judgment to the local authority not having complied with the direction to file a statement is a reference to the fact that it was not filed by 28 August; it is dated 20 September. The deployment by the local authority of points which are unfounded in fact causes one to question the reliability of other assertions.

Ground 2

33. One of the first points made in relation to ground two was an assertion that the social work team manager had attended court on 30 July and could have given evidence. This also was simply wrong. Ms Y did not attend that hearing and could not have given evidence. The further assertion that the father's application for a psychological assessment would have prevented the final hearing was similarly misplaced. That application had been refused before and was not granted on this occasion. Finally the assertion that the local authority was not responsible for the decision to adjourn the final hearing is irrelevant.

34. The local authority submit that the judge was wrong both in terms of her factual conclusions in relation to when the local authority notified the parties of Ms X's unavailability and in her characterisation of that failure as reprehensible so as to warrant the making of a costs order. Mr Wilkinson argues that the judgment wrongly asserts that no one was told before the morning of 30 July that Ms X could not come and that the judge wrongly says that the section 7 report was filed 15 days late. The order records that the father had been told on the Friday, 27 July but the judgment itself concludes that the parties (or the father) was told one day (working) before the hearing. However the evidence of Miss Broadmeadow which was before the judge which asserts (without identifying how) that both the mother and the father were told on 27 July was not consistent with the statements filed by Ms Y (which was not in the trial bundle but had obviously been see by the judge) which only asserted that the father was informed by a reply to an email he had sent that day. Mr Wilkinson submitted that the local authority was unsure when Ms X would be in a position to resume work and that it was unfair to criticise them for only informing the parties on 27 July. Of course what is conspicuous in its absence from any of the evidence filed by the local authority was any attempt to inform the court of any difficulties with Ms X or any identification of what they knew in terms of Ms X being certified unfit. Whilst I accept the point that one cannot predict how long an illness will last that hardly addresses the point of the local authority's state of knowledge of how long a period Ms X was certified unfit to work which presumably was known to the local authority and which ought to have been passed on to the court. More importantly the evidence discloses no attempt to notify the court in advance of the issue of Ms X's illness and her probable inability to attend which would have enabled the court to consider whether three days of court time ought to remain set aside for the case or whether the case should be adjourned or converted into a hearing of a temporary leave to remove application. Thus although Mr Wilkinson may be right in identifying a minor error in the judge's recording of the facts relating to Ms X non-attendance on 30 July 2018 that has no bearing on the cause of the adjournment and the waste of costs that accompanied the ineffective hearing. Taken at its highest the local authority's case is that both parties were notified in the course of the Friday that Ms X would not be available on the Monday. That communication even if correct was so late in the day that neither party could have taken any meaningful action in response. As the judgment makes clear HHJ Bush was particularly concerned that no steps had been taken to notify the court. Mr Wilkinson submitted that the hearing would have been adjourned in any event and in this he relies on the direction for an addendum section 7 report. I do not accept that there is any merit in this. Had Ms X been available all the indications are that the hearing would have proceeded. The direction for an addendum

section 7 report was an effect of the adjournment not a cause of it. The order of 30 July makes clear that the hearing was adjourned because of the absence of Ms X and that the court and the parties had been deprived of the opportunity to either vacate the hearing or converted into some other purpose by the failure of the local authority to provide proper notice of the problem. Mr Wilkinson's submission that the awareness of the parties earlier in July that Ms X was ill (as recorded in the child in need meeting) or that the notification on 27 July was somehow adequate are without any merit. The first duty of an authority directed by a court to provide a section 7 report whose author is directed to attend a hearing is to the court and not to the parties; although a duty is also owed to the parties. The failure to notify the court in good time is inexcusable. I'm told that the local authority is one of the largest in the country and I have little doubt that the children services Department and the legal department are familiar with both the duty and the processes to update the court. Indeed the local authority did so in relation to seeking an extension of time for filing the report and so the failure to keep the court and the parties informed in good time of Ms X's illness is inexplicable. Had this been the only default it is a matter of speculation as to whether HHJ Bush would have made a non-party costs order but regrettably it was not.

35. Mr Wilkinson submits that the section 7 report and the oral evidence should not be characterised as falling so far below the standard to be expected that they could be characterised as reprehensible conduct on the part of the local authority. He submits that they deal with the relocation issue albeit in brief terms. He also submitted that the criticism of Ms Y and Ms X for not having read (or fully read) the parties' statements prior to giving evidence or completion of the report should not be criticised. He submitted that it was the duty of the parties to provide witnesses such as Ms Y with the material and to ensure that they had read it. Whilst I accept that this would be well directed in relation to updating material it is utterly without foundation when one is referring to the substantive witness statements in support of the competing child arrangements applications. It is particularly hard for Mr Wilkinson to maintain the submission when the skeleton argument filed on behalf of the local authority contained the concessions (following the obtaining of the transcripts of their evidence)

'*at the outset, the trust accepts that in a number of respects, its practitioners conduct fell short of what was reasonably to be expected'*

as explained above, it is acknowledged that the quality of the written and oral evidence fell short of what was reasonably to be expected.

36. Mr Wilkinson also submitted that any deficiencies in the section 7 report ought to have been identified by the court and by the parties on 30 July and that Ms Y ought to have been directed to address those issues. He submitted that it was inappropriate to criticise the practitioners' evidence in September, particularly bearing in mind they are social workers not Cafcass officers, when the defects were not identified either at the dispute resolution appointment or at the hearing on 30 July. Mr Butterfield responded that it is not unusual for defects in a section 7 report to be made good by exploration with the witness in oral evidence and that hindsight should not now be deployed to criticise the way the case was managed by the parties and the judge. Whilst I am prepared to accept that in an ideal world defects in a section 7 report will be identified at DRA and the author invited to address them the reality is that in a very significant number of cases there will indeed be omissions which might be plugged or uncertainties which might be clarified and practice in the real world suggests that these are usually adequately dealt

with by questions in oral evidence rather than by requiring a supplementary report. Given that neither the social worker, counsel or the judge identified at that stage that the report was so defective that the only possible course would have been to direct a supplementary report I am not prepared to accept the submission that the local authority should not be held responsible for the defects because others were also responsible. The duty to complete the section 7 report lies upon the local authority. They should have in place processes which ensure that such reports (which are not the ordinary fare of children services social workers) are allocated to an individual who has the necessary experience and skills to undertake the work. If such an individual is not identified then management and legal support should be put in place to ensure that the report addresses the issues the court has identified. Ultimately it is the responsibility of the local authority at senior management level to ensure that they comply with the direction of the court and if they feel unable to do so they should notify the court accordingly. In this case the local authority did not (until the 3rd May 2019) assert that Cafcass were a more appropriate resource, nor did they assert that they did not have the capacity or ability to provide such a specialist report.

37. Mr Wilkinson submitted that the criticism of Ms Z recorded within the transcript of evidence and referred to at paragraph 15 of the judgment was unfair and indicated (along with other matters) that the evaluation that the local authorities conduct was reprehensible was wrong. I am prepared to accept that there are extracts from the transcript which would suggest that Ms Z was criticised for not having considered issues which did not fall within the remit of the addendum section 7 report. However those isolated examples that Mr Wilkinson took me to are hardly representative of the entirety of the transcript of evidence or the overall impression which clearly emerges from it of a failure to grapple with the really significant issues which confronted the court and the parties. It hardly needs to be said that the section 7 report on such issues can be hugely significant in equipping the court with the evidence to determine the issues and in making reasoned recommendations to assist the court in understanding what will best promote the child's welfare. For reasons which I am not entirely clear (and I accept may be related to pressures of work, inexperience, lack of support) the preparation that was undertaken both in the report and in the oral evidence was plainly so defective that the court was simply not provided with useful evidence on which it might seek to rely in the determination of these important applications.

38. The Local Authority also argued that a further section 7 report would have been required anyway because the judge reached different conclusions on the facts to those reached by Ms X. That is simply incorrect as no findings were made by HHJ Bush at the September/October hearing. The actual basis for requiring a further risk assessment is set out in paragraph 16 of the judgment and relates not to findings made but matters not addressed in the original report.

39. It is plainly a most unusual course for a judge to take to direct an entirely new section 7 assessment from a different agency. Having heard evidence from Ms Y and Ms Z over the space of some three days HHJ Bush adopted a most unusual course because she clearly concluded that the evidence she had heard had not provided her or the parties with the material required to justly determine the applications. Having dipped my toe into the transcripts her conclusion that the evidence was so poor would appear to be irrefutable. It is of course also supported by the concessions made by the local authority at the hearing on 3 May.

40. I note that in Cobb J characterised the failings in Re OB as '*not minor, they are extensive, and have had a profound effect on the conduct of the proceedings… they have failed fundamentally to investigate, address or analyse the serious issues in the case….* 'HHJ Bush's description of the failures of the Local Authority is certainly within the parameters of the kind of failure Cobb J relied on. Some judges might have taken a more benign view of the failings but many (perhaps most) would have taken an equally robust view of the failings. I see no reason at all to disagree with HHJ Bush's characterisation of those failures as falling within the scope of reprehensible or unreasonable conduct.

Ground three

41. As set out above it is asserted that the judge was mistaken as to the law.

i) Although the judge and the parents referred at various times to wasted costs the criticism of the judgment is unfounded when it is appreciated that HHJ Bush did not apply the wasted costs jurisdiction but rather applied the non-party costs jurisdiction. It is simply use of colloquial rather than technical terminology but has no significance.

ii) The criticism that the judge did not refer to the principal authority on the application of the rules on costs in children cases namely Re S (A child) [2015] UKSC 20 and the guidance that costs orders should only be made in unusual circumstances is of no relevance given that the actual test that she applied of needing to identify reprehensible behaviour and recognising that such a course is exceptional (i.e. rarely done) applies a test which is at least as stringent as that identified by the Supreme Court in re S. The Local Authority argument is one of form without substance and given the Local Authority did not rely on Re S (above) before HHJ Bush the criticism is not open to the Local Authority. As an aside, albeit without determining it, there are unexplored arguments as to whether Re-S or Re T are directly relevant. Both deal with applications for costs orders in children cases as between the parties rather than applications for costs against non-parties.

iii) The criticisms that the judge made a reference to guidance apparently derived from the Family Procedure Rules which is in fact not present is also without consequence. Both counsel submitted that the FPR does not refer to non-party costs orders although the Red Book does and it contains a summary in the 2019 Edition at p.2210. The authorities referred to by the parties and indeed by Mr Wilkinson make clear that it is not a precondition that there must be exceptional circumstances in order to make such an order. What the authorities do make clear is that such an order is only likely to be made in unusual circumstances and where there is clearly identifiable conduct (or misconduct) which makes it just to make such an order. Whether one uses the terminology of reprehensible, or unreasonable or misconduct or breach of duty is perhaps neither here nor there. The criticism that the judge cited a passage from one case which was in fact attributable to another case is no more than a proverbial slip of the pen/tongue/keyboard. It is of no consequence given that Mr Wilkinson accepts that it is an accurate reference to what was said in a relevant judgment.

iv) In her judgment as a result of the mother's summation of the law in her skeleton argument HHJ Bush quite properly summarised the need to establish a sufficiently close connection or responsibility for the proceedings to bring them within the reach of a non-party costs order. The central focus of Mr Wilkinson's oral submissions was the submission that in fact the local authority was not sufficiently connected with the proceedings so as to fall within the category of persons against whom a non-party costs order could be made. Given that no such submission was made to HHJ Bush I declined to permit Mr Wilkinson to rely on this. The skeleton argument submitted on behalf of the local authority for the hearing on 3 May 2019 makes absolutely no reference to any argument that there was an insufficiently close connection to bring them within the reach of a non-party costs order. It is implicit in the skeleton argument that is it is accepted that the local authority is sufficiently closely connected. As I have said before given the absence of full argument on this point I reach no conclusions on the legal test to be applied and whether there is a distinction between a section 37 direction and a section 7 report being ordered. The cases suggest that the focus should be on substance not form which would be consistent with the approach generally under the Family Procedure Rules where the focus is on achieving a just outcome rather than permitting reliance on technicalities. It is clear that on the facts HHJ Bush at paragraph 25 found that there was a sufficiently close connection to engage the jurisdiction. Given the local authority's position during the hearing on 3 May 2019 that conclusion is not open to them to challenge her application of the law. However stepping back and undertaking my own independent judicial duty to consider matters of law I am unable to see any matter which would undermine the conclusion that on the facts of this case this local authority were sufficiently connected having regard to the central importance of this section 7 report.

Conclusion

42. Returning then to the general terms of the Grounds I am therefore entirely satisfied that

i) there is no substance in the assertion that the process adopted by the court was unfair to the local authority. The test on an appeal is whether the decision is unjust for procedural irregularity. The case advanced on behalf of the local authority does not establish any procedural irregularity still less one which rendered the decision unjust.

ii) The judge's conclusions as to reprehensible behaviour were open to her on the facts as she knew them or found them to be. Having dealt with the application since 30 July she was well placed to determine the extent of the failures of the local authority and the impact they had had on the proceedings. What amounted to reprehensible conduct is a question of evaluation and the judge was well within her evaluative discretion to determine that the failure to notify the court and the parties in good time before the hearing on 30 July and the failures to prepare the section 7 report or to prepare for oral evidence fell within the parameters of reprehensible conduct.

iii) Her summary of the law broadly reflected the submissions that had been made to her in particular those made by the local authority and in fact she adopted the

general test propounded by counsel for the local authority at the hearing. There is no error of law demonstrated.

43. In the circumstances I do not consider that the local authority has demonstrated any real prospect of success in relation to any of the grounds. On closer examination which has been afforded by this hearing and the benefit of sight of the skeleton argument submitted on behalf of the local authority to HHJ Bush and the benefit of submissions from Mr Butterfield as well as Mr Wilkinson it is clear that the appeal never had a realistic prospect of success and I therefore declined to grant permission to appeal. There might have been a compelling reason to grant permission had the issue of 'sufficient connection' been open to the Local Authority to argue but that issue will have to await a case where it has been argued at first instance.

44. I gave judgment in respect of the costs application determining that in respect of grounds one and three the appeal was unreasonably brought in respect of ground two I accepted that there were some matters which made it not unreasonable for the local authority to have pursued the appeal albeit I ultimately found against them. I therefore determined that the local authority should pay two thirds of the appellant's costs which I assessed on an indemnity basis in a summary fashion.

Order

45. I therefore confirm that I will make the following order

i) the application for permission to appeal is refused.

ii) The local authority shall pay two thirds of the mother's costs assessed summarily on an indemnity basis in the sum of £5681.89.