IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No. FA-2024-000094

Neutral citation number: [2024] EWHC 3329 (Fam)

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 3 May 2024

Before:

MRS JUSTICE MORGAN DBE

(In Private)

B E T W E E N :

A Mother (Appellant)

- and -

(1) A Father
(2) A CHILD (through their Children's Guardian) (Respondents)

DR C PROUDMAN appeared on behalf of the Appellant.

MR A FORBES appeared on behalf of the First Respondent.

MR I ALBA appeared on behalf of the Second Respondent.

J U D G M E N T

(Transcript prepared without the aid of documentation)

MRS JUSTICE MORGAN:

1 This application has been listed before me today pursuant to the order of Mr Justice Cohen, whose order is dated 23 April 2024. The appellant has been represented by Dr Proudman, the first respondent by Mr Forbes, and the second respondent by Mr Alba. The appellant is the mother of a child with whom a court in a different part of the country is concerned, who is rising nine. The first respondent is her father, and the second respondent is the instructed Children's Guardian within ongoing proceedings.

2 I have been very greatly assisted at this hearing to have from all counsel a skeleton argument which sets out their client's position and arguments in support of that position, and also in each case I have had oral amplification of those matters in the hearing before me.

3 The application as configured is first for permission to make out of time an application for permission to appeal; second, for the permission to appeal; and third, if permission is granted, for the appeal to follow on. The appeal contended for is against a decision HHJ Miller made on 14 March of this year in the character of a case management order in the court which is hearing a substantive issue in respect to the child concerned.

4 Mr Justice Cohen's order provided that today the matter be listed with a time estimate of one day to hear the applications which I have just set out. In so listing the matter, he said this:

> "*It is very regrettable that the application was not made much earlier. The decision was given on 14 March (the order recites that the mother was represented by Dr Proudman). It is a case management order for which the time appeal is seven days. It is, in my view, out of time. The appeal was lodged on day 21, and the skeleton argument did not follow until 14 days later. This has created an urgency which should have been avoided.*"

5 It is no doubt against that context that the judge listing it listed it as soon as he was able to and with relatively little time available. At the same time, as I will come on to, the learned judge made some directions for papers to be filed to assist. The first direction that he made in that respect was that notes of judgment should be put by the applicant before the judge forthwith for his approval in the absence of a transcript. Happily, a transcript of Judge Miller's judgment has become available and has been placed in the bundle before me.

6 On account of the way in which the matter has been listed, it has been necessary for me to hear the parties' submissions as to the application for permission out of time, the application for permission to appeal, and indeed the appeal, should it be granted, to follow on, all as a piece, because there was insufficient time to do anything other, and it would not have been practicable to distil out those matters and hear them separately.

7 Within this judgment, it will not be either purposeful or possible for me to recite all that I have heard from each counsel or all that I have read, but I confirm, for the avoidance of doubt, that I have listened carefully to and done my best not to interrupt, save for clarification, the submissions of each. I have read and been greatly assisted by their written

documents, and I have also looked carefully not only at those parts of the authorities bundle to which my attention has been drawn but also to read more widely around those over the short adjournment so as to put the authorities in context.

8 Included within Cohen J's directions on 23 April, before I leave the topic of papers, was a direction to this effect:

> "*The bundle should comprise only the appeal documents lodged by the appellant and the position statements of the father and children's guardian, which must be limited to a maximum of eight sides and filed no later than 4 p.m. on 1 May.*"

9 This morning, during the reading time which had been provided within the directions, I received a message to say that a certain number of additional documents had been sent to me on behalf of the appellant. I declined to admit those documents and raised a query as to how it was that they were being put in without permission and seemingly without being copied to other counsel. I was told that those documents included, first of all, two position statements. I was readily able to understand the attempt to put them in because I had seen, within the bundle prepared for this hearing, that father's position statement at the court below had been included by his solicitors who had had carriage of the bundle. I had already decided that that was not a document I would read given that it fell outwith the directions for listing.

10 Accordingly, against the not unreasonable assumption I might not have noticed that and would have read it, the appellant had sought to put in position statements of the mother and the guardian so as to counterbalance it. I say straight away that I have not regarded it as appropriate to admit or read any of those position statements having regard to the issues before me and decline to do so, but I do understand why it might have been thought necessary to try to admit those two documents.

11 I was also told that what was being provided to me included a transcript of the whole hearing at the court below, as well as the trial bundle from the hearing the court below. When I made inquiries as to how it was that the transcript of the whole hearing was being provided to me, Dr Proudman told me that this had been agreed by all counsel. I was told by Mr Forbes and Mr Alba that neither of them had a recollection of agreeing this and neither, in the father's case, had his solicitor agreed. It was unnecessary for me to investigate how that misunderstanding came about. It was not necessary for me at this hearing to look at any part of the transcript of the whole hearing. Likewise, as I have said, the statements.

12 I do observe at this stage, however, that I am dismayed by the habit, which is increasingly noticeable, that in appeals and cases where an oral permission has been listed, of some counsel to simply come along and seek to provide documents for which no permission has been given. That includes where, as in this case, directions have been made that no extra documents should be put in. I would like that habit, please, to stop.

13 Turning now to the issues before me. I consider first the application for permission to bring the application out of time. The appellant seeks the permission. The father is very strongly opposed and sets out reasons for that. The children's guardian is opposed to permission being granted out of time but confines herself within the context of this case, through counsel, to adopting and supporting that which is argued on behalf of the father. Counsel in his submissions has identified for me that the emphasis of the guardian's thought, and

therefore her submissions, has been geared towards that which she would wish to advance in the event that I am persuaded there should be permission out of time and the submissions that she would advance against the granting of permission. It is for that reason that in considering the question of submissions out of time, I have largely confined my thinking to that which has been advanced by Dr Proudman and by Mr Forbes.

14 I have been very greatly assisted by the way in which Mr Forbes has set out the position in advance in writing in his document. I note, of course, in respect of the legal position that an appellant's notice must be filed within seven days of the decision of the lower court because this is a case management decision. I have been helpfully referred by Mr Forbes to that which appears in the case of *R (On The Application Of The Hysaj) v SSHD* [2014] EWCA 1633, which finds its way into the Family Division by approval within the case of *Re D (Appeal: Procedure: Evidence)* [2016] 1FLR 249, where the Court of Appeal has considered the approach to be taken to applications for extension of time. From that, my attention has been drawn to the way in which guidance is to be adopted on those applications for relief from sanctions by analogy.

15 The first matter to which Mr Forbes draws my attention is this, that if the failure to comply with the relevant rule, practice direction or court order – here the time – can be properly regarded as trivial, then usually the court will grant relief, provided that the application is then made promptly. If the failure is not trivial, the burden on the defaulting party – here the mother – is to persuade the court to grant the relief.

16 Within this case, Mr Forbes submits that the default was not trivial and the application was not made promptly. He expressly draws my attention to those matters which are helpfully set out in *Hysaj*, and he particularly relies upon the fact that being a litigant in person is not a relevant matter at the first stage of inquiry. That, no doubt, is because it is strongly urged on me, for reasons I fully understand, by the appellant to have regard to the fact that whilst at the court below she was represented, she was not in the period thereafter anything other than a litigant in person.

17 That is because, although of course she was represented at the hearing of 14 March, she was represented by counsel instructed on a direct access basis. That means, as I am properly reminded by Dr Proudman in her document, Dr Proudman is not able to conduct litigation. It is plain – and I asked Mr Forbes to be clear about his position on this – that in *Hysai*, as applied and adopted in *Re D*, the question of being a litigant in person is not relevant at all. I will come on later to consider some other aspects of the mother's position, but it has been of some note to me that, importantly, although she has for some of the time, particularly in relation to this appeal, been a litigant in person, she was not so on 14 March, when both she and her counsel were present at court.

18 Whilst direct access instruction is an impediment to some things, conducting litigation most notably, it is no impediment to – as any counsel would - giving advice on the decision made by the Court below at the time and, at the time the decision is received, on any appeal time limits or requirements. Accordingly, not only by reason of the application of *Hysaj* but also by examining the circumstance of the mother when it was handed down, I do not regard the mere fact that she was a litigant in person as determinative.

19 I accept also that it is not permissible for me to make a decision on the question of extension of time by reference to a consideration of the merits of the case. For the appellant it is contended that I should permit the application to be made out of time regardless. Counsel

does not really address in argument the principles emerging from the case of *Hysaj* or their efficacy within the Family Division as confirmed in *Re D*, but rather drew my attention to the fact that, first of all, in various other cases, permission to appeal out of time has been given even where much greater than here. It is accepted, and I agree, that the lapse of time here is far less egregious in terms of the delay than in some cases, although not without its impact.

20 I certainly fully accept that in other cases – the example that was pressed on me is *H-N and Others (Children) (Domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448 – it is not unusual in some circumstances for greater extensions of time not to be an impediment. I have not found it helpful to look at that authority in considering the question of this appeal being out of time because so many of these cases are fact specific and indeed the facts in the specific circumstances of those conjoined appeals giving rise to *H-N* are very much of their type and very different from this one.

21 Also advanced, however, is that I should take account of the fact that the appellant at the court below was, for the purposes of that judge, one who fell within the category of vulnerable for the question of, for example, participation directions, and that I should accordingly, in this court, when I consider her failure to comply with time limits and procedural requirements, take a not ungenerous view about the difficulties that may have placed her in. That submission by Dr Proudman I regard as having more weight and persuasiveness than the enjoinder to be lax about time delay in this case because it is permitted elsewhere.

22 I have come very close to refusing to allow permission out of time. I recognise the very considerable force of the arguments made against permission, and for that matter, I have weighed against that the paucity of the reasons advanced for why I should. It is right that the delay is not egregious, but it is significant, and I cannot easily see why there was the failure to serve the grounds and skeletons with the notice, which simply exacerbates the point.

23 Though, in that respect, I have reminded myself it might be right to remember that some small contribution to that is that where the mother has elected to instruct counsel on a direct access basis, and I should recognise that that is likely to have meant that the way in which Dr Proudman was able to assist her was circumscribed. Although I bear in mind that a case is only suitable for direct access counsel if it is possible for the person instructing to manage the litigation matters themselves.

24 I have, however, decided to give permission out of time even though I recognise that in so doing I am very likely to be taking an over-generous approach and one which does not fall readily within and sit beside the decided case law. I readily acknowledge that on this occasion the fact that I have had to hear argument both about that and about the merits of permission to appeal means that it is less realistic to disregard its merits even when I think about the extension of time. That is another illustration of how this case is fact specific.

25 I accept also, on a fine balance, that some of the submissions made by Dr Proudman that I should have regard to the mother's vulnerability and the impact that may have had with her compliance with time when I reflect on the fact that anyone representing a party, whether on instructions or in a direct access way, must tell their client at the hearing of the requirements and time limits for any appeal. It is nonetheless likely that, in reality, a party's vulnerability may impede their ability meaningfully to absorb that information when it is given. If they

have chosen to instruct through direct access, they do not have the same level of assistance thereafter.

26 I have had some hesitation in taking that approach as it, in part, seems to fly in the face of what I recognise is the approach to litigants in person and their relevance in relation to timely compliance in *Hysaj* and *Re D*. The fact that I do so on the facts of this case is not intended to be of wider application. Overall, in the circumstances of this case, I have thought it right to permit, notwithstanding the very problematic delays highlighted by Sir Jonathan Cohen in giving permission, the application for permission to appeal to be made out of time.

27 I turn now to the application for permission itself. Both the father and the Children's Guardian oppose the granting of permission to appeal. I will outline in short form only the relevant law. Where a court considers an application for permission to appeal, it falls within the governance of the Family Procedure Rules 2010, rule 30.3(7), and should be granted only if:

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

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

28 If permission is granted and proceeds to an appeal hearing, the test there is set out FPR 2010 rule 30.1(2):

a) the appeal will be allowed only where the decision of the lower court is wrong; or

b) it is unjust because of a serious procedural or other irregularity in the proceedings at the lower court.

29 I pause there to say that Dr Proudman is quite right when she reminds both me and Counsel that although in the course of submissions I heard several submissions which were couched in the older language of 'plainly wrong,' the test is simply '*wrong*' and not '*plainly wrong*.' For the avoidance of doubt, I am naturally, aware of that and had filtered out the '*plainly*' whilst listening to submissions.

30 I have been referred in the respect of the '*real prospect of success*' test to the guidance given by Peter Jackson LJ in the case of *Re R (A Child)* [2019] EWCA Civ 895, in which he reinforced for the profession and the judiciary that the correct test is that the prospect must be realistic rather than fanciful. That applies to the appellate consideration at all levels of court, whether High Court or Court of Appeal.

31 The prospect of success does not even have to be quantifiable as more likely than not. So far as any consideration of a procedural irregularity or injustice or consideration as to whether a decision made is wrong, by reference to Peel J in *GK v PR* [2021] EWFC 106:

"The court may conclude a decision is wrong […]:

i.) if 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;

iii.) the judge has clearly failed to give due weight to some significant matter, or has clearly given undue weight to some [other] matter;

iv.) a process has been adopted which is procedurally irregular and unfair to an extent that it renders the decision unjust;

v.) a discretion has been exercised in a way which was outside the parameters within which reasonable disagreement is possible."

32 I accept also the submission from the father, by reference to the case of *Piglowska v Piglowski* [1999] 2 FLR 763, that I must resist the temptation to subvert the principle that I should not substitute my own discretion for that of the judge by a narrow textual analysis which enables it to be claimed that he misdirected himself.

33 Since this is an appeal against a case management decision, I have also helpfully been reminded that in *Re TG (A Child)* [2013] EWCA 5, it was observed at para.35 that:

> "It must be understood that in the case of appeals from case management decisions, the circumstances in which it can interfere are limited. The Court of Appeal can interfere only if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion. […] There are sound pragmatic reasons for this approach. [Namely, first, that] 'case management should not be interrupted by interim appeals as this will lead to satellite litigation and delays in the litigation process.' [Two, that] 'the judge dealing with case management is often better equipped to deal with case management issues.'"

34 I pause there to say that of course in this case there has been some interruption to the progress of the case below by this interim appeal, but fortunately, as far as I have been made aware at this hearing, the interruption has had the effect of a relatively modest delay between a final hearing contemplated on or about 14 May to a final hearing now contemplated on or about 17 June. During the course of argument, each counsel has taken me to relevant of authorities within the authorities bundle to which I have referred earlier.

35 Arguments. The appellant contends she should be given permission to appeal on seven grounds. They are as follows:

1. That the judge was wrong in departing from the guardian's recommendation not to set aside the consent order dated 29 June 2022 and instead to adjudicate on allegations falling post 29 June 2022.

2. That the judge erred in not considering the impact on the child of reopening old allegations that concerned her welfare, especially considering the guardian's evidence that to do so may be harmful to the child.

3. That the judge was wrong in failing to give reasons for allowing three previous sets of previous proceedings and allegations to be reopened without considering whether they are relevant and proportionate to the welfare of the child and the probative value of evidence that dates back seven years.

4. The judge failed to give reasons for not acceding to the public policy argument against reopening previous decisions, along with the President's Guidance in the *Way Ahead* document.

5. The judge's approach in allowing all the evidence and allegations pre-2022 into the proceedings is incompatible with the overriding objective, and the judge failed to give reasons as to why it is necessary and proportionate to consider all historical allegations.

6. It is procedurally irregular and improper to admit into evidence transcripts of evidence from around six witnesses in 2022 when mother was part-heard during her evidence, father did not give evidence and without considering whether those witnesses may need to be recalled.

7. The judge was wrong in failing to explain or give reasons for going behind his own decision at the earlier hearing of 12 January 2024 without any formal written application from the father.

36 There is then reference to the recital upon the court noting that parties agreeing that they are bound by the order dated 29 June 2022 such that they may not pursue the specific findings and allegations against each other – which were the subject of the June 22 fact-finding hearing – unless they make an application to the court.

37 At the heart of the appeal against the decision made by HHJ Miller on 14 March is that by not limiting the allegations to those which post-date June 2022 he has "*opened up*" what Dr Proudman has described as a binding agreement by which the parties compromised an earlier court dispute. That is a reference to the text which I have just read in terms of the recital.

38 As a consequence of that, I have heard submissions from each party and been referred to the well-known and now very old and established authority of *Re B (Minors Care Proceedings) (Issue Estoppel)* [1997] Family 117. The doctrine of issue estoppel, it is well established, does not apply in children's cases. I, therefore, can see no real possibility of a successful argument against Mr Forbes' perfectly pitched submission on that point, that there is no such thing as a binding agreement.

39 I have not, however, elected to think about it in that narrow way only because within the useful arguments I have heard today, Dr Proudman has characterised that binding agreement, as she put it in her document, as being as if it were a finding made. It so happens that, at this hearing, Mr Alba has made it clear that the guardian disagrees with that characterisation, but it seems to me that even were it a finding made by a court, whilst not

routine and whilst not encouraged, the Family Division is well used to later revisiting what were thought to be settled findings and, for that matter, for holding fact-finding hearings where it had been thought previously neither necessary nor right to hold them.

40 Although I have heard a great deal of argument in relation to *Re B* this afternoon and been reminded of the anxious consideration that was given to the question of issue estoppel and what in earlier times would have been called *res judicata* in the late 1990s, I have no difficulty in finding myself wholly satisfied that whatever the parties thought they were or were not binding themselves to by the agreement, and whatever is contained within the recital in respect of the June 2022 agreement, that there can be no argument - as against the principles in *Re B* - that it cannot be revisited.

41 So far as Grounds 1 and 2 of the proposed appeal are concerned, I regard those as helpful to consider together along with Ground 7, from which I am moving away in *Re B*. I agree with the submission made that *Re B* provides guidance – detailed guidance – as to the factors that the court must take into account when exercising what is the court's discretion, i.e. Judge Miller's discretion, as to how any investigation before it should be conducted.

42 I absolutely accept that Dr Proudman is correct when she says that there is a strong public interest in concluding and bringing to an end litigation between parties. The more so when there is a child whose welfare requires decisions, but it is only one of the relevant issues to be considered. I see within the judgment given by Judge Miller, which I remind myself was on a case management issue, that he considered at paras.18, 19 and 20 the question of the possible expansion of the litigation and referred back to paras.14 onwards, where the father had addressed him in submissions on the *Re B* factors.

43 I am satisfied that in so doing, the learned judge first of all did properly direct himself about the guidance of *Re B,* and more, that he did take account and was sufficiently reasoned in giving his decision, of the public policy considerations when deciding what he would permit.

44 When he departed from the children's guardian's own position, as it is complained he did in that which is set out in Grounds 1 and 2, I am satisfied he did give sufficiently clear reasons for so doing. I have been reminded and taken through those parts of the judgment at this hearing that he effectively took note of the fact that the mother's own schedule of allegations included ones which predated June 2022, and that, on her case, therefore, the court was also being asked to go further back.

45 At this hearing, I have heard two explanations from the appellant for that, the logic of which explanations I have found hard to understand. The first is that they were allegations which were not matters which had been predetermined and were not the subject matter of the closed agreement, but the second is that the mother effectively only raised those matters because she thought the father would be raising allegations going back before 2022. So, although she had not herself wanted them determined, she, in those circumstances, had thought it right to rely on them.

46 Whether or not those explanations are either meaningful or helpful, it does seem to me that the learned judge was able to and did take account of the fact that the allegations being made before him in both parties' case went in time before June 2022. The second reason that he clearly gives in his judgment is that, so far as he was concerned, he did not regard it as possible to understand meaningfully and come to a conclusion about why the child is

expressing reluctance to see her father so soon after the 2022 hearing if the starting point is as set out in the recital to that June order: i.e. that in the light of the compromise reflected, neither party pursues their allegations and accordingly it follows that there are no welfare concerns from either parent.

47 Furthermore as indicated, the judge, I am satisfied did apply the guidance in *Re B* requiring him to have regard to whether previous findings were the result of a full hearing in which the parties took place, or a partial hearing, and whether the evidence had been tested. This is not so in this case. I have been reminded several times by Dr Proudman that the mother had only partially given her evidence when the compromise was reached. It is said, that this disadvantages the mother in giving her evidence .

48 I do not need to form any view as to whether the mother is, as Dr Proudman suggests, disadvantaged by having already given partially her evidence more proximately to the time, or advantaged by having given it already on oath more proximately to the time, as Mr Forbes suggests. It is, as it happens, a partial piece of evidence as to which there has as yet been no judgment or determination.

49 So far as the question of departing from the guardian's view without reasons ground is concerned, which appears at Ground 1, I do not myself regard the judge as having done that. But I am interested to see that whereas the judge disagreed, as he was entitled to, and departed from, as he was entitled to, the children's guardian's view – with, as I have found, sufficient reasons – the children's guardian's own submission at this hearing is that they take the position that although the children's team at the court below took a different view to the judge, they explicitly do not contend before me that the judge, in coming to a contrary view , was outwith his discretion or outwith the proper exercise of it. I am satisfied that he has given sufficiently clear reasons for it.

50 I do not accept either that there is any prospect of success in Ground 5, that the judge's approach to allowing all the evidence and allegations pre-2022 into the proceedings is incompatible with the overriding objective, and the judge failed to give reasons why it is necessary and proportionate to consider all historical allegations.

51 I accept the children's guardian's submissions in respect of that, as well as in respect of Ground 3. Ground 3 is that the judge was wrong in failing to give reasons for allowing three previous sets of proceedings and allegations to be reopened without considering whether they are relevant and proportionate. I accept the children's guardian's well-pitched submission that what Judge Miller has done on 14 March is not to limit the findings that he may consider to those which post-date the 2022 June hearing, and to set up a case management structure to consider what evidence is appropriate.

52 I do not see the order of 14 March, as I read it, as doing what Grounds 3 and 5 suggested it has done. I regard Ground 5 as misconceived in so far as it describes the judge as allowing in all of the evidence and allegations, when he has, not only case managed but has set up later hearings further to consider and manage the allegations and evidence which will be necessary.

53 Of course, counsel at this hearing for the appellant is disadvantaged by not having been counsel who has appeared at the later case management hearing held at the end of April. On that occasion the learned judge case managed the evidence and the requirement for witnesses in a way that falls within the four-day period now listed in June. I recognise, of

course, that there is case management yet to come about which I know nothing because the transcripts which have been directed, of evidence from the earlier hearing, are not yet available.

54 It was submitted to me by counsel for the appellant that they are not yet approved by the judge. I, for myself, cannot see why it is thought that the transcripts of evidence as opposed to transcripts of the judgment would be approved by the judge, but in so far as they are not yet available to the judge, that reinforces my view that the judge will have and take the opportunity to case manage that evidence and form a view as to what requires determination and what does not.

55 Both counsel and I are, to an extent, disadvantaged by not being versed in the case management which has taken place and will take place, but it nevertheless is sufficient for me to say that Ground 5 is misconceived because there is not an automatic assumption that all allegations going back seven years will necessarily be considered. I do, however, see that it is within the context of what might be described as a pattern of behaviour alleged that the learned judge has taken those decisions amid a pattern of allegations, and that will be a matter for him to case manage.

56 So far as Ground 6 is concerned, it is contended for that it is procedurally irregular and improper to admit into evidence transcripts of evidence from around six witnesses when the mother was part-heard, the father did not give evidence, and without considering whether those witnesses will need to be recalled. It is plain, in fact, that the learned judge will have had the opportunity, and to an extent has had the opportunity, to have some witnesses recalled, but to the extent that admitting into evidence transcripts of previous hearings, whether or not evidence had been completed within those, I see no prospect of arguing successfully that it is procedurally irregular or improper so to admit.

57 I have taken care, before reaching the decision that I am driven to, to reread not only my notes of submissions made before me today but to go back and read in particular the submissions put before me in writing in the skeleton in support of the application for permission. In so doing, I have highlighted upon a curiosity of the wording in relation to a submission made about the compromise of allegations made before 29 June 2022.

58 I am beyond satisfied that there can be no such thing as a binding agreement, and I am beyond satisfied that the effect of *Re B* is that such a compromise could not be one which prevented either party from going back and making allegations if a judge thought it appropriate. But I see within the helpful document on behalf of the appellant at para.26 that it begins in this way: "It is submitted that the judge was wrong to reopen a binding consent order dating back to 29 June 2022…" I pause there to say I do not in fact find that he has, but it goes on to say this:

> "…which states that they withdraw their allegations against each other. The court endorses the same. Neither parent poses a risk to the child as a result of those allegations (therefore they do not need investigating), and both parties agreed that in these specific findings and allegation [emphasis added by counsel] for this time frame should not be pursued in any future proceedings [again, emphasis added]."

59 It is a curiosity that, even on the appellant's case, the characterisation is "*should not be pursued*" and not "*cannot be pursued*." I alighted on that curiosity and went back to look

again at the submissions I had heard about *Re B* to see if that in fact altered anything that I had concluded about it. As it happens, it does not, because I do not see that the submissions as to any agreement being binding within these children's proceedings has any prospects of success in any event.

60 I have ultimately been driven to the conclusion that, although I have almost certainly heard more in the way of submissions and read more detailed documentation than I would in an application for permission that I were considering on paper, having heard the application for permission to appeal so carefully and in such detail, I am satisfied that the only decision I can come to is to refuse permission to appeal.

61 I do not, accordingly, go on to consider the third matter falling before me today, because since I do not give permission to appeal, I do not go on to consider the appeal to follow on. I recognise that the reality is I have heard many of the submissions I would have heard had I done so. I, in fact, having reviewed the matters contended for in permission to appeal, am also satisfied that the application for permission to appeal this case management decision by the judge, seized of the matter in the court below, is totally without merit.

62 In this case, I realise that has little practical effect in the sense that had I refused the matter on paper, and had I been hearing the application for an oral permission today as a renewed application, I would by a different route reach the same point, which is there can be no further application in respect of that permission. Accordingly, I conclude by saying that I will invite counsel to draft an order which gives permission to bring the application out of time for permission to appeal, refuses permission to appeal, and that will be the decision of the court. I will hear submissions now and determine any issue in respect of costs.

CERTIFICATE

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