Neutral Citation Number: [2010] EWCA Civ 1253
Case No: B4/2010/1718

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MAIDSTONE COUNTY COURT
His Honour Judge Caddick
TN07P00125

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 November 2010

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE JACOB
and
LORD JUSTICE MUNBY

- -

In the Matter of the L-W Children

Between :

CPL Appellant

- and -

(1) CH-W
(2) ML-W
(3) EL-W (by their Guardian ad litem)

Respondents

- -

Mr Grant Armstrong (instructed by Alison Fielden and Co) for the Appellant (father)
Mr David Walden-Smith (instructed by Berry & Berry) for the First Respondent (mother)
Mr Stuart Fuller (instructed by Stantons) for the Second and Third Respondents (children)

Hearing date: 27 August 2010

- -

Judgment

Lord Justice Munby :

1. These are appeals by a father from various orders made in the Maidstone County Court by His Honour Judge Caddick in the course of exercising his jurisdiction in private law family proceedings.

2. The first appeal is against five orders made by the Judge pursuant to sections 11J-11P of the Children Act 1989 (as amended by the Children and Adoption Act 2006): (i) a compensation order made pursuant to section 11O on 15 December 2009, (ii) an enforcement order made pursuant to section 11J on 8 January 2010; (iii) a further enforcement order dated 27 January 2010; (iv) a further compensation order also dated 27 January 2010, and (v) a further compensation order dated 24 June 2010. For that appeal the father needs permission to appeal (and permission to appeal out of time), which we grant. The other appeal, for which permission is not required, is against a committal order made by the Judge on 24 June 2010.

3. In my judgment each of these appeals succeeds. With minor exceptions each of the orders of which complaint is made must be set aside.

The background

4. The father, Mr L, and the mother, Ms H-W, have two children: M, a boy, born in 1999, and E, a girl, born in 2001. M lives with his father, E with her mother. There have been protracted proceedings in relation to contact, in particular in relation to M's contact with his mother. The proceedings have been heard throughout by Judge Caddick. On 15 December 2009 he said that the litigation "is fairly described as an intractable contact dispute, with an element of parental alienation, and persistent failure to comply."

The proceedings

5. For present purposes I can begin with an order which Judge Caddick made on 13 May 2009 (it was not the first). So far as material, paragraph 5(ii) of that order, to which a penal notice was attached, provided as follows:

   "The father shall allow the mother to have contact with M, and make him available accordingly, as follows: From 12 midday until 6.00pm on each of [various dates], 25th July, 22nd August, 19th September 2009 and every fourth week thereafter; mother to collect from and return to father's home."

19 September 2009 was a Saturday, so in substance the order provided for there to be contact between M and his mother on Saturday afternoon every four weeks. I note that the language of the order – "father shall allow the mother to have contact with M" – followed the language of the definition of a contact order in section 8(1) of the 1989 Act. Properly so: see *Re S* [2010] EWCA Civ 705. The additional words – "and make him available accordingly" – were a permissible direction made in accordance with section 11(7).

6. On 15 September 2009 the mother issued an application for an enforcement order and an order for compensation for financial loss (her petrol costs of attending contact), alleging that M was "not available for contact" on 25 July 2009 and 22 August 2009.

7. On 28 September 2009 Judge Caddick started a lengthy hearing dealing with issues in relation to contact, that is, the mother's contact with M and the father's contact with E. The matter had to be adjourned part heard after three days and resumed for a further two days on 24 and 25 November 2009. Judge Caddick had the assistance of evidence from a consultant clinical psychologist and from the children's guardian, Mr Bill Stevens of CAFCASS, who had produced a detailed report filed on 21 September 2009 and further reports filed on 23 November 2009 and (two more) on 2 December 2009. Judge Caddick also heard oral evidence from Mr Peter West of CAFCASS, who had been the children's guardian until July 2009.

8. On 4 December 2009 Judge Caddick delivered a lengthy judgment dealing with the issues of contact and describing events since a previous judgment he had given on 7 November 2007. In the upshot, he made an order the same day, 4 December 2009, which, using the same form of words as in the earlier order of 13 May 2009, ordered that the mother have contact with M on 26 December 2009, on Saturdays 2, 16 and 30 January 2010, 13 and 27 February, 13 and 27 March and 10 April 2010 and for the weekend (Saturday to Sunday) on 24-25 April and 22-23 May 2010 "and each fourth weekend thereafter." A penal notice was again attached. Mindful of what this court had said in *Hammerton v Hammerton* [2007] EWCA Civ 248, [2007] 2 FLR 1133, Judge Caddick adjourned the hearing of the mother's application for enforcement and compensation orders to a date later in December 2009.

9. That hearing took place on 15 December 2009. At the end of the hearing Judge Caddick delivered a judgment explaining why he proposed to make both an enforcement order and a compensation order. He made an order the same day, 15 December 2009, deciding that "in principle" an enforcement order should be made, but adjourning the matter for further consideration to enable CAFCASS to

obtain certain further information required under section 11L(2). He ordered the father to pay the mother £180 "as financial compensation for losses incurred as a result of his failure to comply with" the contact order of 13 May 2009. He refused the father permission to appeal against the compensation order and "prospectively" against the enforcement order, though extending time for appeal so that it did not run in the case of the compensation order until 23 December 2009 and in the case of the enforcement order until it was actually made.

10. On 5 January 2010 the mother issued a further application for an enforcement order and an order for compensation for financial loss (petrol costs), alleging that M was "not available for contact" on 24 December 2009 and 2 January 2010.

11. On 8 January 2010 Judge Caddick, having obtained the further information from CAFCASS, made an enforcement order which recited the father's "failure" to comply with the order of 13 May 2009 on 13, 20 and 27 June 2009, 25 July and 22 August 2009. He ordered the father to carry out 120 hours of unpaid work in respect of those failures, the work to be completed no later than 7 January 2011. The order contained a penal notice. At the same time Judge Caddick extended the father's time for appealing against the compensation order so that it ran, as in the case of the enforcement order, from 8 January 2010.

12. On 27 January 2010 Judge Caddick heard the mother's application for a further enforcement order. He made another enforcement order which recited the father's "failure" to comply with the order of 4 December 2009 on 26 December 2009 and 2 January 2010 (the court "also taking into account your further failure" on 23 January 2010). He ordered the father to carry out 80 hours of unpaid work, the work to be completed no later than 26 January 2011 and to be additional to the work ordered on 8 January 2010. The father was also ordered to pay the mother £45 financial compensation for losses incurred as a result of his failure to comply with the contact order of 4 December 2009. This order again contained a penal notice.

13. On 20 April 2010 the mother issued a further application for an enforcement order and an order for compensation for financial loss (petrol costs), alleging that M was "not available for contact" on 13 March 2010, 27 March 2010 and 10 April 2010. At the same time she issued a notice to show good reason why an order for committal should not be made, alleging that the father had breached the order of 4 December 2009 on 30 January, 13 and 27 February, 13 and 27 March and 10 April 2010 by:

"1 not allowing M to have contact with his mother on [those] dates
2 not encouraging and ensuring M attends for contact on [those] dates
3 not having a reasonable excuse for not allowing contact or ensuring M attends for contact
4 taking M out of the country for contact on 10 April 2010 without consulting with mother or offering an alternative date for replacement contact."

14. On 7 May 2010, there was a further hearing to consider contact issues. Judge Caddick had the benefit of a further report from Mr Stevens filed on 7 May 2010. He made an order the same day, 7 May 2010, providing, in the same words as the previous orders, for the mother to have contact with M every fourth weekend on Sunday from 11am to 5pm commencing on 22 May 2010. The order further provided that "the father shall take M to the home of the maternal grandparents to arrive at 10.30am ... [and] shall return to collect M at 5pm." A penal notice was again attached.

15. On 15 June 2010 Judge Caddick heard the mother's applications for a further enforcement order, a further compensation order and a committal order. There were further reports from Mr Stevens dated 8 June 2010 and 14 June 2010. Judge Caddick gave a judgment explaining the order he made the same day, 15 June 2010, recording his decision in principle to make a suspended committal order but adjourning further consideration of the enforcement proceedings and of the precise conditions of suspension of the committal order until 24 June 2010.

16. On 24 June 2010 Judge Caddick gave a further judgment and made two orders. The first contained directions for a further hearing in relation to M, to embrace issues of both contact and residence. The directions provided for the instruction of a consultant child and adolescent psychiatrist to report on various matters, including the current relationship between the mother and M, the current relationship between the father and M, and the likely impact on M of a transfer of residence from the father to the mother and the optimum management of such a change. The order further provided that in addition to the contact ordered by the order of 7 May 2010 the father was to allow the mother to have contact with M, and make M available accordingly, on 14 July 2010 and on such dates as were notified to the father by the instructed expert for the purposes of observing contact between the mother and child. The father was ordered to pay the mother £225 financial compensation for losses incurred as a result of his failure to comply with the contact order of 4 December 2009. The order recorded that no further enforcement

order was being made in respect of the breaches for which the court had made a committal order.

17. The other order made by Judge Caddick on 24 June 2010 was a committal order. It recited that the father had been guilty of contempt of court:

    "by disobeying the order dated 4.12.2009 by failing to allow the mother to have contact with [M], and make him available accordingly, on each of the following dates",

    that is, on 30 January 2010, 13 and 27 February, 13 and 27 March and 10 April 2010. On each of those six breaches the father was sentenced to 28 days imprisonment concurrent, suspended for 12 months on condition that he obeyed the contact orders of 7 May 2010 and 24 June 2010 and any further contact order as might be made varying or replacing those orders.

18. On 16 July 2010 the father filed an appellant's notice challenging the committal order of 24 June 2010. On 29 July 2010 Wilson LJ made an order staying activation of the committal order until determination of the appeal, fixed for hearing on 27 August 2010. On 25 August 2010 the father filed an appellant's notice seeking permission to appeal (and permission to appeal out of time) against the enforcement orders of 8 January 2010 and 27 January 2010 and the compensation orders of 15 December 2009, 27 January 2010 and 24 June 2010.

19. On 26 August 2010 Mr Stevens filed a further report, reporting on a further meeting with M on 3 June 2010.

20. The appeals came on for hearing before us on 27 August 2010. The father was represented by Mr Grant Armstrong, the mother by Mr David Walden-Smith and M (and E) by Mr Stuart Fuller. At the end of the hearing we announced that we had decided to set aside the committal order. We reserved our reasons for that, as also our decision in relation to the enforcement and compensation orders.

21. We understand that the father has performed some, but not all, the work required under the enforcement orders

The context – the judgment of 4 December 2009

22. To put the appeals in context it is necessary at this point to return to the judgment Judge Caddick had given on 4 December 2009 and to the CAFCASS reports he had before him on that occasion.

23. Mr Stevens' report of 21 September 2009 contains the following observations of particular relevance for present purposes. Referring to a visit to see M in August 2009:

"M said 'it was pointless for the Court hearings to go ahead as he will not be seeing mummy until she can show that she has changed. I want my mummy back from when I was younger not what she has changed into' ... He said 'I will go to contact but only when I am ready and not before, if she .does not grant me this one wish then I don't want to see her, I want her to be the mummy she was until I was about 3 years old.'"

Mr Stevens saw M as "an articulate and intelligent young person who holds strong views on issues of right and wrong." He referred to "concerns that M is heavily influenced by his father regarding his views of his mother" but expressed his view as follows:

"I found no direct evidence of M being placed under any duress or influence by his father regarding his views and feelings about his mother. However, his sophisticated use of language was evident together with an overt reliance on analogies [which] appears to be sophisticated for his age ... I observed a very confident young person expressing his own views, some of which did not appear to be shared by his father, such as his wish not to see his mother on contact."

24. In his report dated 23 November 2009, reporting another meeting with M in October 2009, Mr Stevens said that "M continues to express a distrust of his mother for what he perceives as her refusal to engage with him in resolving outstanding issues between them." In the first of his two reports dated 2 December 2009 Mr Stevens, referring to the mother's application for an enforcement order, said

"I would question ... whether, even if as a last resort [the father] were committed to prison for breach of the Contact Orders, an Order in the terms sought by [the mother] would actually now result in her having any direct contact with M."

He expressed his opinion as being that "any reconciliation process between M and his mother will require extensive work and therapy by experienced professionals." He recognised that the court might be "effectively forced" into what he called the "abhorrent" position in which "M will lose a real relationship with his mother for many years."

25. These expert views have to be borne in mind when considering the judgment which Judge Caddick delivered on 4 December 2009. It is, if I may say so, a careful, detailed and impressive judgment. For present purposes what matters are the Judge's findings about M and

his father. He said (paragraph 81) that "with firm handling M can behave himself." He quoted (paragraph 83) Mr West's evidence that "M would co-operate with anything that the father really suggested and encouraged." Referring to the father he said this (paragraph 89);

"if it was not the object of his behaviour to completely ruin contact, certainly the effect of his attitude to it and his approach to M has been to jeopardise contact close to that point. Putting it perhaps more mildly: he has tried a bit, but he has not tried anywhere near hard enough and effectively enough to promote contact."

He continued (paragraph 90):

"The fact is that M does want to have contact with his mother ... He ... wants an ongoing relationship with her. The father's attitude does not promote that, certainly not in any sustained way. It is the father's underlying mind set that creates a home environment for M where lasting resolution cannot be achieved and progression in it other than on father's terms. It is telling how the child's views are controlled and distorted by unhealthy involvement of the child in adult issues and overwhelmingly the disproportionate power and responsibility heaped upon M by the father. The clear central point that has struck me forcefully over the days of listening to this case is that the father must give M his childhood back. For three years now M has been given the power of an adult which his years and his emotional level of development do not want and cannot cope with."

26. Judge Caddick returned to these themes (paragraphs 97-99):

"In truth, M actually wants to see the mother and have a good relationship with her. The adults – and in particular the father as the resident parent – must get behind the talk of not wanting to see mother and remember what he really wants and needs. He gives mixed messages: sometimes the outward talk is "I don't want to see mother" but inside he really does and when people get through to him he admits that. There is no reason apart from M's mind set and the attitude and mind set of the father why he should not go on regular contact with the mother. There is no proper reason that has been put before me as to why he has not been going on those occasions when there has been a contact order for him to go on contact and the father, for whatever reason, has failed to produce him. It is the father's privilege to have a residence order in respect of M. He is in the powerful position of being able to influence M in what he thinks and does, but it must not be abused. He can if he wishes bring proper influence on M to make sure that he goes to contact. If the father wants to I am quite sure that he will achieve that; just as he gets the child to go to school every day, no doubt sometimes when he does not want to go ...

Contact is not optional to M or to the father as the resident parent. How does the father do that when M objects? It is part of his parenting skills – reasoning, persuading, cajoling, probably in the end sanctions. I appreciate that he does not believe in any form of physical chastisement. But how he does it is up to him using his parenting skills. It is not for me to advise him as to how to do it. He is the parent and he should know how to handle his child. But there comes a point when the child has to do things even though he does not want to do them, and this sometimes is one of them."

The law

27. So much for the factual background. It is convenient at this point, and before turning to the reasons Judge Caddick gave for the various orders now under challenge, to summarise the relevant legal framework.

The law – committal

28. There is no need for any elaborate analysis of the law. It suffices for present purposes to refer to two recent decisions of this court.

29. The first is *Re A (Abduction: Contempt)* [2008] EWCA Civ 1138, [2009] 1 FLR 1, where a father had abducted his child to Syria in circumstances which, because it did not involve the breach of any order of the court, did not constitute a contempt of court. The court then made a series of orders that the father cause the child to be returned to the jurisdiction. The child was not returned and the father was committed for contempt. He appealed, essentially (see para [5]) on the ground that that there was no sufficient evidence of contempt of court and that the approach taken by the mother – she had adduced no evidence at all – effectively reversed the onus of proof by requiring him to demonstrate that he was unable to effect the return of the child, rather than accepting that it was the mother's responsibility to demonstrate that he was in deliberate breach of the order. The appeal was allowed.

30. Hughes LJ, with whom Thomas and Keene LJJ agreed, set out the following propositions (at para [6]):

"(1) The contempt which has to be established lies in the disobedience to the order to return rather than in the original abduction ... (2) Contempt of court must be proved to the criminal standard: that is to say, so that the judge is sure. Whatever the traditional form of notice to show cause may say, the burden of proof lies at all times on the applicant. (3) Contempt of court involves a contumelious, that is to say a deliberate, disobedience to the order.

If it be the case that the father cannot cause the return of the child he is not in contempt of court, however disgraceful and/or criminal the original abduction may have been. Nor is it enough to suspect recalcitrance, it has to be proved: see *London Borough of Southwark v B* [1993] 2 FLR 559. That the onus remains on the applicant throughout is clearly demonstrated by *Mubarak v Mubarak* [2001]1 FLR 698."

31. The reason why the appeal succeeded appears from what Hughes LJ went on to say (para [10]):

"There was in the course of the judge's ruling no finding that the father was able to achieve return. Without that finding it seems to me that it was not justified to hold him in contempt of court. I have asked myself with some anxiety whether such a finding is implicit in what the judge said given that he would undoubtedly have been extremely familiar with both the onus and the standard of proof in a case of contempt of court, but it seems to me that in the absence of any evidence whatever from the mother it is simply not safe to assume a finding which has not plainly been made. In a case of imprisonment for contempt of court it is necessary that there be a clear finding to the criminal standard of proof of what it is that the alleged contemnor has done that he should not have done or in this case what it is that he has failed to do when he had the ability to do it. There must, as it seems to me, be a clear finding not only of breach of the order but that the breach was deliberate."

32. Earlier (at para [7]) Hughes LJ had rejected the submission that "the only way contempt can be proved in a case such as this is by the applicant mother adducing positive evidence to demonstrate a particular step which is available to the father." He went on: "It would, as it seems to me, be sufficient for her to make the judge sure that the father could achieve the return of the child, for example through the siblings if not through the grandfather, and she might be able to do that without calling specific evidence to refute each obstacle successively raised by the father."

33. The only other authority I need to refer to at this stage is the decision of this court in Re S-C (Contempt) [2010] EWCA Civ 21, [2010] 1 FLR 1478, where Wall LJ said this (para [17]):

"if ... the order ... was to have penal consequences, it seems to us that it needed to be clear on its face as to precisely what it meant, and precisely what it forbad both the appellant and the respondent from doing. Contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a specified timeframe. The person or persons affected must know with complete precision what

it is that they are required to do or abstain from doing – see *(inter alia) Federal Bank of the Middle East Limited v Hadkinson and Others* [2000] 1 WLR 1695; *D v D (Access: Contempt: Committal)* [1991] 2 FLR 34 and *Harris v Harris, A-G v Harris* [2001] 2 FLR 895 at para [288]."

In Harris I had referred (para [288]) to the decision of this court in Deodat v Deodat (unreported) 9 June 1978 as authority for the proposition that it is impossible to read implied terms into an injunction.

34. What I derive from these authorities are the following further propositions: (1) The first task for the judge hearing an application for committal for alleged breach of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that the order required the defendant to do. That is a question of construction and, thus, a question of law. (2) The next task for the judge is to determine whether the defendant has done what he was required to do and, if he has not, whether it was within his power to do it. To adopt Hughes LJ's language, Could he do it? Was he able to do it? These are questions of fact. (3) The burden of proof lies throughout on the applicant: it is for the applicant to establish that it was within the power of the defendant to do what the order required, not for the defendant to establish that it was not within his power to do it. (4) The standard of proof is the criminal standard, so that before finding the defendant guilty of contempt the judge must be sure (a) that the defendant has not done what he was required to do and (b) that it was within the power of the defendant to do it. (5) If the judge finds the defendant guilty the judgment must set out plainly and clearly (a) the judge's finding of what it is that the defendant has failed to do and (b) the judge's finding that he had the ability to do it.

The law – enforcement and compensation orders

35. Enforcement orders are dealt with in sections 11J-11N of the 1989 Act. There is no need to set out these provisions at length. So far as is material for present purposes section 11J provides as follows:

"(2) If the court is satisfied beyond reasonable doubt that a person has failed to comply with the contact order, it may make an order (an "enforcement order") imposing on the person an unpaid work requirement.

(3) But the court may not make an enforcement order if it is satisfied that the person had a reasonable excuse for failing to comply with the contact order.

(4) The burden of proof as to the matter mentioned in subsection (3) lies on the person claiming to have had a reasonable excuse, and the standard of proof is the balance of probabilities."

36. Section 11L provides so far as material:

"(1) Before making an enforcement order as regards a person in breach of a contact order, the court must be satisfied that –

(a) making the enforcement order proposed is necessary to secure the person's compliance with the contact order or any contact order that has effect in its place;

(b) the likely effect on the person of the enforcement order proposed to be made is proportionate to the seriousness of the breach of the contact order.

(2) Before making an enforcement order, the court must satisfy itself that provision for the person to work under an unpaid work requirement imposed by an enforcement order can be made in the local justice area in which the person in breach resides or will reside.

(3) Before making an enforcement order as regards a person in breach of a contact order, the court must obtain and consider information about the person and the likely effect of the enforcement order on him.

…

(7) In making an enforcement order in relation to a contact order, a court must take into account the welfare of the child who is the subject of the contact order."

37. Compensation orders are dealt with in sections in sections 11O-11P of the 1989 Act. Again, there is no need to set out these provisions at length. So far as is material for present purposes section 11O provides as follows:

"(2) If the court is satisfied that –

(a) an individual has failed to comply with the contact order, and

(b) a person falling within subsection (6) has suffered financial loss by reason of the breach, it may make an order requiring the individual in breach to pay the person compensation in respect of his financial loss.

(3) But the court may not make an order under subsection (2) if it is satisfied that the individual in breach had a reasonable excuse for failing to comply with the contact order.

(4) The burden of proof as to the matter mentioned in subsection (3) lies on the individual claiming to have had a reasonable excuse.

…

(9) The amount of compensation is to be determined by the court, but may not exceed the amount of the applicant's financial loss.

(10) In determining the amount of compensation payable by the individual in breach, the court must take into account the individual's financial circumstances.

…

(14) In exercising its powers under this section, a court is to take into account the welfare of the child concerned."

38. There are two features of all this to which I need to draw particular attention. First, it will be observed that, although the statutory scheme in relation to both enforcement orders and compensation orders is much the same, there is a difference in the required standard of proof. For the purposes of making an enforcement order the relevant breach must be proved (section 11J(2)) beyond reasonable doubt, that is to the criminal standard. But for the purposes of making a compensation order the relevant breach need only be proved (section 11O(2)) to the civil standard.

39. Second, it is important to understand the relationship between sections 11J(2) and (3). (Precisely the same point arises in relation to sections 11O(2)(a) and 11O(3) so I can confine my analysis to section 11J.) Section 11J(2) identifies as the necessary condition for making an enforcement order a finding that there has been a "failure" to comply with the contact order, that is, a breach of the contact order. Moreover, as section 11J(2) makes clear, this is a finding that has to be made to the criminal standard of proof and in circumstances where the burden of proof is on the applicant. Absent such a finding the application must fail; in other words, absent a finding of breach in accordance with section 11J(2) one never gets to a consideration of section 11J(3). Section 11J(3) is thus addressing the case where although there has been a "failure to comply" there is nonetheless a "reasonable excuse" for that failure – an issue on which, as section 11J(4) makes clear, the burden of proof lies on the defendant albeit that all he has to show is proof on a balance of probabilities. The significance of this is that it is necessary to keep

the question of reasonable excuse entirely separate and distinct from the logically prior question of breach. Putting the same point in different words, one cannot determine the question of breach – of failure to comply – by reference to the question of reasonable excuse.

40. I should add a few words about what is meant by "reasonable excuse". Bearing in mind that a defendant is not in breach of a mandatory order, even if he has not done what the order required, if it was not within his power to do it, issues of force majeure are properly to be considered as going to questions of breach rather than reasonable excuse. So, for example, if a parent taking a child for contact is prevented from going on or is delayed by unforeseen and insuperable transport or weather problems – one thinks of the sudden and unexpected grounding of the nation's airlines by volcanic ash – then there will be no breach. Reasonable excuse, in contrast, arises where, although it was within the power of the defendant to comply, he has some good reason, specifically, a "reasonable excuse", for not doing so. A typical case might be where a child suddenly falls ill and the defendant, reasonably in the circumstances, takes the child to the doctor rather than going to contact.

Judge Caddick's judgment of 15 December 2009

41. I turn to the judgments under appeal, starting with Judge Caddick's judgment of 15 December 2009 in relation to the mother's application for enforcement and compensation orders.

42. At the outset, Judge Caddick correctly reminded himself (paragraph 2) that:

    "the enforcement applications have to be kept separate from the substantive hearing, following the Court of Appeal guidance in*Hammerton v Hammerton* [2007] EWCA Civ 248. That is because the focus and outcomes of the enforcement proceedings are different to the general welfare considerations under section 8 and there are differential standards of proof – the enforcement of proceedings being more akin to quasi-criminal proceedings."

    He then proceeded to rehearse the provisions of sections 11J-11P before turning to consider in some detail the events of 13, 20, and 27 June, 25 July and 22 August 2009.

43. It is not necessary to go through all Judge Caddick's careful findings in detail. The key passages give the flavour. On 13 June 2009 M went off with his mother in her car for contact, which was going to be at her parents' house. There were arguments in the car and M telephoned his father from the car. The father telephoned the police

and asked for their assistance – something which the guardian thought was not unreasonable – and then set out himself for the grandparents' house. I can pick up the story from the judgment (paragraphs 14-15):

"M had quietened down. They had got to her parents' home and he was just harrumphing and stamping his feet and so on, but was getting through it. I accept that he would have got through it completely if the father had not then turned up ... In the presence of the father, the child then started to get upset again. The father took the child off to the police station. It was around that time, as he left, that the father made observations to the mother – in his own anger – that she was not going to be seeing the child again. So contact, which should have been for six hours ... was cut short in that way as the father had taken the child away ... He should never have taken the child off to the police station after that. It was just making the situation worse. That has been the watershed of contact for the moment because there has been no contact since 13th June 2009. At all of the times in which contact should have taken place under the order it has simply not taken place."

44. On 20 June 2009, contact was to be observed by the consultant clinical psychologist. As Judge Caddick found (paragraph 16), the reason the father did not bring M to contact was that:

"M did not want to come. The father takes the view that if M, an intelligent and articulate child, says that he does not want to see Dr H, then he is not going to force him to do so ... He did his best to persuade him, but unsuccessfully, and so he did not come."

45. On 27 June 2009 (paragraphs 17-19):

"The father opened the door and simply told her that M was not coming. M was then brought to the front door and the child said, "I'm not coming. I don't want to come. Why would I want to come after last weekend?" ...The mother ... said something along the lines that M ought to come, and then, trying to persuade him: "If not for me, then for E". M's response was: "Well, I don't need to come and see you to see E. I can see E when she comes here to us". The father gave no support or, as she puts it, vocalisation that it was contact time and he ought to go. He just remained silent."

46. What happened on 25 July 2009 was rather different. Again, I quote from Judge Caddick (paragraphs 21-22):

"There was no answer at all when she, together with her sister, brother-in-law and E, came to the door. They came back an hour later and the father answered the door. He said he had been ill. They

said they were there to collect M and he simply told them that M was not there and did not know where he was. I accept the father's evidence that he was indeed unwell on that day, had taken to his bed and, as far as he was aware, M had gone off with the father's wife ... "shopping or whatever" … He felt there must have been a misjudgement by his wife in not having M there at a time when they knew perfectly well that the mother would be coming for contact, even though of course M was not likely to want to go."

48. Finally, the events of 22 August 2009 (paragraphs 23-24):

"M came to the door on his own and simply said he was not coming and shut the door on them. They knocked again, he opened it, and the mother, and indeed her sister, both asked if they could talk to him, but he refused and said he was not coming. They report that he looked embarrassed, that he had his head down and did not make eye contact and then he shut the door. They did not press the issue and left. The father did not appear. The father says that he had decided on this occasion that he would allow M to go to the door and do the talking, as it were. He played no part in it."

47. The crux of Judge Caddick's ruling is to be found in paragraphs 28-29 of his judgment:

"I must consider separately each of the five occasions alleged. The contact order required him to allow the mother to have contact with M, and make him available accordingly ... Clearly, on each of the five dates involved the father has failed to comply with the order. So far as the points raised by the father are concerned, it is as a matter of law no defence to say that producing the child for contact is difficult or, as he would put it, impossible because of the child's refusal to come. That is not a defence; it is still a failure. The only sensible answer to the question "Has he failed to comply?" is "Of course, clearly he has". Whether the father has a reasonable excuse is another matter and I will come to that in a moment; but he has failed to comply with the order."

48. The Judge said that the events of 13 June 2009 had caused him a "momentary hesitation", because M had gone off with his mother. So, the father argued, he had complied with the order. But (paragraph 30):

"the requirement is to fully comply with the order; that is to allow the child to have contact and make him available accordingly, not just at the beginning of contact, but for the period of contact specified ... by intervening and then taking the child away again part way through the contact period, he certainly was failing to comply with the order from that point onwards."

49. Judge Caddick then turned to consider whether the father had made out the defence under section 11J(3). He held (paragraphs 32-34) that he had not:

"The nub of the father's position on that is quite simple and permeates through each one of these occasions. He cannot produce M for contact because, while he has tried, M – being an intelligent and articulate boy – has his own mind … It is his decision on each occasion and the father will not interfere with that. He says that he has tried, as far as he can, "by persuasion and by saying to him such things as 'Well, come on, let's get it over with'. But really, when M makes his own mind up and he says what he has decided, I cannot move him from that." The father makes it clear that he will not force M to do so, whether physically or by imposing sanctions for refusal. In my view it would be a very strange thing indeed if that could amount to a reasonable excuse for not producing a child for contact. It would completely defeat the object of the statute ... It is not a reasonable excuse for failure to comply for the resident parent to say, to use the father's actual words at one point: "The little fellow … doesn't want to go and so I won't make him." That is not sufficient, both as a general proposition and certainly not in the particular circumstances of this case. That cannot be a proper answer to failure to comply with a contact order: whether in welfare terms, which was my focus in the main section 8 hearing or in terms of a reasonable excuse for failure to produce for contact, which is my focus now."

In further passages (paragraphs 34-39) which I need not set out Judge Caddick returned to the themes he had canvassed in the passages in his judgment of 4 December 2009 which I have quoted in paragraph [24] above.

50. The Judge's conclusion (paragraph 40) was that:

"What is plain is that the father has not got anywhere near establishing, on the balance of probabilities, a reasonable excuse for failing to produce M on those five occasions."

51. Judge Caddick then turned to consider section 11L(1). Dealing first with subsection (l)(a), he explained (paragraphs 41-42) why in his view an order was necessary:

"without any effective sanction behind the contact order, the danger is that the father will not have a change of attitude, a change of firmness with M, a change so that he ensures that the child does do as he should be doing."

Turning to subsection (l)(b), he explained (paragraph 48) why he had concluded that an order would be proportionate. He went on

(paragraphs 49- 53) to consider section 11L(3). He explained (paragraphs 56-57) why he needed further information in accordance with section 11L(2) and why, accordingly, he was adjourning the actual making of an enforcement order until the relevant information was to hand. He explained (paragraphs 61-64) why he was also making a compensation order: the father was in breach; he had no reasonable excuse; in the circumstances, he said, the father ought to compensate the mother her petrol costs for the abortive attempts to have contact.

52. Judge Caddick then considered M's welfare, as required by section 11L(7). He said (paragraph 54);

"The object of enforcement is to get contact working. It may be effective or not. If it works, then it will be very much to the benefit of M. If the father can be helped to the mindset of a positive encouragement of contact rather than the negative and alienating influence that he exhibits at the moment, then that can only be for the benefit of M. If it does not help get contact working then that positive welfare benefit for the child will not be gained. It need not be negative, however. The father does not have to let the child know that an enforcement order has been made and discuss it with him ... I trust that the father will not do so. I appreciate that on past performance it may very well be that the father will see fit to discuss it with the child ... If it did happen then if M is such an intelligent and articulate child as I am told by the father he is, then the point may not be lost on him that a child's actions in this case can have an adverse effect on the father and he needs to bear that in mind. But M is not emotionally mature and I emphasise that I am not suggesting for one moment that he should be told."

53. So far as concerned the compensation order, Judge Caddick made the same point (paragraph 63): "the child does not have to know, and indeed should not know, about such order being made."

54. Accordingly, Judge Caddick made both an enforcement order and a compensation order.

55. There is no judgment explaining why he made the further enforcement and compensation orders on 27 January 2010, but it is to be assumed (and this is, I think, implicit in what Judge Caddick subsequently said in the judgment he gave on 15 June 2010) that his approach on that occasion was exactly the same as the approach previously set out in his judgment of 15 December 2009. Judge Caddick's judgments of 15 and 24 June 2010

56. As we have seen, by the time Judge Caddick came to consider matters on 15 June 2010, he had the benefit of three further reports

by Mr Stevens. In the first, filed on 7 May 2010, Mr Stevens, reported on a meeting he had with M on 13 March 2010:

"I asked M if he was going to contact to which he responded 'no'. I said to M everyone including me expected him to attend contact with his mother to which he replied 'I am not going I do not want to.'"

57. In his second report, dated 8 June 2010, Mr Stevens reported on another meeting he had had with M on 15 May 2010:

"M repeatedly told me he does not want contact with his mother and that he did not intend to go to the next scheduled session due over the weekend of [22 May 2010] ... Throughout my visit to M he remained resistant to changes and entrenched in his wishes not to have contact with his mother .... his reasons ... are largely based on his past experiences ... the trust has gone in his relationship with his mother. Some of the language M used was quite sophisticated ... However, it was clear from my meeting that M is expressing a wish not to have contact with his mother."

58. In his third report, filed on 14 June 2010, Mr Stevens dealt with the welfare implications of the mother's applications for an enforcement order and committal. He described the effect on M and E of learning that their father had been committed pursuant to an application by their mother:

"The impact on both children emotionally of this information and therefore on their respective long term relationships with their parents must surely be nothing but negative and could be very damaging."

He commented that if the father was to "disappear" for even a short time the adults would be placed in "an invidious position of having a choice between lying and telling the truth, the later having potentially extremely damaging consequences." He reiterated that in the event of the father being committed: "it is likely that both children will be affected emotionally", adding that:

"given M lives with his father the impact is likely to be more profound with feelings of loss and separation that may well also affect his behaviour and other relationships."

He suggested that the court might wish to consider the option of making a suspended committal order so that the father could "reflect on the implications should he not ensure M attends contact".

59. Judge Caddick gave judgment on 15 June 2010 dealing with the alleged breaches on 30 January, 13 and 27 February, 13 and 27

March and 10 April 2010. He directed himself again (paragraph 7) as to the relevant requirements of section 11J. In relation to committal he said this (paragraph 8):

"I have to be sure that there have been, on each date we are concerned with, clear breaches of the contact order. That is that the act of the father, or the failure to act, was deliberate on his part in terms of a failure to do as required by the order. Further, although it is not always spelt out in that way, it is relevant to think in terms of reasonable excuses just as it is in the framework of enforcement orders. Again, I keep in mind the principle that committal orders are remedies of last resort. I will leave that for further discussion later, as I will the impact of welfare. Welfare considerations as to what kind of order to actually make do impinge on both considering a committal order (though it is not spelt out in the statute in that case) and enforcement orders (as is specifically set out in section 11). In either case it is relevant as a consideration to be borne in mind; but it is not paramount, as it would be in section 8 issues."

60. Judge Caddick then turned to consider the question of whether the father had breached the order and, in particular, the submission that he had not "because in a literal sense he did allow the mother to have contact and he did make M available." He rejected the submission (paragraph 9):

"That in my judgment is an overly legalistic view of the ordinary terms that one expresses contact orders in and indeed the terms of section 8 itself ... It is not enough to simply bring the child to the doorstep and stand there while the child says "No, I don't want to come", anymore than it is enough to go to the doorstep oneself and say, "No, he sends the message that he doesn't want to come." The short point is that the father did not ensure that the child went for contact with the mother on any of those dates. He was responsible for the child; he had the privilege of having a residence order and the child living with him in his home; he had to make sure that he did all that was necessary so that that child would go – imposing sanctions or whatever other steps within the exercise of his parental responsibility were necessary to make sure that he went."

61. Judge Caddick then turned to consider the alleged breaches, saying (paragraph 10):

"the reality is that nothing has changed ... We have now another six occasions of failure to comply with the contact order in force. I do not propose to go through all six in great detail because they are really more of the same as before. On each of those dates – bar the last one – we have the mother going to the house with an agreed family member and the child does not go for contact."

62. He then dealt in turn with the first five occasions. I can take his account of events on 30 January 2010 (paragraph 11) as representative:

"The grandmother goes to the door to collect M; he and his father come to the door. The grandmother reports to the mother simply that M had said that he is not coming; the father had remained silent and had not spoken to her; M simply was insistent that he was not coming and retreated back into the house; the father said nothing – no words of encouragement to M".

63. In relation to these five occasions Judge Caddick summarised matters as follows (paragraph 16):

"On each of those occasions I have no doubt that the father did fail to comply with the order. It is a question of whether the father had a reasonable excuse for not complying. Certainly he did not comply and I am afraid I reject the interpretation placed by counsel for the father on the wording of the contact order. If he were right, then of course that in itself would drive a coach and horses through the whole notion of contact orders and how they can be enforced. The submissions made go to reasonable excuse in my judgment, not to the basic fact of a prima facie non-compliance."

64. Events on the last occasion, 10 April 2010, were, as Judge Caddick said (paragraph 17) very different in kind:

"despite the contact being arranged ... as set out in the order of 4th December, he then some three months later announces that actually M will be on holiday that day in the Far East and so will not be able to have contact. Thus it was of course that the child was not available at all literally. He was at the other end of the world".

So, he concluded, "again on the face of it a clear breach of the order."

65. Judge Caddick then turned to consider the question of reasonable excuse, explaining (paragraph 18) his approach as follows:

"it seems to me as a matter of law (and in this case certainly as a matter of fact) it is not a reasonable excuse to say: "Well of course I want him to go but you know he is so intelligent and articulate. He says he will not go and I can not make him. I can not be responsible for his failures and refusal to go. I've done my best and it's really down to him; it is his decision". If that did represent the law then it would again drive a coach and horses through the statute. There would have been absolutely no point in Parliament passing this law if

all that the resident parent has to do is to say well it is the child's decision, even if in fact that is what the child is expressing."

66. Judge Caddick then turned to consider how matters had come to this pass, commenting (paragraph 19) that "it is still the business of the child running the show as it were ... that is the heart of the problem, a problem that the father has very largely created, giving M power way beyond his years and his emotional understanding ... furthermore an entrenchment due to the kind of atmosphere that has been engendered in the father's own home". But, he added (paragraph 20), "What I do not see is the father really supporting contact with M, conveying to him by words and actions direct to M, living out the truth of it, … a firm encouragement of contact … with sanctions if need to be to kick start it … The father has got to make sure that it happens." He commented (paragraph 21) that M "is trying to rule the roost and he is being allowed to do so", adding that "it has got to a difficult and entrenched position." He referred (paragraph 22) to the evidence of Mr Stevens, who "believed that the entrenched view of M, particularly as to his mother, is the making of M's present attitude" but also "that the father has it in his power to persuade M to do that which is plainly right, and that is to have contact with the mother." He concluded (paragraphs 23-24) that there was nothing, even on the balance of probabilities, to show a reasonable excuse for failing to allow M to have contact with the mother and, accordingly, that "the conditions are made out for making these orders, subject of course to any further welfare considerations."

67. He continued:

"We have reached a point of what seems to be last resort ... we really get to a position on the present applications where it seems to me that I have to have a committal order uppermost in my mind, unless of course even now it can be said that some lesser order may meet the objects of enforcement action. Those objects are firstly, to secure compliance with the contact order and secondly, to punish for deliberate and persistent disobedience of the orders of the court."

Having heard further submissions and further evidence from Mr Stevens, Judge Caddick continued (paragraph 26):

"I have no doubt that the appropriate order to make in this case does involve a committal order. We are really at the end of the line with attempts to persuade, cajole and exhort this father into making sure that his son has the contact with the mother as he should."

He went on to explain his reasons for imposing a sentence of 28 days' imprisonment, albeit suspended.

68. As I have already mentioned, Judge Caddick in fact postponed the formal making of the orders until 24 June 2010, on which occasion he gave a further short judgment. He acknowledged (paragraph 3) that a committal order is a matter of last resort even in an intractable parental alienation contact case such as this but observed that, short of an actual transfer of residence, the court had tried just about every other method to break the deadlock. He explained why he was suspending the order (paragraph 7):

"That puts the father firmly in the saddle in this sense. Going to prison or not will entirely depend on him, and obviously to a much lesser extent on M, and how he the father decides to act. I hope that it will at last galvanise the father into a period of responsible exercise of parental responsibility, which is required of him as the parent with the privilege of being the resident parent at the present, even if that does involve some "tough love" and firm handling of M."

Finally (paragraph 8) Judge Caddick explained why, although he was not making a further enforcement order, he was making a further compensation order.

The arguments on the appeal

69. In relation to each appeal, the grounds of appeal make the same essential points. First, it is said that the judge erred in law in finding that there had been breaches or (as the case may be) failures to comply with the contact orders (and in the latter case in also finding that there was no reasonable excuse) given that although M was present and not physically inhibited by the father from going he refused to go for contact, despite the persuasion of the father and others, because of his deeply entrenched views. It was, it is said, impossible for the father to get M to attend contact. Second, it is said that the judge erred in law in making a suspended committal order (or, as the case may be, enforcement orders) in circumstances where M is highly resistant to contact, stuck in an "emotional rut" and "entrenched." Third, it is said that the judge erred as a matter of principle in seeking to use committal (or enforcement orders) as a method of effecting a change by the father in M's views and in circumstances where there would be a risk of M feeling responsible for the outcome. Fourth, it is said that the judge failed to deal adequately with the welfare issues in the light of the guardian's reports, focusing on what the judge considered were positive outcomes and without having regard to the negative outcomes identified by the guardian. Fifth, it is said, without further elaboration, that the judge failed to have regard to Article 6 and Article 8 of the ECHR. Finally it is said that the judge failed to apply correctly the burden of proof.

70. Mr Armstrong on behalf of the father supplemented the grounds of appeal with skeleton arguments making further points which can be summarised as follows. The judge misconstrued the critical words "allow" and "make available". On the correct construction of those words there had been no breach: M was "allowed" to go and was "available" for collection by his mother, albeit that he was resistant and declined to go. "Allow" is a simple English word and should be construed as such. The language of the orders (like the language of section 8) is not 'result based' and does not, as Judge Caddick thought, impose an absolute obligation to achieve the outcome that contact takes place. It does not, for example, require the father to use physical force to compel M to go to contact. In any event, given M's attitude, the father had a reasonable excuse. Although the court should respect the judge's findings of primary fact, his ultimate conclusion failed to give proper weight to the fact that M has his own views and is entrenched in an emotional rut. Moreover, even if there was a breach, neither committal nor the making of enforcement orders was appropriate or proportionate. The judge was seeking to punish the father with a view to achieving a psychological change in M and, moreover, by use of tools which at best were very blunt and at worst capable of causing M extremely significant harm, a factor which, according to Mr Armstrong, the judge effectively ignored although the guardian had been very alive to it. He criticised the judge's analysis and treatment of the guardian's evidence. He criticised the judge for failing to have proper regard to M's welfare. The reality, he suggested, is that if one rules out physical force all one is left with is persuasion of an intelligent 11 year old, so the sanctions being imposed by the judge were for a failure to achieve effective persuasion of an 11 year old. Finally Mr Armstrong argued, albeit rather faintly, that the judge had struck the wrong balance between the various competing rights under the Convention which he suggested were engaged. For all these reasons, he submitted, both the committal order and the various enforcement orders had to be set aside. So far as concerns the compensation orders they, he said, fell with the enforcement orders.

71. On behalf of the mother, Mr Walden-Smith submitted that this was a fact sensitive case conducted by a judge who, having handled the litigation throughout, was extremely familiar with the circumstances and whose findings were clear, justified and should not be disturbed. Their cumulative effect, he said, was important and fully justified the judge's conclusions. Judge Caddick was correct in his construction of the critical words. To "make available", Mr Walden-Smith submitted, involves the exercise of such parental discipline, guidance and encouragement as is reasonable in all the circumstances to ensure that contact takes place. The judge was

entitled to find that the father had failed to take the steps it was reasonable for him to take to effect contact; that failure had been proved beyond reasonable doubt; and the father had failed to establish any reasonable excuse for his failure. Judge Caddick had carried out the fact finding exercise impeccably and directed himself fully and accurately as to the law.

72. Mr Fuller, on behalf of the children joined with Mr Walden-Smith in seeking to resist the father's appeals and for much the same reasons. Judge Caddick, he said, heard all the evidence, correctly identified the criminal standard of proof, properly directed himself and gave appropriate consideration to the welfare implications. Mr Fuller recognised that much may turn on what is meant by the word "allow" but submitted that the father's approach is far too narrow and legalistic. Rather than looking at each individual incident and considering whether on each occasion M was or was not "allowed" to go, the correct approach, he said, and the approach adopted by Judge Caddick, is to consider what he called the 'bigger picture' and to examine whether the conduct of the father has "allowed" M to have contact. What happened on each occasion should be regarded as a symptom of the problem rather than as a problem in its own right. Moreover, he said, the father had by his own words and actions, gone some way towards creating M's wishes in relation to contact. The father, he said, had created and fostered in M the view that his mother behaves unfairly towards the children, requires police intervention with her behaviour and suffers from mental illness – even though, as he insisted, there has never been any evidence to support that contention. All of this, Mr Fuller submitted, is completely inimical to "allowing" M to have contact with his mother.

Discussion

73. I consider first the question of breach.

74. At the outset I should like to pay tribute to the care and attention to detail which Judge Caddick brought to bear upon this exceedingly difficult case. His judgments, if I may say so, are impressive and, in most respects, admirable. But in my judgment they are vitiated by two fundamental errors in his approach. In the first place, Judge Caddick overstated what it was that the relevant orders required the father to do. Alternatively, on the facts before him he wrongly rejected impossibility of performance as being a defence.

75. The father's obligations under each successive order were to "allow" contact and "make M available" for contact. To "allow" is to concede or to permit; to "make available" is to put at one's disposal or within one's reach. That was the father's obligation; no more and no less.

But that is not how Judge Caddick treated the orders. Running through all his judgments is the assumption, indeed the repeated assertion (see the passages I have set out in paragraphs [26], [51], [60], [66] and [67] above), that the father's obligation was to "make sure" or "ensure" that M went and that contact took place. The father's obligation, according to Judge Caddick (see the passage set out in paragraph [60] above), was to "make sure that he did all that was necessary so that that child would go" and to take "whatever other steps within the exercise of his parental responsibility were necessary to make sure that he went". The father may have been under a parental or moral obligation to do these things, but on the wording of these orders he was not, in my judgment, under any legal obligation such as to render him in breach of the orders for failing to do them, let alone for failing to achieve – to "ensure" – that contact actually took place. Nor, with all respect to Mr Walden-Smith, was the father under a legally enforceable obligation to take such steps in the exercise of his parental discipline, guidance and encouragement as were reasonable in all the circumstances to ensure that contact took place.

76. Moreover, Judge Caddick took the view (see the passage set out in paragraph [47] above) that "it is as a matter of law no defence to say that producing the child for contact is … impossible because of the child's refusal to come". That, with respect to him, was wrong. I have already explained why in paragraphs [31] and [34] above. Furthermore, in saying in relation to committal (see the passage set out in paragraph [59] above) that "it is relevant to think in terms of reasonable excuses", he seems to have allowed himself to confuse two separate issues. For, as I have already observed, one cannot determine the question of breach by reference to the question of reasonable excuse.

77. So, in my judgment, Judge Caddick's approach to the question of breach in relation to both the committal order and the enforcement orders was erroneous. What are the consequences?

78. There is no basis for challenging any of Judge Caddick's findings of primary fact. Indeed, the contrary has not been suggested. I proceed therefore on the basis that the events on the relevant dates were as found by the judge and as described in the various passages in his judgments to which I have referred.

79. Now in relation to three of those occasions – 13 June 2009, 25 July 2009 and 10 April 2010 – the judge's erroneous approach seems to me to have been neither here nor there, for on the basis of the facts as he has found them the father, in my judgment, would on any sensible view have been found to be in breach. On 13 June 2009

the father did not "allow" contact to continue for the allotted period; he removed M from the mother's house while contact was taking place. For the reasons given by Judge Caddick (see the passage set out in paragraph [48] above) that was plainly a breach. And Judge Caddick was, in my judgment, entitled to find that the father did not have a reasonable excuse. On 25 July 2009 M was not at home, as he should have been, when the mother arrived to collect him for contact. Judge Caddick was, in my judgment, entitled to find that in the circumstances as he described them the father was in breach and had no reasonable excuse. The same goes for 10 April 2010 when M was not at home, in fact was on holiday with the father in the Far East. That again, in my judgment, was on any view a plain breach.

80. Apart from those three occasions, however, I do not see how the judge's findings of breach can stand, given the facts as he has found them. On all the other occasions M was at home at the due time. The father did not, on the judge's findings, do anything active or positive to obstruct contact or to prevent it taking place, even if he did little or nothing active or positive to encourage or facilitate it. So how can it be said that the father did not "allow" contact or that he did not "make M available"? That is not the question that Judge Caddick addressed and it would, in my judgment, be wrong for us to speculate as to what answer he might have given if he had done so.

81. Nor would it be right for us to speculate as to what view the judge might have come to if he had correctly approached the question of suggested impossibility. In relation to that I add only this observation. As we have seen, Judge Caddick repeatedly said that it was for the father to do whatever needed to be done in order to ensure that contact took place, but he did not identify what, specifically, the father could or should have done. As he said (see the passage set out in paragraph [26] above), "It is not for me to advise him as to how to do it." Without going so far as to say that such an omission is fatal, one can see certain difficulties in the necessary finding that it was within the power of the defendant to do what the order required him to do – and such a finding, it must be remembered, has to be made to the criminal standard of proof – if the judge does not identify what had to be done.

82. I do not overlook the fact that Judge Caddick thought (see the passage set out in paragraph [25] above) that "M would co-operate with anything that the father really suggested and encouraged" and (see paragraph [66] above) that "the father has it in his power to persuade M to … have contact with the mother." But that is not an adequate foundation for findings of breach to the criminal standard of proof, least of all where the defect in the judge's approach lay not

so much in a misunderstanding of the significance of asserted impossibility but rather in his misunderstanding of the logically prior question of what the father's obligations were under the order. I repeat that if breach is to be established what has to be demonstrated is that (a) that the defendant has not done what he was required to do and (b) that it was within the power of the defendant to do it. Judge Caddick's finding, even if sustainable on the evidence (and I have to say I have my doubts), is not in the circumstances a secure foundation for a finding of breach.

83. Before passing from the question of breach there is one other matter I must advert to. Mr Fuller, as we have seen, submitted that, rather than looking at each individual incident, and considering whether on each occasion M was or was not "allowed" to go, the correct approach was to consider the 'bigger picture' and to examine whether the conduct of the father has "allowed" M to have contact. And in this connection he suggested that it is the father's own words and actions that have created the current impasse. Now that may be an entirely appropriate approach if the court is embarking upon a welfare determination, but it will not do if one is concerned, as here, with questions of breach said to justify committal or the making of enforcement orders.

84. If it is to be said, for example, that on 30 January 2010 the father was in breach of the order then, to repeat, the task for the judge is to identify, by reference to the express language of the order, precisely what it is that the order required the father to do on 30 January 2010 and then to determine whether the father has done what he was required to do and, if he has not, whether it was on 30 January 2010 within his power to do it. So any allegation of breach necessarily involves a close and careful scrutiny of the events of the day in question. Moreover, the question in the example I have given is whether, on 30 January 2010, it was or was not within the power of the father to do what the order required. If the answer to that question is that it was, then so be it. But if the answer is that it was not (or, to be more precise, that it has not been proved that it was within his power) then that is the end of the allegation, and it matters not at all that the father may by his own acts (or omissions) on previous occasions have brought about the state of affairs upon which he now relies by way of defence. Putting the same point rather differently, the allegation here is that on, for example, 30 January 2010 the father failed to allow contact and failed to make M available for contact; it is not that because of things he had done on earlier occasions he had brought about a state of affairs where, because of Ms' obduracy, contact could not take place.

85. I conclude, therefore, that the father was properly found to be in breach on 13 June 2009, 25 July 2009 and 10 April 2010 but that none of the other findings of breach can stand. What is to be done?

86. The first two breaches led (in part) to the enforcement order Judge Caddick made on 8 January 2010, the third breach to the committal order he made on 24 June 2010. In my judgment rather different considerations apply to the enforcement order and the committal order.

87. So far as concerns the enforcement order, Judge Caddick was, in my judgment, entitled to conclude that such an order was in the circumstances (and despite the fact that on this hypothesis there had been only two breaches) both necessary and proportionate. And given the nature of an enforcement order, in contrast to a committal order, Judge Caddick was also entitled to conclude, as he did, that the enforcement order he was minded to make was compatible with M's welfare. His analysis, as I have set it out in paragraph [52] above, cannot be faulted. So the father cannot complain about the making of an enforcement order on that occasion nor about the fact that he has done at least some of the work he was ordered to perform. I propose therefore (1) that we set aside the enforcement order made by the judge on 27 January 2010 and so much of the enforcement order made by the judge on 8 January 2010 as was referable to the alleged breaches on 20 and 27 June and 22 August 2009 and (2) that we discharge the father from any remaining obligation to carry out the unpaid work he was ordered to perform.

88. So far as concerns the committal order it must be set aside so far as relates to the alleged breaches on 30 January, 13 and 27 February and 13 and 27 March 2010. That leaves the breach proved to have been committed on 10 April 2010, in relation to which Judge Caddick imposed a suspended sentence of 28 days. Since that sentence was expressed as being concurrent with the sentences imposed for the other alleged breaches it survives the setting aside of the other parts of the committal order. But was such a sentence appropriate in the circumstances? Indeed, was committal appropriate in the circumstances? That is a much more difficult question, and one which has caused me much concern.

89. We have been taken to various decisions of this court bearing on the appropriateness or otherwise of making committal orders in cases such as this.

90. It is well known that Ormrod LJ held strong views on the subject. In *Churchard v Churchard* [1984] FLR 635 he expressed himself (at page 638) in trenchant terms:

"To accede to the father's application for the committal order would not conceivably be in the best interests of the children. It would mean two things: first, if committed, that their mother would be taken away from them for a time and their father would be branded in their eyes as the man who had put their mother in prison. That is a brand from which no parent in my experience can ever hope to recover. It is the most deadly blow a parent can inflict on his children. There is no doubt and it should be clearly understood – I am speaking for myself now – throughout the legal profession that an application to commit for breach of orders relating to access (and I limit my comments to breaches of orders relating to access) are inevitably futile and should not be made. The damage which they cause is appalling. The damage in this case which they have caused is obvious. To apply for a legalistic but futile remedy, because it is the only thing left to do, is, in my judgment, the last hope of the destitute. The court is only concerned with the welfare of the children and ought not to trouble itself too much about its own dignity. These cases are exceedingly intractable. They can only be dealt with by tact not force. Force is bound to fail."

Brandon LJ agreed.

91. A softer version of the same point was made by Balcombe LJ, with whom Glidewell LJ agreed, in Re S (Minors: Access) [1990] 2 FLR 166 when he said (at page 170):

"The usual problem in this type of case where the custodial parent resolutely refuses to obey an order for access by the court is that the court has no effective sanction to enforce that order ... it is a rare case – although I would not go so far as to say it can never happen – that the welfare of the child requires that the custodial parent be sent to prison for refusing to give the other parent access."

92. Ormrod LJ's approach was doubted by Ward LJ, with whom Beldam LJ agreed, in *A v N (Committal: Refusal of Contact)* [1997] 1 FLR 533. Dismissing a mother's appeal against the activation of a suspended committal order, Ward LJ observed (at page 540) that the welfare of the child, although obviously a material consideration, was not in this context paramount. Referring to the observations of Sir Thomas Bingham MR in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 and of Sir Stephen Brown P in *Re F* (unreported, 13 May 1996), Ward LJ said (at page 541):

"The stark reality of this case is that this is a mother who has flagrantly set herself upon a course of collision with the court's order ... In my judgment, it is time that it is realised that against the wisdom of the observations of Ormrod LJ is to be balanced the consideration that orders of the court are made to be obeyed. They

are not made for any other reason ... it is perhaps appropriate that the message goes out in loud and in clear terms that there does come a limit to the tolerance of the court to see its orders flouted by mothers even if they have to care for their young children. If she goes to prison it is her fault, not the fault of the judge who did no more than his duty to the child which is imposed upon him by Parliament."

Beldam LJ said much the same, commenting (at page 542) that:

"the court has been placed by the mother in a situation in which it either has to yield to her obstinacy and back down from its own order or it has to enforce it. If the court were to yield to such persistent intransigence, respect for its orders and for the administration of justice would be at an end."

Similar sentiments were expressed by all three members of the court (Thorpe, Arden and Neuberger LJJ) dismissing a mother's appeal from a committal order in *Re S (Contact Dispute: Committal)* [2004] EWCA Civ 1790, [2005] 1 FLR 812. It suffices to note what Neuberger LJ said (at paragraph 14):

"It seems to me that this was an order which was justified both in terms of enforcing respect for the orders of the court, and, therefore, for the rule of law in society, and also, as a last resort, to coerce the mother into complying with court orders. In my view, the judge's decision was amply justified".

93. Finally, I go to *B v S* [2009] EWCA Civ 548, a case where Wilson LJ, with whom Ward LJ agreed, said (para [16]):

"The days are long gone when mothers can assume that their role as carers of children protects them from being sentenced to immediate terms of imprisonment for clear, repeated and deliberate breaches of contact orders."

94. For my part, and I wish to emphasis this, I agree entirely with the approach adopted in *A v N*, in *Re S* and in *B v S*. Committal is – has to be – an essential weapon in the court's armoury in cases such as this. Nothing in this judgment should be seen as a charter for avoiding enforcement of contact orders in whatever is the most appropriate way, including, where appropriate, by means of committal.

95. The proper handling of contact cases which have become or are on the way to becoming intractable requires judicial continuity and effective timetabling as essential components of the necessary judicial case management: see *Re D (Intractable Contact Dispute:*

Publicity)[2004] EWHC 727 (Fam), [2004] 1 FLR 1226, paras [48]-[49]. Moreover, as I went on to say, referring to the judgment of Wall J (as he then was) in *Re M (Intractable Contact Dispute: Interim Care Orders)* [2003] EWHC 1024 (Fam), [2003] 2 FLR 636:

"proper judicial control and judicial case management requires what Wall J referred to in Re M at para [115] as 'consistency of judicial approach' within the context of a judicially set 'strategy for the case'. This must form what he described at para [118] as 'part of a wider plan for [the] children, which … needs to be thought through'."

I added (at para [57]):

"It may be that committal is the remedy of last resort but, as Wall J recognised in Re M at para [115], the strategy for a case may properly involve the use of imprisonment. Interestingly he seems to have accepted (see at para [117]) that imprisonment, even for a day, might in some cases be an appropriate tool in the judicial armoury. I agree. A willingness to impose very short sentences – 1, 2 or 3 days – may suffice to achieve the necessary deterrent or coercive effect without significantly impairing a mother's ability to look after her children."

96. There is, here, a very difficult balance to be held. The point was put very clearly by Dame Elizabeth Butler-Sloss P in *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] EWCA Civ 18, [2004] 1 FLR 1279, at para [28]:

"the sanction of prison for mothers who refuse to allow contact is a heavy one and may well be a self-defeating one. It will hardly endear the father to the child who is already reluctant to see him to be told that the father is responsible for the mother going to prison. Prison is a sanction of last resort and there is little else the court can do. At this stage also the court may have the evidence that the continuing efforts to persuade the mother to agree to contact are having a disproportionately adverse effect upon the child whose welfare is paramount and the court may be find it necessary, however reluctantly, to stop trying to promote contact. That is a very sad situation but may be necessary for a short or for a longer time if the welfare of the child requires it. One aspect of proportionality which has to be weighed in the balance is the length to which a court should go to force contact on an unwilling child and on the apprehensive primary carer. At this point the factor of proportionality becomes all-important since there is a limit beyond which the court should not strive to promote contact and the court has the overriding obligation to put the welfare of the child at the forefront and above the rights of either parent."

She added (para [32]):

"It is … most important that the attempt to promote contact between a child and the non-resident parent should not be abandoned until it is clear that the child will not benefit from continuing the attempt."

97. Mr Armstrong submitted, as we have seen, that in the present case Judge Caddick failed to have proper regard to M's welfare and gave insufficient weight both to the unfortunate realities and to the guardian's views. The guardian was sceptical as to whether even committal would bring about a resumption of contact (see the extract from his report of 2 December 2009 set out in paragraph [24] above). And in his report of 14 June 2010 he foresaw that committal could be damaging, indeed potentially extremely damaging, it being likely, he thought, that both children would be affected emotionally, whilst for M the impact was "likely to be more profound, with feelings of loss and separation that may well also affect his behaviour and other relationships" (see the extracts set out in paragraph [58] above).

98. I confess to a considerable feeling of unease as to whether by June 2010 the point had not already been reached at which it was simply too late to be contemplating committal as an appropriate remedy. Too late because by then – indeed well before then – M had become entrenched in his rejection of contact, because the prospects of even committal effecting what Judge Caddick thought and hoped it would achieve were by then modest at best and, indeed, on one view vanishingly small, and because the potential damage to the children, and to M in particular, was simply too great to be tolerated, not least when balanced against the small prospects of committal achieving the desired objective.

99. These concerns are powerfully reinforced by the guardian's latest report, dated 26 August 2010. In that report, which of course was not before Judge Caddick when he made the orders in June 2010, Mr Stevens recorded what had happened at another meeting he had had with M on 3 July 2010 (the report says June but I think this must be a misprint). Told by Mr Stevens about the risk that his father might go to prison,

"M told me 'I don't care I am not going to see mummy, if daddy goes to prison what one will it be, I will go and live with X ...' M said 'I don't care if they send daddy to prison I will find him.' He went on to say 'why does it have to get that drastic it's because mummy has made it that way' ... M told me that he no longer refers to his mummy as 'mummy' but [by her name]. He said 'I want mummy to answer my questions'."

Mr Stevens then talked to M about the contact that was due to take place on 14 July 2010:

"M told me he would not go to see his mother, at which time I reminded him the Court expects his father to ensure he does attend. M replied 'I don't care'. M told me he did not feel his mother was being 'co-operative'."

100. Whatever view I might ultimately have come to in the absence of that report, its very worrying contents to my mind quite plainly tip the balance heavily against committal.

101. It is one thing to postulate, as Judge Caddick will have needed no reminding, that no court should threaten coercive action unless it is prepared to see it through. It is another to find that the process has reached an unanticipated crisis in which coercive action may actually undermine the objective. Both are unavoidable aspects of the deployment of judicial procedures to try to resolve differences and arguments which are centrally to do with human relations and only marginally to do with law.

102. Something of the sort has happened here. The upshot is threefold. First, the judge's evidence-based finding that much M's objection to seeing his mother has come from the father has carried through into a finding that this is something that the father can still undo, if necessary under threat of imprisonment. Given the boy's clearly expressed attitude, one has now to doubt this.

103. Secondly, and more immediately, it is now clear from the guardian's latest report that the risk that the threat of imprisoning the father would not shift the boy's attitude was real; indeed, as things have turned out, much more real than Judge Caddick anticipated. Told that his father would go to prison if he continued to refuse to see his mother, the boy was unrelenting. The judge cannot, of course, have known this. But the significance of it can hardly be overstated. The boy now has a weapon that no child should possess: by agreeing to see his mother he can save his father from gaol; by refusing he can have his father punished.

104. Thirdly, if this order stands there is a prospect of indefinite non-compliance, driving the court to indefinite committals and, it may be, ever lengthening sentences. Whatever the origin of M's attitude – and on the evidence and findings it is not confined to the father's influence – if he persists after the expiry of this 28-day sentence in his refusal, the father will have to be sent back to prison because this is the course on which the court will now be set. What then will happen to the boy, for whose welfare this entire process was

intended, with no father to look after him and a mother with whom, for better or for worse, he does not want to be?

105. With the advantage of a great deal of hindsight – which is why I make no criticism whatever of Judge Caddick on this score – we can see now where the enforcement order was going to lead. But we have to decide whether, in the light of what is now the situation, committal of the father to prison will be anything but counterproductive. It is clear to me that it will not be, and for that reason alone the committal order, in my judgment, cannot stand.

106. That suffices to deal with the present case, but in relation to committal there is one final observation I should add. A common trope, as we have seen, is that committal in this kind of case is or ought to be a last resort. I agree, but it is important not to misunderstand what is meant by this handy aphorism. Committal should not be used unless it is a proportionate response to the problem nor if some less drastic remedy will provide an adequate solution. But this does not mean that one has to wait unduly before having resort to committal, let alone waiting so long that the moment has passed and the situation has become irretrievable. That point, in the nature of things, is often easier to identify with the priceless benefit of hindsight – I do not underestimate the difficulties of deciding the right strategy in this kind of case. But I cannot help feeling that, on occasions, the understandable reluctance to resort to such a drastic remedy as committal means that when recourse to it is first proposed it is too late for committal, whereas a willingness to grasp the nettle by making a committal order at an earlier stage might have ended up making all the difference. I repeat a point I have already made. The threat, or if need be the actual implementation, of a very short period of imprisonment – just a day or two – may at an earlier stage of the proceedings achieve more than the threat of a longer sentence at a much later stage in the process. I do not suggest this as a panacea – this is an area in which there is no panacea – but it is something which, I suggest, is worth keeping in mind.

107. Committal apart, there are various other techniques to which recourse may be had in cases such as this. The three important judgments of Wall J (as he then was) in *Re M (Intractable Contact Dispute: Interim Care Orders)* [2003] EWHC 1024 (Fam), [2003] 2 FLR 636, *Re O (Contact: Withdrawal of Application)* [2003] EWHC 3031 (Fam), [2004] 1 FLR 1258 and *A v A (Shared Residence)* [2004] EWHC 142 (Fam), [2004] 1 FLR 1195, illuminatingly illustrate different techniques for attempting to resolve disputes of this kind. In all three cases the mother was the residential parent. In *Re M* residence was transferred to the father by

means of an interim care order followed in due course by a residence order; in Re O the father's contact was stopped; in *A v A* a joint residence order was made. Since then, of course, the court has been given power (by the amendments to the 1989 Act introduced by the 2006 Act) to make not merely enforcement orders and compensation orders but also contact activity directions in accordance with sections 11A-11G. The effect of these amendments is to give the court a wide range of options in an intractable contact dispute. For example, we understand that CAFCASS is now funding parenting information programmes and that there are in some places in the country parenting classes which seek to educate parents into an appreciation of the damage which polarisation can cause children. Other orders are possible if all this fails. In an appropriate case an order may be made providing for an immediate transfer of residence. More recently this court has endorsed the propriety in an appropriate case of making a suspended residence order, that is, an order providing for a future transfer of residence upon the happening (or non-happening) of a defined event: see *Re A (Suspended Residence Order)* [2009] EWHC 1576 (Fam), [2010] 1 FLR 1679 (appeal dismissed *Re D (Children)* [2009] EWCA Civ 1551), and *Re D (Children)* xxx (appeal dismissed *Re D (Children*) [2010] EWCA Civ 496).

108. Which form of order (if any) is appropriate in a particular case must of course depend upon the inevitably unique circumstances of the individual case. I say no more for, as already noted, Judge Caddick is faced in this very case with an application for a transfer of M's residence from the father to the mother.

Conclusion

109. For these reasons I conclude that:

i) We should set aside the enforcement order made by the judge on 27 January 2010 and so much of the enforcement order made by the judge on 8 January 2010 as was referable to the alleged breaches on 20 and 27 June and 22 August 2009.

ii) We should discharge the father from any remaining obligation to carry out the unpaid work he was ordered to perform.

iii) We should set aside the committal order made by the judge on 24 June 2010 save insofar as it records the finding of breach on 10 April 2010.

That leaves only the compensation orders. Recognising that a lower standard of proof is required to justify making a compensation order in contrast to either an enforcement order or a committal order, I do not think that the compensation orders can be saved on this basis.

Given the reasons why, as I have found, the enforcement orders and the committal order have to fall, the compensation orders, in my judgment, have to suffer the same fate.

A further point

110. Mr Armstrong submitted that the case requires transfer to the High Court. His argument was that this is a case which requires what he called some form of long-term family therapy or mediation between all members of the family (including but not limited to mother, father and M) and that such assistance is not available to the parties either via their public funding or from CAFCASS or from any other public resource.

111. Even assuming the factual accuracy of the premise which appears to underlie this submission – and in present circumstances, unhappily, it is all too believable – I do not agree that this is a case that ought to be transferred to the High Court.

112. Plainly, a litigant cannot seek a transfer because he disagrees with the view a judge has formed of him. On the contrary, the court should be very slow indeed to direct a transfer of an intractable contact case such as this where the parties have, as here, had the still all too unusual advantage of judicial continuity throughout: as to the desirability of which in cases such as this see the observations of Wall J in the three cases I have already referred to and my own observations in *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam), [2004] 1 FLR 1226, para [48]. As Mr Fuller aptly said, explaining why the guardian opposes a transfer, it would bring to an end the judicial continuity with which this case has to date been blessed. And as Mr Walden-Smith said, equally aptly, what the father is here seeking inappropriately to do is to have the matter removed from this experienced Circuit Judge who, having conducted a series of hearings, has an invaluable knowledge of the case.

113. Moreover, judges should, in my view, be slow to accept that the High Court has resources available to it in such cases that are lacking in the County Court, Usually it does not. And if I may be permitted the observation, the idea that a High Court judge, as such, has something that a Circuit Judge does not which can, in some usually unidentified manner, achieve the success which has hitherto eluded the County Court is, I fear, a proposition owing more to bare hope than to realistic expectation. Moreover, as Mr Fuller pointed out, a transfer here would in fact be inconsistent with the President's Practice Direction: Allocation and Transfer of Proceedings [2009] 1 FLR 365. As he said, nothing in paragraphs 5.1 and 5.2, which identify the kinds of case which may be suitable for transfer to the

High Court, is applicable here. On the contrary, paragraph 5.3(1) provides that:

"Proceedings will not normally be suitable to be dealt with in the High Court merely because of … intractable problems with regard to contact."

114. In my judgment this case should remain in the County Court so that the parties and the children can continue to benefit from the judicial continuity hitherto provided so effectively by Judge Caddick.

115. I have read Sedley LJ's judgment in draft. I agree with it.

Lord Justice Jacob:

116. I agree with both judgments.

Lord Justice Sedley:

117. I agree both with the analysis set out in the judgment of Munby LJ and with the consequent disposals which he proposes. I take the liberty of adding some remarks of my own because the case seems to me to raise significant issues not only of family law and practice but of law enforcement generally.

118. Precisely because a court order, once made, should not be able to be defied without consequences, it is axiomatic that a court should never make an order which it is not prepared to enforce. The problem which this creates in a jurisdiction whose task is to regulate human and family relations is immense, because – as this case starkly illustrates – it requires the judge at a relatively early stage to form a firm view of the dynamics of a fragmented family.

119. If, as happened here and must happen in a good many cases, the judge legitimately forms the view that it is the father who is obstructing contact by transmitting to the child his hostility towards the mother, the judge may well make a coercive order against the father. From that point the judicial die is cast: subject to accidents, failures of contact will be the father's fault, and punishment will if necessary follow. But this paradigm of fault omits something which may well be, or become, critical – the child's own feelings and attitude. Even if, as Judge Caddick strongly sensed, it was from the father that the boy had picked up not only his view of the mother but the vocabulary in which he was expressing it, by the time committal was on the agenda it was very plainly the boy's own refusal which was impeding contact.

120. The potential consequences are vividly described by Munby LJ. Some are clearer to us than they were to Judge Caddick, but all were in my view predictable. They include placing an intelligent 10-year-old in a position in which he can either keep his father out of prison by grudgingly going to see his mother or acquire a burden of guilt by persisting in his refusal and letting his father go to gaol. In a case in which it was clear that the voice might be the voice of the child but the hand still plainly that of the father, this might even so be necessary; but it is not, and has for some while not been, this case. The premise on which the judge made his initial order has become absorbed into a much more complex and intractable situation which punishing the father not only cannot solve but will exacerbate.

121. There are at least two morals. One is that before deciding that a parent is the author of a child's resistance to contact and so can be made the subject of a coercive order, the court needs also to be sure that the parent, by one acceptable means or another, can still reverse the child's attitude. The other is that even then a court, despite the affront to its dignity, may have to be prepared, if it comes to the point of committal, to accept that the predictive premise on which it initially acted has turned out to be wrong: that, for example, the child has internalised the custodial parent's hostility, so that punishing the parent can no longer produce the intended outcome and may produce its opposite.

122. This last point brings me to something which I venture to say less as a judge than as a parent. The critical attitude which M has acquired or developed towards his mother is not one of simple hostility. He wants her to be the mother he remembers when he was little. There is a real pathos about this in a boy, still only ten or eleven years old, who has had and is still having to live through an acrimonious family rift and realignment. If instead of seeking to restore relations with his mother by letting her see him for a few hours at a time the courts were to abandon the blunt instrument of coercion and were to let time take its course, it seems to me much more likely that M will in his own time find his own way back to the affectionate relationship with his mother which both of them wish for. It may not happen, of course; but if we continue down the present road it will certainly not happen. The law does its best in the absence of other means, and modern legislation has done what it can to make the law's own means practical and fair; but the law is not omnicompetent, perhaps most of all when, equipped only with its received or inherent powers, it is called on to intervene in the subtle and unpredictable business of child care and human relations.