Neutral Citation Number: [2015] EWCA Civ 719
Case No: B4/2014/2671
& B4/2014/2553

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL FAMILY COURT
Her Honour Judge Hughes QC
FD12P00358

& B4/2014/2553
Royal Courts of Justice
Strand, London, WC2A 2LL
14/07/2015

B e f o r e :

LORD JUSTICE TOMLINSON
LADY JUSTICE GLOSTER
and
MR JUSTICE COBB

Between:

Re T (A Child)(Suspension of contact)(Section 91(14) CA 1989)

The First Appellant (Father) in person
The Second Appellants (Paternal Grandparents) in person
The 1st Respondent (Mother) in person
Mr. Michael Liebrecht (instructed by CB4law) for the 2nd Respondent (Child, by her Guardian)

Hearing dates: 25 June 2015

Lord Justice Tomlinson:

1. This is the judgment of the Court, prepared by Mr Justice Cobb.

Introduction

2. E was born in December 2009 and is therefore now 5½ years old. She is the only child of the First Appellant ("the father") and First Respondent ("the mother"). E lives

with her mother; she has not had any contact with her father for nearly two years, and had only very limited contact with him in the year before that. She has not seen the Second Appellants ("the paternal grandparents") since December 2013. E has been the subject of family law litigation for virtually all of her life, and, since May 2011 has been a party to these proceedings, represented by her Children's Guardian appointed by Cafcass.

3. The father and paternal grandparents separately seek permission to appeal against orders made by HHJ Hughes QC of 3 July 2014, by which (on the mother's application) all contact between the father and E was suspended indefinitely, and an order was made under *section 91(14)* of the *Children Act 1989* ('*CA 1989*') prohibiting the father from making an application for contact or any *section 8 CA 1989* order in respect of E, without the leave of the court, until December 2019 (i.e. when E is 10). These orders were made in the absence of the father.

4. It is regrettable that the application for permission to appeal has taken nearly one year to be listed for hearing though we are satisfied, on enquiry, that this has been unavoidable for entirely legitimate administrative reasons. This is, it is to be noted, the fourth occasion in which the issues arising from the separation of these parties has proceeded to the Court of Appeal, the second to a full Court.

5. The four key issues, which we have distilled from the written Grounds of Appeal (the father's Notice contains 19 separate grounds), Skeleton Arguments and submissions before us, are these:

   i) Did judicially-assisted conciliation between the parties in respect of child arrangements for E (specifically E's living arrangements and contact) at a hearing on 13 May 2014, disqualify the Judge from conducting a subsequent contested hearing on 3 July 2014?

   ii) Did the Judge err in making substantive orders on 3 July 2014 (including a *section 91(14)* order restricting any application under *section 8 CA 1989*):

      a) In the absence of the father?

      b) On the basis of factual findings made without forensic testing of the documentary material, of some of which the father had no knowledge?

      And/or

      c) Having indicated to the parties that she would not conduct any hearing in relation to residence issues?

   iii) In ordering the indefinite suspension of contact, did the Judge pay proper regard to *section 1(1) CA 1989* and the statutory list of welfare factors (*section 1(3)* ibid.), and to the *Article 8* rights of the father and the child, all of which were engaged in such a decision?

   iv) Was the order under *section 91(14) CA 1989* appropriate in principle, and/or proportionate?

6. At the conclusion of the appeal hearing on 25 June we informed the parties that we would grant permission to the father to appeal, and we allowed his appeal; we remitted the matter to a Judge of the Family Division for rehearing. At the hearing before us the paternal grandparents acknowledged that they were not directly affected by the order under challenge, and in light of our determination of the father's application and appeal they chose not to pursue their application; we therefore made no order upon it. Plainly the grandparents' position in E's life can be considered as part of any further review by the Court.

Background

7. E's parents are highly educated, intelligent, professional people. They met at university and married in 2000; they separated in 2010. Professional concerns about the parents' mental ill-health and domestic abuse around the time of E's birth prompted safeguarding intervention from the relevant social services. In March 2010, proceedings under *Part IV CA 1989* were instituted in respect of E, and for a short period, she was the subject of an interim care order, albeit placed at home. Those public law proceedings were withdrawn in July 2010, after a period of stability in which – for a number of months – the mother and E lived with the paternal grandparents.

8. In December 2010, almost immediately after the parental separation, the father issued an application for residence and contact, the first of a number of court applications made by both parties under the *CA 1989*, and the *Family Law Act 1996*. We consider it unnecessary, for the purposes of this judgment, to rehearse in detail the extensive litigation chronology. The multiple court hearings, and judgments and orders which have flowed from them, reflect an extraordinarily high degree of conflict in the parental separation. By the time the proceedings were listed before HHJ Hayward Smith QC on 12 December 2011, he expressed a concern that the case was "in danger of spiralling out of control", a fear which has in our view regrettably all too obviously come to pass. Not only have the parents been in relentless conflict with each other, but the father has also raised repeated and serious allegations of professional misconduct against E's court-appointed Guardian, against counsel instructed in the case at various times, and against some of the judges. Family related litigation was at one time unacceptably being conducted simultaneously in three family court centres in different parts of the country, and even when co-ordinated in one location, there has been a regrettable lack of judicial continuity (even though it had been explicitly acknowledged by many of the judges involved to have been "essential" to maintain firm and consistent management of the case).

9. In our own review of the background history we recognised that there was a risk, by which in our view this experienced Judge allowed herself to be distracted, that the truly dreadful chronology of litigation, and the behaviours of the adults towards each other and the professionals, would divert attention from, and ultimately eclipse, the essential issue, namely E's relationship with both her parents.

10. In May 2011, the Court made a defined order for regular fortnightly contact between E and her father on the basis that it was to take place at the home of a maternal aunt; the father enjoyed contact in accordance with this order and after two months it was relaxed to permit for staying contact at a location of the father's choosing, provided

that at some point in the weekend a member of the paternal family was present. Later in the same year, the paternal grandparents whose contact with E by then had become problematic, applied for and were granted permission to make an application for contact. In December 2011, at a directions hearing to which we have already made reference (see [8] above), HHJ Hayward Smith QC granted a final residence order in favour of the mother and a further contact order to the father largely in line with the existing order; HHJ Hayward-Smith gave specific leave to the father to apply for additional contact conditional upon him obtaining and filing a report from an identified psychologist upon his mental functioning and health. The father sought permission to appeal these orders to this court (see [12] below).

11. On the second of the contact visits which followed the December 2011 Order, there was an altercation between the parents at the hand-over of E; each parent made an allegation of assault against the other. A judicial finding of joint culpability was ultimately made, albeit with the mother bearing the larger share of responsibility. Contact ceased and the father issued an application for enforcement; contact resumed for a short time, but reduced to visiting contact in a contact centre.

12. In refusing the father's application for permission to appeal the order of HHJ Hayward-Smith in February 2012, Thorpe LJ bemoaned that the case had "rushed off the rails" and had collapsed "into acrimony and violence", while nonetheless concluding "unhesitatingly" that HHJ Hayward-Smith had not erred in making the orders described above.

13. Multiple further court hearings in 2012 and 2013 focused on the ongoing difficulties arising from the father's contact with E. The residence order made by HHJ Hayward Smith QC was challenged both formally and informally by the father, though his challenges were rejected and dismissed by the courts. In April 2012, the father made a complaint to social services about the mother's care of E which provoked an investigation under *section 47 CA 1989*; no action was taken on the complaint. The style of these challenges was described as "hectoring and argumentative", the father portrayed as "bullying and aggressive if he does not get his own way", leaving the mother ostensibly vulnerable and undermined, or as HHJ Compston (who succeeded HHJ Hayward Smith QC in managing the case) observed "utterly and completely miserable by this case … overwhelmed by difficulties … a sad, bruised figure". HHJ Compston was caused further to reflect that "I do not think I have ever encountered a person quite so irredeemably difficult as the father", an assessment which doubtless caused him to ponder:

> "… should there be a *section 91(14)* ban on the father's residence applications? I have to say that I think there should be if the father is not prepared to calm down and take a more sensible and conciliatory attitude towards the mother, which I have to say I very much doubt whether he will. I am not going to make it. That is a very serious warning shot."

14. In August 2012, HHJ Compston refused the father's application to vary the residence order, and ordered eight periods of supervised contact between E and the father at a designated contact centre; he transferred the case to HHJ Altman (now the fifth judge to have dealt substantively with the case in 18 months), and indicated as HHJ

Hayward Smith QC had earlier done that he considered that a psychological report on the father would be helpful.

15. The father declined to attend the contact which had been ordered contending that supervised contact was more harmful to E than no contact at all; he sought permission (unsuccessfully) from the Court of Appeal to appeal HHJ Compston's orders. In September 2012, the father applied for "joint residence" ('shared residence') and/or unsupervised contact, prompting the mother to make her first application for an order under *section 91(14)*.

16. In 2013, contact between the father and E was finally restored after a gap of 14 months, and eight sessions took place at a contact centre; they were assessed to be successful and mutually enjoyable. A court order generated at a review hearing in July 2013, part-way through that programme of contacts, contained the recital which reflected the Court's view that by now the "litigation needs to be brought to a timely conclusion". Contact then stopped; the father wanted to have contact away from a contact centre, an outcome not supported by the mother or Guardian. The paternal family expressed dissatisfaction with HHJ Altman's management of the case and the father made an application for HHJ Altman to recuse himself; the paternal grandparents made a formal complaint about him to the Judicial Conduct Investigation Office (which was, we are informed, dismissed). In March 2014, HHJ Altman ordered fortnightly supervised contact; it did not happen. In a detailed and careful judgment, HHJ Altman answered the father's multiple complaints and rejected the application for recusal, but nonetheless further transferred the case to HHJ Hughes QC for the final hearing of the parties' cross-applications, and for immediate determination of a discrete application issued by the father that E should attend his wedding celebration (the father by now having re-married). The Judge rationalised this further transfer on the basis that he did not want the parties' dissatisfaction with his judicial management of the case to distract from the main issue – namely, the father's relationship with his daughter. The mother's application for an order under *section 91(14)* was adjourned to be heard on 16 June 2014.

17. The father's application in relation to the wedding celebration was heard by HHJ Hughes QC on 13 May 2014; she refused the application. At the hearing, the Judge, entirely appropriately in our judgment, took an opportunity to conduct some in-court conciliation between the parties in an effort to break the deadlock on residence and contact. At that hearing, the following exchange took place between the Judge and the father (as recorded by the father, but which we do not believe to be challenged):

> Father: "Your Honour, can I ask that this is heard….? If you are going to hear this as a conciliation attempt then you cannot hear the hearing"
>
> Judge: "That is absolutely fine with me. I will not hear the hearing. I am trying to deal with this now."

At the conclusion of the 3 July 2014 hearing in delivering judgment (para [2]), the Judge characterised this exchange thus:

> "During the hearing the father accused (sic.) me of attempting to conciliate and suggested that I should therefore recuse myself".

The description of the manner in which the father challenged the Judge (an 'accusation') may reveal a little of the father's tone of lay advocacy not revealed by a transcript.

18. The father does not currently challenge the Judge's assessment of the prospects of his case on residence, or her stance in advising him of them. She later described her conciliation attempt thus:

> "I suggested to him that an application for residence of [E] was actually not going to be very successful because he had not seen [E] for ten months, and he accepted that at the time." (see transcript of the hearing on 3 July 2014).

His account is similar:

> "It was agreed by all parties before HHJ Hughes on 13 May that the hearing regarding residence should be adjourned with liberty to the father to restore if and when he believed it appropriate to [E]'s interests … I accept that there are no realistic prospects of a Court allowing [a change of residence] at the present when there is no contact taking place. I accept that [E]'s residence in the immediate future is likely to be with her mother" (see father's letter to the Court 2 July 2014).

19. It therefore appeared to have been agreed that at least for the "immediate future", E's living arrangements would not be in issue, and the focus should be on the father's contact; once contact was restored and maintained, it equally appears that the issue would potentially become 'live' again. This is material, as (it will be apparent) at the 3 July 2014 hearing the Judge effectively disposed of the father's application for residence and contact, and imposed an extended embargo on him applying for any *section 8* order, justifying her continuing exercise of judgment in this way:

> "This is the contact and this arises out of the hearing on 13th May as extended in 20th June. This is not *the* hearing, this is the prelude to the hearing and I am sitting here and I am carrying on with it." (emphasis by italics in the original).

20. The Judge offers a degree of clarity to what she saw (by then) as her residual judicial function when ruling on the father's application for permission to appeal the 3 July 2014 order:

> "I agree that at the hearing in May I may have said I would not deal with the case but I did not feel that matters arising directly out of the May hearing could properly be dealt with by another judge".

In a separate ruling refusing permission to the grandparents to appeal the same order, HHJ Hughes QC said this:

> "At the hearing in May I tried to broker contact. The father said I was conducting a conciliation hearing and that would exclude me from hearing the case. I said I would not hear the matter but what happened next arose directly out of the hearing in May and I did not believe since it was a chain of events directly related

to the contact I had tried to order in May that it would be fair or right to give it to another judge".

21. The Order which flowed from the 13 May 2014 hearing specifically adjourned the father's application for residence "generally … with liberty to restore", a 'liberty' which was, as we say, significantly curtailed by the Judge some weeks later.

22. At the 13 May 2014 hearing, there had been a discussion of preferred contact centres as a venue for father's resumed supervised contact with E. The father wished this to take place at Contact Centre B; the mother preferred Contact Centre A. The Judge specifically directed (and this is in the Order generated on that day) that "neither mother nor father is to contact the said contact centres in between arranged sessions". Notwithstanding this direction, before the sessions had commenced the father telephoned Contact Centre A (on his own account on seven occasions; we have seen the father's partial records of the conversations). We have read the e-mail from the director of Contact Centre A (dated 29 May 2014) to the child's solicitor which describes the conversations thus:

> "… [the father] has obsessively / repeatedly called our organisation in the last couple of weeks. On each occasion he was extremely abusive, consistently making racist remarks, intimidating and threatening staff …. It is evident that centre staff are scared by the experience of dealing with [the father] and further dealings or contact arrangements at [the contact centre] are likely to pose significant risks to both his child and the centre staff. For the above reasons, [the contact centre] is not in a position to facilitate supervised contact sessions between [the father] and his daughter".

23. The final hearing of the father's application for residence had originally been listed for 16-20 June 2014. In view of the concession on residence (see [18] above), the parties agreed that a 5-day listing would no longer be required, but the afternoon of 20 June 2014 was retained for the giving of directions on contact. On 16 June 2014, the father wrote to the Court enquiring whether the hearing was still effective; he apparently received no reply. He assumed that the hearing was not effective, and did not attend; he was not, in our judgment, entitled to make such an assumption.

24. At the hearing on 20 June, and in the light of the father's communications with the contact centre (see [22] above), the mother informed the court that she wished to apply for all contact between E and her father to come to an end, and for the father to be subject to an order under *section 91(14) CA 1989*; she issued a formal application to that effect on that day and supported it with a detailed written position statement. Given the nature of this newly issued application, coupled with the father's lack of notice of it, the Judge rightly adjourned the proceedings to a hearing which she scheduled for 3 July 2014. An Order was drawn and sealed, listing the case for 3 July 2014; the order provided that the mother's applications will be "heard whether the father attends or not".

25. As it happens, none of the parties (including the child's solicitor) actually received the Order from the 20 June hearing. Nor did the parties ever receive a copy of the mother's application which had been issued on the same day. That said, on the evening of the hearing on 20 June, the child's solicitor e-mailed the father and advised

him that (a) the mother had issued applications for a cessation of contact and for a *section 91(14)* order, (b) of the new hearing date, and (c) that "[t]he judge … will hear the applications whether you attend or not". On 27th June the mother filed a further Position Statement; it is unclear whether this was served on the father.

26. On 2 July 2014, the father wrote to the court indicating that he assumed that the hearing on the following day would not go ahead given the lack of any formal notification of the hearing (which had been promised) and non-service of the mother's application; it is nonetheless clear from this letter that he knew about the general nature of the applications before the court. He (with some justification it seems) complained about the history of late service of Practice Direction Documents (*PD27A FPR 2010*) on him and the prejudice to him as an unrepresented litigant. Having been provided with at least the first of the two Position Statements of the mother in support of her applications, he provided a detailed response, adding that "if the mother raises any further issues I should be given the opportunity to respond to them".

27. The Guardian prepared a report for the Court for the 3 July hearing; his conclusion was that:

> "… unless [the father] can give the Court sufficient assurances that he will accept that the best placement for [E] is with her mother, that he is able to commit to bringing this four year long litigatory (sic.) process to an end and that he can commit to contact that the Court should terminate all direct contact between [E] and her father. In the event that [the father] seeks to continue or renew the litigation the Court should make a *section 91(14)* order for as long a period as possible."

28. On 3 July 2014, the mother, the paternal grandfather and the child's solicitor attended at court. The father did not attend and was not represented. Satisfied that the father had notice of the hearing (albeit erroneously initially believing that he had been served with the order listing the hearing) the Judge proceeded with the hearing. The mother addressed the Court informing the Judge that "[E] is very upset about the fact that [the father] has not seen her"; she emphasised how "stressed" she had become by the process, and wanted the litigation at an end. The paternal grandfather attended and invited the court to keep the proceedings alive, albeit not specifically advocating (as he made clear) on his son's behalf. The child's solicitor supported the mother's case. At the conclusion of the hearing, the Judge made the orders which are under appeal.

The judgment

29. The judgment under challenge is relatively short, extending to no more than ten paragraphs. The judge's decision on the issue of the suspension of contact (at paragraph [7]) is as follows:

> "The father's behaviour during the short period of my involvement has been in my judgement unreasonable. He was extremely argumentative during the hearing in May as I am sure the tape would show. At the end of the hearing I am aware there was a difficulty between the father and the Guardian which certainly involved raised voices as I received an e-mail from another solicitor who had witnessed what occurred which I attach to this judgment. He then embarked on a

tirade to the [contact centre A] and was very argumentative and in my view unreasonable in his communications with the other parties in the case. He said he would pay towards an Independent Social worker but then set to impose all sorts of conditions to this. I am afraid he is and has been in the past a person who is inconsistent and he does not mind what he says or to whom if they are not acting in the way he thinks they should. I have come to the conclusion that I am not doing anyone any favours if I allow the contact to continue. The mother is showing signs of stress and there is likely to be disagreement continuing between herself and the father and E is likely to get caught up in the cross fire. In my judgement a person who seriously wanted future contact to his four year old daughter would not sabotage a contact centre which may have assisted him and was more accessible to the mother for delivery of E simply because he had an alternative which he preferred when as he well knew the mother found the journey to the other quite onerous. A reading of the correspondence/e-mails is absolutely necessary if the reader is to understand my reasoning in its entirety. I predict that even if the sessions at [contact centre B] go smoothly there will be constant issues and it will be difficult if not impossible to implement contact in the community such is the irrationality of the father's behaviour. I have reluctantly come to the conclusion that I should accede to the mother's application supported by the Guardian and conclude that the father should not have contact to E."

30. The judge's rationale for the *section 91(14)* order is set out in paragraph 8 thus:

> "I am asked by the Guardian (sic. – actually it was the mother's application) to put a *91(14)* restriction on the father's further applications. This was first suggested by Judge Compston … and adjourned by His Honour Judge Altman…. The Guardian suggests the father has been warned of this and this final behaviour tip the balance in favour of making it. The Guardian says it should be for as long as possible. The Guardian's Solicitor says it should be for 5 years. It seems to me that the submission the father will only do things if they are when and how he wants them is made out in this case and the mother should not be expected to be subjected to this either through the Courts or otherwise for the foreseeable future. I believe I can take into account the fact that the parties are still in litigation and have not been out of litigation except for the first four months of [E]'s short life and there is not any prospect of normal contact – outside the contact centre – being established. Moreover, while the father holds any notion he will achieve residence of the child the mother would be anxious and it would not be in the interests of the child for this to be the case. I have come to the conclusion that there should be a ban under *section 91(14)* of the *Children Act 1989* and the father should not be able to apply to the Court unless the Court gave him leave on an *ex parte* application to the Court for further residence or contact before [E] attains the age of 10, that is before December 2019. At that time she may or may not wish to see him and may or not be able to contribute to such decisions."

Did judicially-assisted conciliation between the parties in respect of child arrangements for E (specifically E's living arrangements and contact) at an earlier hearing on 13 May 2014, disqualify the Judge from conducting a subsequent contested hearing on 3 July 2014?

31. We have explained above that the hearing on 13 May 2014 was set up by HHJ Altman for HHJ Hughes QC to determine whether E should attend the father's wedding celebration. During that hearing the Judge engaged the parties in some in-court conciliation. The father therefore submitted to this Court that the Judge should not have continued any involvement in the case, and specifically should not have determined the substantive contact and *section 91(14)* issues on 3 July 2014.

32. In private law cases concerning children, judges of the Family Court routinely engage the parties in conciliation at court hearings, in an endeavour to facilitate agreements; this is an ever-more important judicial function in cases of this kind, particularly given the increasingly high number of litigants who (since the funding changes brought about by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*) appear in private law proceedings unrepresented, without the benefit of independent legal, practical, or other advice. It is widely recognised that negotiated agreements between adults generally enhance long-term co-operation, and are better for the child concerned, and Judges are encouraged to promote this (see the 'Child Arrangements Programme' ['CAP'] *para.1.3 PD12B FPR 2010*). Indeed, the judge who conducts the First Hearing Dispute Resolution Appointment ('FHDRA') in private law children cases, which is generally the first hearing attended by the parties, is explicitly expected under the provisions of the CAP to attempt conciliation between the parties (see *PD12B FPR 2010, para.14.11*).

33. We wish to emphasise that the facilitation of in-court conciliation at a FHDRA (or indeed at any other hearing in a private law children case) does not of itself disqualify judges from continuing involvement with the case, particularly as information shared at such a hearing is expressly not regarded as privileged (*PD12B FPR 2010 para.14.9*). Were it otherwise, the "objective" of judicial continuity from the FHDRA (where, as indicated above, conciliation may have been attempted in accordance with the rules) to the making of a final order (see *PD12B FPR 2010 para.10*) would be defeated. The current arrangement should therefore be distinguished from:

    i) Old-style conciliation appointments, which operated prior to the implementation of the 'Private Law Programme' in 2004, the predecessor to the CAP (see *Practice Direction* [1982] 3 FLR 448; *Practice Direction: Conciliation – children*: [1992] 1 FLR 228: i.e. "If the conciliation proves unsuccessful the district judge will give directions (including timetabling) with a view to the early hearing and disposal of the application. In such cases that district judge and court welfare officer will not be further involved in that application".);

    ii) Non-court dispute resolution (by way of mediation / conciliation) conducted by professionals outside of the court setting: see *Re D (Minors) (Conciliation: Privilege* [1993] 1 FLR 932, *Farm Assist Ltd (in liquidation) –v- DEFRA (No 2)* [2009] EWHC 1102 (TCC)), and the Family Mediation Council Code of Practice for family mediators, paras 5.6.1 and 5.6.4;

    iii) A Financial Dispute Resolution (FDR) Appointment in a financial remedy case; the judge conducting such a hearing is not permitted to have any further involvement with the application, save for giving directions: see *rule 9.17(2) FPR 2010*. In a financial case, of course, the Judge is likely to have been armed to conciliate with the provision of all the privileged communications between the parties.

34. Private law proceedings in the family court have become more than ever "inquisitorial in nature" (*Re C (Due Process)* [2013] EWCA Civ 1412 [2014] 1 FLR 1239 at [47]) in large measure attributable to the overwhelming number of unrepresented parties who require and deserve more than just neutral arbitration; in such cases, particularly at a FHDRA or a Dispute Resolution Appointment, there is presented to the judge "a real opportunity for dispute resolution in the same way that an Issues Resolution Hearing provides that facility in public law children proceedings" (per Ryder LJ at [47] in *Re C (Due Process)*). We recognise that in exceptional cases, it is possible that a judge may express a view in the context of judicially-assisted conciliation which may render it inappropriate for that judge to go on to determine contested issues at a substantive hearing. Recusal would only be justified, we emphasise exceptionally, if to proceed to hear the substantive case would cause "the fair-minded and informed observer, having considered the facts, …[to]… conclude that there was a real possibility that the tribunal was biased": see *Porter v Magill, Weeks v Magill* [2001] UKHL 67, [2002] AC 357, [2002] 2 WLR 37, [2002] 1 All ER 465, [2002] LGR 51.

35. As we indicated at [18] above at the 13 May hearing the Judge enabled the father to recognise that his residence application was not currently likely to succeed; the father, for his part, appears to have accepted the judicial steer. We do not see why that indication on its own should at that stage of the case have caused the Judge to disqualify herself from maintaining case responsibility. It is not apparent that the parties took any position or made any other offer of compromise which would have given rise to any other potential conflict for the judge.

36. Be that as it may, it is clear from (a) the father's account of the 13 May 2014 hearing ([17] above), (b) the transcript of the 3 July hearing ([18] & [19] above) (c) the 3 July 2014 judgment ([17] above), and (d) the Judge's reasons for refusing permission to appeal ([20] above), that she accepts that she made it clear to the parties that she would <u>not</u> conduct any substantive or final 'hearing'. We turn to this point next.

    Did the Judge err in making substantive orders on 3 July 2014 (including a section 91(14) order restricting any application under section 8 CA 1989): (a) in the absence of the father? (b) on the basis of factual findings made without forensic testing of the documentary material, of some of which the father had no knowledge? And/or (c) having indicated to the parties that she would not conduct any hearing in relation to residence issues?

37. The Judge was rightly satisfied in our view that the father had notice of the hearing on 3 July, even if that was only informal notice. He, like any other party to family law litigation of this kind, is required to attend court hearings: see *rule 12.14 FPR 2010*, and notably *rule 12.14(2)*, and *rule 27.3 FPR 2010*. Indeed in this case, HHJ Altman had specifically ruled in his 25 April 2014 judgment that "all parties must attend all future hearings". If a party chooses not to attend a court hearing, and the Judge is satisfied that they have had proper notice of it, it is of course permissible for the hearing to proceed in their absence (see *rule 12.14(5)/(6)* ibid.). We do not believe that there is a proper basis to challenge the simple fact that the Judge proceeded with the hearing in the father's absence on 3 July, particularly given his track record of failing to attend court hearings in the past.

38. However, the father's absence was a significant factor which contributed to two material errors which in our judgment fundamentally undermine the integrity of the Judge's conclusions:

    i) She made findings of fact on documentary material of which the father had no notice, and on which he had had no chance to make representations;

    ii) She made substantive orders fundamentally affecting his relationship with his daughter, and his access to the court, having previously told the father that she would not 'hear the hearing' of any such substantive application.

    In [39-41] and [42] we enlarge on these points.

39. The judgment of 3 July 2014, and orders which flow from it, is predicated upon findings of fact which the Judge reached on written documentation (e-mails and position statements) which was not in conventional form (see *rule 22 FPR 2010*). We make no criticism of that *per se*, but consider that the judge should have cautioned herself about the possible deficiencies inherent in making findings in these circumstances, particularly where the evidence was not tested. She found that the father's conversations with Contact Centre A displayed "a truly monstrous display of manipulation" yet the father's written representations (dated 19 June and 2 July 2014), which she had apparently considered in reaching that conclusion, do not address this evidence in detail; indeed the father makes no specific reference at all in his submission to the e-mail from Contact Centre A (see [22] above). We cannot be certain that the father had even seen it.

40. Of more concern, the Judge refers to, and appears to rely on as evidence of the father's generally disruptive and belligerent conduct, an e-mail from a solicitor (unconnected with the case) who is reported to have overheard a heated conversation ("raised voices") between the father and the Children's Guardian following the 13 May 2014 hearing. The Judge at the 3 July 2014 hearing told those present that she "has no reason to distrust" the author of the e-mail, which she describes as "quite shocking". Again, the father, so far as we can tell, was unaware of this evidence and had no opportunity to challenge it; the father had as it happens separately written to the Court complaining that after the 13 May 2014 hearing the Guardian had threatened to report the father to his local social services department, but the Judge does not bring in to her reckoning the father's complaint.

41. It also appears that the father had not received the Guardian's report prior to the 3 July 2014 hearing; certainly he claims not to have seen it at the time he sent in his written representations to the court on the day prior to the hearing. We found no evidence that he had had seen the position statement of the child's solicitor which (by admission) "went a little further" than the Guardian's report/recommendation. The father had had no opportunity to comment on any of this material which rendered the judge's conclusions, in our judgment, highly vulnerable.

42. More significantly, at the hearing on 3 July 2014 the Judge made orders which went further than had previously been intimated, bringing to a formal end the father's relationship with his daughter for the foreseeable future, and curbing his ability to pursue an application under *section 8 CA 1989* in relation to her for many years. The

father was entitled to the view that the Judge had earlier given the impression that she would not herself deal with such issues, giving him 'liberty to apply' at the earlier (13 May 14) hearing. In short, in making these substantive orders (which directly impacted upon the father's prospective residence claim), the Judge did, in our judgment, precisely that which she had told the parties she would not do. In this respect we have reluctantly concluded that the Judge materially fell into error, leaving the father with an understandable sense of grievance, and reaching a conclusion which is in the circumstances unsustainable.

43. While sympathetic to the Judge's belief that she needed to make a decision about contact reasonably urgently (as a scheduled contact visit was due to take place on 5 July), we consider that the appropriate course would have been for her to make only an *interim* suspension of contact order on 3 July and adjourn for a further hearing when she could have been satisfied that the father at least had all of the relevant material.

In suspending the contact, did the Judge give proper weight to the range of welfare factors, and the child and father's Article 8 rights, engaged in such a decision?

44. The Judge's reasoning for her order suspending contact indefinitely is set out in paragraph 7 of her judgment, reproduced in full at [29] above. There is no indication in that passage that the Judge weighed the factors which she had identified as adverse to the father's application for the restoration of contact against the relevant welfare factors supporting it, including the obvious advantages for E of an ongoing relationship with her father through direct or indirect contact. Nor is there any reference to the undisputed evidence that when contact between E and her father had last occurred in 2013 it had been seen to be of a good quality. Regrettably, in our view, the Judge failed to follow the clear advice of the Guardian who reported that:

> "Any deliberation about the future direction of contact between [the father] and [E] needs to balance the benefits to [E] of a positive relationship with both of her parents with the impact on [E] of the continued conflict between her mother and father. The court will need to consider the impact of these proceedings on [E] and the implications for her if contact proceeds or is suspended indefinitely."

Adding that:

> "[E] would benefit from having an on-going relationship with her father. Her sense of self and her identity would be enhanced by the resumption of contact."

45. In reaching her ultimate conclusion the Judge was required to apply the essential welfare test, as required of her by statute (*section 1(1) CA 1989*) together with the factors in the checklist (*section 1(3)* ibid.). We recognise of course that, as Baroness Hale said in *Re G* [2006] UKHL 43, [2006] 2 FLR 629, any experienced family judge is well aware of the contents of the statutory checklist and can be assumed to have had regard to it whether or not this is spelled out in a judgment. However, we simply find no reference in this judgment to E's best interests, causing us to question whether they were given any or any sufficient weight or prominence. As Baroness Hale goes on to say ([40]):

"… in any difficult or finely balanced case … it is a great help to address each of the factors in the list, along with any others which may be relevant, so as to ensure that no particular feature of the case is given more weight than it should properly bear."

46. It appears to us that judicial condemnation of the father's litigation conduct (however well deserved) assumed an inappropriately pivotal significance in the judge's decision-making. Only when refusing the father's application for permission to appeal did the Judge refer in passing to E's best interests as having guided her conclusion.

47. Where an issue of such fundamental importance as the cessation of contact arises, we would expect a Judge to acknowledge and weigh in the balance the important *Article 8 ECHR* rights of the parent and child reflected by some or all of the factors discussed by this court in *Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521 [2011] 2 FLR 912; note from [37] onwards, and in particular [47] (per Munby LJ, as he then was) namely:

- "Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
- Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.
- There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.
- The court should take both a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.
- The key question, which requires 'stricter scrutiny', is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.
- All that said, at the end of the day the welfare of the child is paramount; 'the child's interest must have precedence over any other consideration."

48. The absence in this judgment of consideration of any such factors is all the more glaring given that in a judgment delivered only a few months earlier (February 2014) HHJ Altman had expressed the view that if the proceedings ended with an order for no contact this "would not appear to be in the interests of the child. She is reported as loving both parents and it was in her interest to have contact if it could be managed safely".

Was the order under section 91(14) CA 1989 appropriate in principle, and/or proportionate?

49. *Section 91(14)* of the *Children Act 1989* provides that:

> "On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court."

50. Orders under this subsection are very much the exception not the rule, and only where the welfare of the child requires it, having regard to the guidance given by this Court in *Re P (Section 91(14) Guidelines)(Residence and Religious heritage)* [1999] 2 FLR 573. Given the significant implications of this statutory intrusion into a party's ordinary ability to access justice, it is imperative that the Court is satisfied that the parties affected:

    i) Are fully aware that the Court is seised of an application, and is considering making such an order;

    ii) Understand the meaning and effect of such an order;

    iii) Have full knowledge of the evidential basis on which such an order is sought;

    iv) Have had a proper opportunity to make representations in relation to the making of such an order; this may of course mean adjourning the application for it to be made in writing and on notice.

51. These fundamental requirements obtain whether the parties are legally represented or not. It is, we suggest, even more critical that these requirements are observed when the party affected is unrepresented. Observations to this effect were made by Wall LJ in *Re C (Litigant in Person: Section 91(14) Order)* [2009] EWCA Civ 674 [2009] 2 FLR 1461, who added:

> "Where the parties are both or all in person, there is a powerful obligation on any court minded to make a *s 91(14)* order to explain to them the course the court is minded to take. This will involve the court telling the parties in ordinary language what a *s 91(14)* order is; and what effect it has, together with the duration of the order which the court has in mind to impose. Above all, unrepresented parties must be given the opportunity to make any submissions they wish about the making of such an order, and if there is a substantive objection on which a litigant wishes to seek legal advice the court should either normally not make an order; alternatively it can make an order and give the recipient permission to apply to set it aside within a specified time". (emphasis by underlining added).

52. In this case the father could not say that he had not been warned of the possibility of the imposition of a *section 91(14)* order. In June 2012, HHJ Compston had clearly threatened it (see [13] above). It had been on the cards in 2013 and 2014 before HHJ Altman and the father had notice of the mother's revived application by e-mail on 20 June 2014, accompanied by at least one of the two position statements prepared by the mother for that hearing. It is difficult to be sure that the father knew precisely what the order actually meant, though his response gives a sufficient indication that he did.

53. Given the length and intensity of the litigation it may be that it was indeed appropriate for the Court, in its discretion, to make an order under this subsection for a period of time; however, we consider that the Judge's reasoning in her judgment does not adequately explain or justify such an outcome. Butler Sloss LJ in *Re P* guides the court "in the exercise of its discretion" to "weigh in the balance all the relevant circumstances" (Guideline (2): emphasis by underlining added), subject to the overall test of what is in the best interests of the individual child (Guideline (1): emphasis by underlining added). In this case, while it is evident that, in exercising her discretion, the Judge considered the length of the litigation (particularly by reference to the age of the child), the difficulty of establishing "normal" contact between the father and child, and the evident hope of the father to disturb the current order by which E resides with her mother, she did not ostensibly consider (or refer to):

    i) the reasons for the difficulties in the father's contact with E, and whether they may at least in part be attributable to the conduct of the mother;

    ii) whether all available steps had been taken to maintain contact;

    and crucially

    iii) whether, and if so why, such an order would be in E's best interests.

54. The Guardian himself had recommended in his report for the 3 July 2014 hearing that such an order would be appropriate "[in] the event that [the father] seeks to continue or renew the litigation", and if so then it should be made "for as long a period as possible". It is not clear whether the father had seen this report prior to the hearing; if he had, he may well have formed the conclusion that the Guardian did not support a *section 91(14)* order at that time. However, in the later Position Statement prepared by the child's solicitor (again which the father may well not have seen prior to the hearing), the Guardian's position appears to have evolved into one preferring an immediate *section 91(14)* order for a period of five years which, it was said, "would be proportionate" (interestingly, in 2013, the child's solicitor had suggested a 2-year period). As we say, we are far from satisfied that the father knew that this was the Guardian's position.

55. Any Judge considering such an order will be bound to consider for how long it should be in place, and, given its obvious interference with a litigant's fundamental access to justice, to impose an order for the minimum period necessary. In this case, the Judge did not explain the rationale for the 5½ year embargo, save to observe that in 2019, E "may or may not wish to see [the father] and may or not be able to contribute to such decisions"; there was no obvious justification for relaxing the embargo when E was 10, nor was there any proportionality measure applied. The order ought to be proportionate to the harm it is intended to avoid (see *Re P*, Guideline (10)). In the particular circumstances of this case, the Judge should at least have given the father permission to apply to set it aside within a specified time (per *Re C* [51] above).

56. While recognising that each case must be determined on its own facts, we nonetheless note that Thorpe LJ in *Re C (Litigant in Person: Section 91(14) Order)* [2009] EWCA Civ 674 [2009] 2 FLR 1461, considered that "… the duration of the order, 5 years, in relation to a child of A's age seems on the face of it disproportionate" (see [8]); in *Re*

C the child, A, was 8 years old. Similar comments were made by Wall LJ (as he then was) in *Re G (a child)* [2010] EWCA 470 in relation to a five year *section 91(14)* order in respect of a child aged 3½ ("the period was excessive" [8], the Judge "went too far in imposing a period of five years" [9]). In light of those observations there was perhaps an even greater need for the Judge:

i) to explain the necessity and proportionality of a 5½ year long embargo in respect of an application concerning a child aged only 4½ (as E was at the time of the order);

ii) to give the father an opportunity to make representations as to the duration of the order.

57. In the circumstances, having regard to the deficiencies in the procedure, the insufficiency of a proper explanation of the rationale for the making of the order in the best interests of the child, and the absence of explanation as to the reason for its duration, we conclude that HHJ Hughes QC's order in this respect is wrong and cannot stand.

Conclusion

58. No one should underestimate the challenges to family judges of dealing with cases of this kind. A number of experienced family judges have laudably tried different methods, alternately robust and cautious, to achieve the best outcome for E, but appear to have failed. While we are conscious that the case has presented significant management issues, largely attributable it appears to the conduct of the father, regrettably judicial continuity has not been achieved and this may have added to the faltering process.

59. By allowing this appeal, we are conscious that we are consigning these parties to a further round of litigation concerning E; this is particularly unfortunate given the history of this case, and the inevitable toll which it is taking on all of the parties, evident from our own assessment of them in court.

60. In remitting the case for re-hearing, we do not intend to signal any view as to the merits of the mother's applications, or the likely outcome of the same. We are conscious that E has had virtually no relationship with her father for over half of her life; the Judge could not be criticised for observing, as she did, that a contact regime has thus far proved impossible to sustain. Our own summary of the relevant history above may demonstrate this sufficiently. However, given the life-long implications for E, her parents and family, of the orders which have been successfully challenged by this application and appeal, it is imperative that a proper determination is achieved, as soon as practicable, in order that fully-informed welfare-based decisions can properly be made in the interests of E.