Neutral Citation Number: [2020] EWHC 2906 (Fam)

Case No: **FA-2019-000024**

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2020

APPEAL FROM A FINAL DECISION OF HHJ OLIVER
IN THE FAMILY COURT SITTING AT CENTRAL LONDON

Before:

MR JUSTICE WILLIAMS

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Between:

BSA	**Applicant**
- and -	
NVT	**Respondent**

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- -

Jaqueline Julyan SC (instructed by **Awan Legal**) for the **Applicant**
Dorian Day (instructed by **Russells Solicitors**) for the **Respondent**

Hearing date: 06 October 2020

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JUDGMENT

This judgment is not certified as citable pursuant to PD Citation of Authorities [2001] 1 WLR 1 and FPR 27A para 4.3A.2

I direct that pursuant to FPR 27.9 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Judgment Approved by the court for handing down

Before Mr Justice Williams:

1. The Appellant father is BSA and the Respondent mother is NVT. They have two minor children: K and A. The children live with their mother in the former family home and the father lives in Switzerland. In 2018 the mother commenced proceedings under Schedule 1 to the Children Act 1989. The parties agreed a consent order concluding those proceedings on 11 December 2018, the order being approved by DDJ O'Leary; this appears to have been made after an FDR. Both parties were represented, and the mother had leading counsel. In summary, the order recorded the parties' agreement that the father would make a housing fund of £2.75 million available for the purchase of a new home for the mother and the children. It also makes provision for periodical payments and some other capital sums and a costs award. Upon the father taking specialist tax advice, a further order dated 13 February 2019 was agreed specifying the mechanics of implementation.

2. Thereafter, the father failed to provide the housing fund and so on 23 July 2019 the mother applied for enforcement of the December order and a week later the father began section 8 Children Act 1989 proceedings. There was a hearing with short notice on 5 August 2019. The Schedule 1 enforcement proceedings and the section 8 proceedings were consolidated. The children were joined with the benefit of a guardian who was served with the application notices in both sets of proceedings.

3. On 6 September 2019 the mother made an application for assistance with her legal costs of both the section 8 and Schedule 1 proceedings together with an application for a variation of the periodical payments order contained in the orders dated December 2018 and January 2019. The court gave directions on 17 September 2019 for each party to file statements and to make up-to-date financial disclosure. The mother did so but the father failed to provide any financial disclosure. The mother issued an application for a judgment summons on 7 October 2019. The enforcement application and the application for a costs allowance were listed for hearing on 8th October with a time estimate of ½ a day. A directions hearing was also listed in the Child Arrangements application.

4. On 8 October 2019 HHJ Oliver made the following orders:

    i) an order for financial disclosure from the father in relation the disclosure which should have been provided in accordance with the order dated 17 September 2019;

    ii) endorsed the order of December 2018 with a penal notice;

    iii) made a costs allowance order in favour of the mother in the sum of £45,967 (to be paid in instalments); and

    iv) set the matter down for a further hearing on 6 December 2019.

    Directions in the alternative were given depending on whether the mother wished to use the hearing on 6 December 2019 to pursue either the application for a judgment summons or her application for general enforcement.

5. The father appealed against the judge's order by an Appellants Notice issued on 29 October. Knowles J granted a stay of the judge's order on 30 October 2019 pending the determination of the application for permission to appeal.

Grounds of Appeal

6. The grounds of appeal are as follows:

Appeal against enforcement and committal

i) **The judge was wrong in allowing enforcement or committal for breaches of an agreement that do not constitute an order of the court.** The mother claims that the father is in breach of agreements which form part of the recital to the court order dated 11 December 2018. It is submitted that these agreements constitute contractual arrangements between the parties and do not form any part of the order which follows thereafter.

ii) **The judge was wrong in allowing enforcement or committal for breaches of an agreement where that agreement could not have been made as an order in Schedule 1 proceedings.** The agreement which the father has allegedly breached falls outside of what could have been made in terms of an order under Schedule 1 of the Children Act. The terms of the agreement go beyond what is permitted in the statute and accordingly are unenforceable by the family court.

Appeal against costs allowance order

iii) **The judge was wrong in making a costs allowance order without first considering whether there was in fact an inequality of arms.** It was made in submissions and put in evidence that the mother had been in receipt of £1,000 a week since last December, had also received a lump sum of £10,000 last December, is believed to have sold jewellery and other assets valued in the region of £75,000, none of which were accounted for as part of her application.

iv) **The judge was wrong in making a costs allowance order without the respondent having given full and frank disclosure regarding her financial position.** The mother as part of her evidence produced no bank or other financial statements in support of her claim to poverty. It will be submitted that the mother was required to make full and frank disclosure of her entire financial position before the court entertained any application for legal services costs funding. It is submitted that any application for legal aid would have required the mother to put forward her entire financial position before legal aid was granted, and that a legal services costs order should be treated on the same footing.

v) **The judge was wrong in making a costs allowance order when the respondent had made no genuine attempts to obtain a loan elsewhere.** It is recorded in the mother's evidence that she did in fact approach two lenders. Both of these lenders were approached by the mother in 2018 and refused to lend in Schedule 1 proceedings. Accordingly, it will be submitted that an application where it is already known that the lender will not lend is not a

genuine application and should not have been treated as such by the judge. It is also submitted that the mother was required to approach high street lenders rather than specialist lenders who she reasonably knew would not lend to her.

vi) **The judge was wrong in making a costs allowance order when the appellant had already offered to advance the respondent the necessary funds to cover legal expenditure**. In an email in September 2019, the father offered to advance the mother up to £50,000 to be deducted from monies she would be receiving from him in December 2019. With such monies available to the mother she would have been able to pay her legal fees without recourse to a costs allowance order.

7. On 5 March 2020 Knowles J refused permission to appeal. The stay on the order was lifted. The deemed date of service was 9 March 2020, the Court having sent the notice on 6 March 2020. According to the chronology the father applied to renew his application for permission to appeal at an oral hearing on 16 March 2020. On 30 March 2020 Knowles J directed that the application for oral renewal be listed before her on the first open date after the Easter vacation. The hearing was given a time estimate of one hour for submissions with one hour for reading and one hour for judgement. She directed that an Essential Reading list be provided. No such list appears in the bundle provided to me or in the skeleton argument and so I have had to identify myself what appeared to be necessary to determine the application. The respondent was not required to attend. The stay on the order of HH J Oliver was reimposed.

8. For reasons which I am not clear about the hearing did not take place after Easter as directed but was listed after the Whitsun vacation on 3 July 2020.

9. On 9 June 2020 the father issued an application within the appeal. That application sought:

i) the join the mother's solicitors to the proceedings and to injunct them from further acting in the proceedings;

ii) to adduce additional evidence; and

iii) to amend the Grounds of Appeal in the light of the additional evidence.

The application was supported by a submission document which asserted that subsequent financial disclosure provided by the mother established that she was untruthful in her statement of 23 September 2019 in saying that she only had £66 in her accounts; that she misled the court regarding her ability to pay her current solicitors in that the statements referenced payments to her solicitors of significant sums when she was claiming she could not pay them; and that she misled the court regarding a loan from her partner. It was also submitted that the mother had taken cocaine and alcohol which was a significant fact in relation to the child arrangements proceedings and that had it been known the judge would not have made the order he did. Amended grounds were not submitted with the application.

10. On 19 June 2020 Knowles J refused the application in respect of the mother's solicitors and adjourned the application in relation to additional evidence and to

amend the Grounds of Appeal to the hearing listed on 3 July 2020. She also gave directions for the filing of a fully searchable electronic bundle. Knowles J noted that:

"The application to adduce additional evidence is supported by over 450 pages of material. That volume of material is wholly disproportionate in circumstances where the application simply failed to identify in plain terms and with particularity what specifically was of relevance in the mass of additional documentation which might satisfy the test in Ladd v Marshall [1954] 3 All ER 745."

11. Again, for reasons which I am unclear about, the hearing listed for 3 July did not take place and was I believe relisted during the vacation. Due to an unavoidable clash of commitments Knowles J was then unable to hear it and listed the matter in the vacation in September. The father's counsel was unavailable for that date and so the matter was again adjourned and relisted before me by order dated 5 August 2020. The time estimate given for the hearing was one day to include reading and preparation of judgment and the date specified was 6 October. A list of essential reading was to be provided. It was not.

12. On 1 October 2020 the father issued a further application seeking an order that the respondent disclose:

    i) payments made to her legal representatives in the lower court proceedings; and

    ii) the terms upon which she has instructed her legal representatives to act in the lower court to include their remuneration.

    The time estimate given for the hearing was three hours. The application is accompanied by a witness statement which says that the application is made as a result of admissions made by the mother during the hearing on 1 September 2020. I'm not sure why or how that explains the delay of in excess of four weeks when what was said would have been known immediately even if the transcript was not available. The emails which accompanied the application suggested that the hearing today be relisted for 1 day before me at some point after 27 October. In practice this would have meant hearing the application in mid-December.

13. I heard the applications today. Ms Julyan represented the father. Mr Day represented the mother. I am grateful to them for their written and oral submissions.

The Father's Case

14. The father's detailed submissions are set out in the skeleton argument dated 20 December 2019. Further submissions are included in the application to admit new evidence and to amend the Grounds of Appeal. A witness statement accompanies the application for disclosure of information about how the mother funded the litigation. Ms Julyan supplemented and expanded upon various aspects of the written documents during her oral submissions. Her principal focus during the time allotted to her submissions was on the application to admit further evidence/Disclosure and to amend the Grounds of appeal rather than on the substantive application for permission to appeal itself. For reasons which were not explained to me the father's team had not complied with the direction given by Knowles J in her order of 30 March 2020 (which reflect FPR PD 30A4.14) to file a statement setting out the reasons why permission

should be granted notwithstanding the reasons for the refusal of permission. Thus I remained in the dark until Ms Julyan made the point that the February 2019 order provided for the property to be purchased and leased to the mother which was not an order that the court could have made. In this regard Ms Julyan relied upon my decision in *DN-v-UD [2020] EWHC (Fam) 627* where I recorded at paragraph 86 that a long lease arrangement was not an order the court could make. I shall consider the points made on behalf of the father in my analysis later in this judgement.

The Mother's Case

15. The mother's response to the original grounds of appeal and skeleton argument are contained within her skeleton argument filed on her behalf on 6 February 2020. The case in relation to the application to adduce further evidence and to amend the Grounds of Appeal dated 1 June 2020 is contained within her written submissions dated 18 June 2020. Mr Day who appeared on behalf of the mother had also filed a written document which dealt with today's hearing and in particular the application issued on 1 October. Unfortunately, this was logged as a submission on costs and I had not read it before the hearing commenced. This was doubly unfortunate in that it was the only document which contained an essential reading list. Happily, the documents identified in it were ones which I identified under my own steam and so had read them in any event.

Appeals: the Legal Framework

16. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for serious procedural irregularity. The test for granting permission [FPR 30.3(7)] is:

    i) there is a real (realistic as opposed to fanciful) prospect of success; or
    ii) there is some other compelling reason to hear the appeal.

17. It is clear from appellate courts of the highest level, that an appellate court should be wary of interfering with first instance judgments in relation to interlocutory or case-management issues and should not be tempted to substitute our own decisions merely because the appellate court might have reached a different view.

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

    i) an error of law has been made;

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

    iii) the judge has clearly failed to give due weight to some very significant matter, or has clearly given undue weight to some matter, *B-v-B (Residence Orders: Reasons for Decision) [1997] 2 FLR 602*;

    iv) a process has been adopted which is procedurally irregular and unfair to an extent that it renders the decision unjust: (has there been an unseemly rush to

judgment) *Re S-W (Care Proceedings: Case Management Hearing) - [2015] 2 FLR 136*; or

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

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

20. In *Re F (Children) [2016] EWCA Civ 546* Munby P summarised an approach to appeals:

22. "Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."

23. The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):

> *"The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*

It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".

21. FPR 30.12 (2) provides that unless it orders otherwise, the appeal court will not receive either oral evidence or evidence which was not before the lower court. This is subject to the overriding objective and the factors identified in *Ladd-v- Marshall [1954] 1 WLR 1489*, which the Court of Appeal have confirmed (see *Gillingham-v-Gillingham [2001] EWCA Civ 906*) remain relevant. Thus, the discretion to admit fresh evidence would be exercisable if:

    i) the evidence could not have been obtained with reasonable diligence for use at the trial;

    ii) the evidence was such that if given it would probably have an important influence on the result of the case, though it need not be decisive; and

    iii) the evidence was credible.

    This all being subject to the overriding objective to deal with the case justly, including proportionately.

ANALYSIS

22. I have considered all the documents provided and been assisted by skeleton arguments and submissions on behalf of the father and the mother.

The Application to admit further evidence and to amend the Grounds of appeal

23. The Appellant seeks to put in evidence of the Respondent's alleged non-disclosure and drug use. Although the application issued on 1 October 2020 is framed as an application for disclosure of information, in her submissions Ms Julian emphasised that it was in effect an extension of the application to admit further evidence in that it sought to uncover how the mother had funded the Children Act proceedings over the course of late 2019 and 2020 notwithstanding that the order for payment of a costs allowance had been stayed for the majority of that period. The effect of granting either application she submitted would require this hearing be adjourned in order to revise the Grounds of Appeal and to file a supplemental skeleton argument. She said that amended draft grounds had not been provided to the court because the father's team were under the impression that the court had refused to accept such. I was unable to find any order and usually draft amended grounds would accompany the application. However during submissions Ms Julyan and I clarified that the nature of the draft grounds would be to the effect that the evidence demonstrated that the mother had misled the court as to her true financial position and that had the court been aware of the information now before the court it would not have been satisfied that the test for making a costs allowance order was met.

24. The essential points which emerged from the original June application to adduce fresh evidence and 1 October disclosure application seem to me to be these:

    i) The mother's statement of 23 September 2019 that she only had £66 in her accounts at that time was shown to be untrue when she disclosed her bank statements;

ii) The mother misled the court regarding her ability to pay her solicitors because the bank statements show payments to the solicitors of many thousands of pounds. In her statement to the court in support of the costs allowance application mother had said she "*..had sold all of the modest assets she owned and she did not have the funds to meet legal costs to now ensure that he adheres to the order which was made. I continue to owe approximately £200,000 in historical legal costs to solicitors*. Ms Julyan highlighted a payment of £5000 made on 5 August 2019, a payment of £1000 made on 10 September and another payment of £1000 made on 8 October. Although it was not possible to identify the date or specific sum it was also asserted that the mother had sold a car and had paid the proceeds to her solicitors; it being thought the sum post- dated 8 October 2019 and that the sum was around £20,000;

iii) The mother had misled the court regarding a loan she had previously obtained from her partner. Bank statements were said to show that the mother paid the partner the money in order for it to be loaned back to her;

iv) The mother has now accepted that she commenced a business and so she had financial resources available to her; and

v) The mother has subsequently been shown to have used cocaine and alcohol and this was not known at the time the order was made. Had the judge known this he would have re-evaluated the need for a costs allowance order.

25. Ms Julyan submitted that the evidence had not been available to the court, that it was material to the determination of the costs allowance application and the appeal and that the order would not have been made had the court been aware of it. The Skeleton cites *Sharland v Sharland [2015] UKSC 60* and notes that the court has the power to set aside its own order on the basis of non-disclosure. Ms Julyan submitted that in these circumstances the court could also deal with the matter as an appeal or indeed could exercise its own jurisdiction to set aside the order on the basis of non-disclosure.

26. The mother's response to these points were that:

i) All of the information was available if reasonable diligence been used by the father. No application for disclosure of any documentation was made prior to the costs allowance hearing. The first limb of *Ladd-v- Marshall* is therefore not satisfied;

ii) The mother was not untruthful in her statement although she was in error in relation to the sum, she had in her bank accounts. Her bank statements show that she had something like £3-400 in her accounts because she had overlooked what I think was a household account which contained a couple of hundred pounds. The statement appeared to show this to be so;

iii) The mother's statement did not maintain that she was unable to pay any sum at all to her solicitors but rather asserted that she did not have the funds to meet legal costs to now ensure the father adhered to the order. She was able to pay some costs in particular disbursements for court and counsel's fees;

iv) The mother disclosed that she had taken a loan from her boyfriend. The statements show how the sum was dealt with and what the father interprets as deceit of the mother paying the sum to the boyfriend in order to receive it back as an apparent loan is shown simply to be the sum being erroneously transferred into another account rather than to her solicitors and having to be re-transferred;

v) The mother accepted that she had commenced a business and the transcript of her evidence shows that she had derived no income from it so far. She was solely reliant on the father. She also accepted that the car had broken down and because she could not afford to repair it she had sold it and paid the money to her solicitors; and

27. Evidence as to the mother's alcohol and/or drug misuse would not have been relevant to the determination of the application for a costs allowance. The court was aware that the mother's use of drugs was a live issue. I also note that Mr Day raised a number of procedural points, particularly in relation to the recent application. Given my view on the merits I have not considered it a proportionate use of time to determine them.

28. I do not think it is necessary for the purposes of this judgement to descend into the debate on whether the alleged non-disclosure should be dealt with better as a set aside application or as an appeal. An application to set aside the order has not been made and if it were made the appropriate target of such an application would be HHJ Oliver not me. As the applications have been made to me within the parameters of the appeal it falls to me to determine them within that jurisdiction.

29. It seems to me that the bottom line in relation to both the application to adduce fresh evidence of 1 June 2020 and the application to adduce further evidence/provide disclosure of 1 October is the second and third limb of the *Ladd-v-Marshall* test; is the evidence such that if given it would probably have an important influence on the result of the case, though it need not be decisive; is it credible?

i) The mother disclosed the loan in her statement in support of her application. What her solicitor may have said at the hearing in August in the course of advocacy seems to me to be beside the point. The bank statements which we eventually located appear to support the mother's account that there was a double transfer rather than she originally having the sum. Given the amount involved and given the explanation supported by the bank statements I do not consider that the father satisfies either the second or third limbs.

ii) In respect of the further sums paid of £1,000 in September and in October the statements show that the sums were paid either on the day or very shortly after the mother had received a maintenance payment from the father. The fact that the mother was using the maintenance payments to keep her solicitors on board if anything adds weight to the need for a costs allowance order rather than demonstrating that the mother in fact had access to additional funds or had misled the court as to her ability to pay anything to her solicitors. The father's contention that he was 'over-paying' maintenance is difficult to justify given the amounts had been agreed by him less than a year before. Had the information been known to HHJ Oliver, or if it was admitted on the appeal, I

do not consider it would have any material impact. In the scheme of the sums set out in the costs schedule a couple of thousand pounds is a drop in the pond.

iii) In relation to the sale of the Range Rover and the payment of the proceeds this evidence clearly post-dates the hearing and so would probably be set aside or Barder territory if one were to be technical. However, the court was aware, as was the father, that the mother owned a car. The fact that it was subsequently sold and these funds paid to her solicitors does not in my view support an argument that had the court been aware of that possibility that it would have materially altered the decision. It seems inconceivable that a judge would require a mother of two children to sell the family car in order to pay her legal fees; particularly when the father was a man of very significant means. Thus I do not consider that if this evidence were admitted for the purposes of the appeal it would have an important influence on the outcome of the appeal.

iv) The evidence in relation to the mother having commenced a business after the order was made is similarly in my view immaterial to the outcome of the appeal. The relevant part of the transcript reads: "*No, I don't have a business. I started a business just before Covid. It had zero sales. There is zero turnover. Unlike Mark, I am not a seasoned businessman. I do not have means. I do not earn £750,000 a year. My sole income is from Mark. The money that I should have now so that I could invest it in a home, is being withheld from me"*. It hardly amounts to the admission of gross non-disclosure that the father seeks to suggest. It also is not relevant to the application for disclosure of payment details.

v) Her evidence is that she was deriving no income from it and there is nothing that the father can point to which suggests that she was deriding some significant income from it which might support an argument that the order ought to be set aside or the appeal allowed as a result of subsequent events. I therefore do not consider that this evidence would have an important influence on the outcome of the appeal.

vi) I do not accept that the statement of the mother was materially misleading. The difference of £200 in her bank accounts is de minimis. She did not assert that she was unable to pay anything at all to her solicitors but rather that she was unable to pay the costs of pursuing the proceedings. Nothing in the evidence that the father seeks to admit suggests that this was wrong. The fact that the mother has remained represented throughout the Children Act proceedings does not prove that as of October 8, 2019 she was either misleading the court or was in a position to pay her solicitors. The payments that can be identified have been explained. The arrangements that the mother has been able to make to retain representation do not demonstrate that the basis for the order was wrong nor does the fact of representation alone have a material impact on the outcome of the appeal. The adverse effects of the stay of the order meant the mother would have been unrepresented had some means not been found to affect that. I do not know how that was done but it does not demonstrate that the basis upon which HHJ Oliver made his order was wrong and thus I do not consider that admitting that evidence would have a material impact on the outcome of the appeal.

vii) The subsequent emergence of evidence that the mother was indeed misusing drugs and alcohol seems to me to be irrelevant for the purposes of the appeal. If the court when it delivers its judgement on the child arrangements application considers that the mother's conduct including any denial of substance misuse is significant it might consider whether she ought to bear any of the costs of those proceedings. However to seek to deploy evidence of the outcome of proceedings in order to attack a costs allowance order would be to encourage an ex post facto assessment by which a party seeks to unravel interlocutory orders on the basis of what the final outcome was. This would be inappropriate and costly. The proper mechanism for dealing with such issues is in costs in the main proceedings.

viii) Costs allowance and legal services orders are by their very nature often made at the outset of proceedings when evidence is thin on the ground and when the issue is determined at a short interlocutory hearing. The court in those circumstances has to do its best with the material available to it and the submissions made to it. The evidence which the father seeks to rely on to undermine the original order in my view falls far short of anything that could reasonably be said to likely have an important influence on the outcome of the appeal.

30. I therefore refuse the father's applications to admit fresh evidence or for disclosure of the means by which the mother's lawyers were funded through the Children Act proceedings.

31. That refusal also determines the application for permission to amend the Grounds of Appeal. Without the admission of the evidence that application has no basis and so I refuse that application.

Permission to Appeal

32. Turning to the Grounds of Appeal, the father asserts that the directions given with respect to enforcement and committal were wrong in law. First, the matters said to have been breached by the father were recitals to the December 2018 consent order and thus not terms ordered by the court itself. They merely established contractual terms which might be enforceable in civil proceedings. Second, those matters went beyond the allowable orders the court might make in Schedule 1 proceedings. To allow enforcement of such terms would be going beyond that permitted by statute. Ms Julyan supplemented the Skeleton Argument. She submitted that the February 2019 order provided a mechanism by which a property would be purchased for the mother and children and provided on a long lease. This was not an order that the court could have made: she relied on paragraph 86 of *DN-v-UD* and the terms of the Act itself. She also referred me to an extract of a practitioner work on financial remedies which she said supported the contention that recitals and orders were different and that it was contemplated that some parts of orders would be enforceable only by a contract action. I was not provided with an extract of this work.

33. Thorpe J in *H v H (Financial Provision)* [1993] 2 FLR 35 took no issue with the proposition that a recital can be enforced as if it had been an order of the court. *Atkinson and another v Castan and another (1991) The Times, April 17* is cited in support. Woolf LJ said:

> *"It is clear from that document first of all that the compromise was set out in full in the recitals; secondly, that it was intended that the compromise so set out should be included as part of the record of the decision of the court; thirdly, that the purpose of this being done was to ensure that the compromise would have the added status which results from a compromise being part of or incorporated into a decision of the court; fourthly, that the obvious purpose of this added status was to put the plaintiffs in a position where they would have the advantages, which would not otherwise be available, of going back to the court in the existing action to have the compromise enforced if the court was prepared to make the necessary orders to achieve this result; and fifthly and finally, that in these circumstances it was implicit, although not express, that there should be liberty to apply for the purposes of enforcing the action. When the matter came before the court, the court had a discretion as to whether or not in the circumstances to make the further orders. On the material which was before the judge in this case there was ample reason why he should regard it as sensible and desirable that the plaintiffs should not be required to bring a fresh action. He then made the orders to which I have already referred."*

34. It would be surprising if the detailed and comprehensive agreement that the parties reached securing the future material needs of the children and crystallised on the face of an order in the formality with which it was expressed was not intended to be legally enforceable. For the father to suggest that this is not an enforceable order but merely an enforceable contract is surprising given that it is in the agreement part of the order of December 2018 that the full and final satisfaction clauses are found. It seems improbable that the mother would not have wished to have the full arsenal of enforcement powers open to her should the need arise and should voluntarily accept enforcement by contract action only in order to assist the father in terms of his tax liabilities.

35. In addition the interpretation that it was intended that the agreement should become part of an order is the only interpretation that makes sense of the matter being adjourned to allow the father to seek specialist tax advice; the parties distilling the mechanics of implementation in a 'consent order'; and that same order providing liberty to apply for implementation.

36. The Appellant agreed to settle £2.75m for the purpose of providing the children with housing. In the order of December 2018, it was done on terms that appeared consistent with a settlement of some form. The adjournment to consider the mechanism and the reference to seeking tax advice suggest that both parties had in mind the alternatives of settlement or long lease.

37. The particular difficulty with the father's submissions is that the Penal notice was attached to the December 2018 order not the February 2019 order which refers to the long lease. The order of December 2018 was a standard family court consent order. Rule 33 of the FPR 2010 contains provisions relating to applications for the family court to enforce an order made in family proceedings. Orders made pursuant to Schedule 1 fall within the ambit of that Rule. The agreement contained in the December 2018 order provided for the father to purchase a property for the benefit of the mother and the children and section 1(2)(d) of Schedule 1 gives the power to

make an order for the settlement of property for the benefit of the child. The recital to the December 2018 order fell squarely within what was lawfully permissible under Schedule 1. I accept the submissions made by the mother that this analysis accords with Chapter 24.43 of Rayden and Jackson on Divorce which states that, "*where an order of the court consists in part of a recital containing an agreement imposing an obligation on a party, and in part an order, the recital may be enforced provided the court would have had jurisdiction to make an order in like terms*". The December 2018 order complies with this requirement. In any event the December 2018 order contains other matters whether in the recitals or in the formal part of the order (including periodical payments) which plainly would permit the court to attach a penal notice to it. The penal notice that HHJ Oliver provided for was not limited to any specific paragraph of the December 2018 order but rather referred to it in its entirety. In addition, I accept, as submitted by Mr Day, that a penal notice is in effect a warning of the possibility of committal proceedings. Although it is part of the enforcement toolkit it is a precursor to true enforcement. The father's arguments that the order is not capable of enforcement because it is in truth an agreement not susceptible to enforcement by committal could of course form part of a defence to an application to commit for failure to comply but I do not accept that there is any merit in the ground that the order of December 2018 could not properly have a penal notice attached to it.

38. Had the penal notice been attached to the specific paragraphs of the order of February 2019 which set out the long lease mechanism the father might have persuaded me that permission should be granted to explore that issue in more depth. However, that is not the order which is appealed against. The order of December 2018 is perfectly capable of being interpreted as a settlement and indeed the court would strive to interpret it in a way which was consistent with the statutory scheme in any event. Thus, I am entirely satisfied that the December 2018 order could properly have a penal notice attached to it.

39. I therefore refuse permission to appeal in respect of these grounds of appeal.

40. The father also appeals against the making of a costs allowance order. I have read the father's submissions that the court did not have the jurisdiction to make a legal services payment order but that was not the order made by the court which was a costs allowance order which the court has the clear jurisdiction to make in these proceedings. It is clear from the transcript that the judge applied the correct test [see paragraph 2 of the transcript of judgment given on 8 October 2019]. I note the order was made in circumstances where the father had failed to provide any financial disclosure and where the mother's disclosure established straitened circumstances. I dismiss these grounds of appeal.

41. Ground 3 is not pursued in the father's Skeleton Argument. In any event there was self-evidently the risk of inequality of arms. The father is very wealthy whereas the mother still owed large sums to her representatives (both Vardags and Russells) from the previous proceedings, which were meant to be paid by the mother.

42. Ground 4 asserts that the judge was wrong in making a costs allowance without the mother having given full and frank disclosure regarding her financial position. The father does not particularise in what way the mother's disclosure is said to be lacking. It is of note that it was the father who was singled out for his lack of compliance with

directions and omission of full and frank disclosure. The jurisprudence in relation to costs allowances sets out the approach that the court is required to take. It is not a requirement that an applicant makes full and frank financial disclosure. The court needs to be satisfied that the applicant requires costs allowance in order to provide equality of arms and that involves demonstrating that she is unable to obtain legal representation without a costs funding order. That requires some evidence of the individual's current income and capital position and their inability to fund legal representation at the required level from their own resources, an inability to borrow the money or to secure funding from legal aid or other resources.

43. The father also submitted that the costs allowance order should not have been made until the mother had attempted to raise funds by way of a litigation loan. Though he accepted she had approached two lenders, he asserted this was a sham as those lenders had been previously approached by her in 2018. It is of note that some of the rejection letters exhibited to the mother's witness statement explain the high improbability of obtaining funding for children proceedings from a litigation funder. That was a matter of fact for the judge who declared himself satisfied that the mother had looked at various lenders and who had taken account of her indebtedness in costs to her present and former legal advisers. I refuse permission to appeal in respect of this ground of appeal.

44. The final substantive ground sought to suggest that the judge was wrong to make a costs allowance order when the father had already offered to advance the mother the funds to cover her legal expenditure. The £50,000 to be advanced to the mother formed part of the order of December 2018 and the terms of paragraph 5(vii) are outwith the mother's ongoing need for monies to pursue her applications. It would have been wholly inappropriate for her to pledge any money received from the father for the benefit of the children to meet legal fees which were not the intended purpose of the monies. There was, in those circumstances, no need for the judge to deal with this submission in his judgment.

45. The father from paragraph 13 to 18 of his skeleton argument raises a number of procedural points in relation to the committal proceedings/judgment summons. These are not pleaded in his Grounds of Appeal and I therefore do not propose to address them.

Conclusion on the Appeal and associated applications

46. For the reasons set out above I therefore dismiss the application to admit further evidence in the appeal. I consider the application to be totally without merit. I dismiss the application to amend the Grounds of appeal. I dismiss the application for disclosure of the means by which the mother funded legal representation. I do not consider that the father has demonstrated a realistic prospect of success in relation to any of his grounds of appeal nor is there any other compelling reason to grant permission and I therefore affirm the decision of Mrs Justice Knowles to refuse permission to appeal. The stay on the order will be discharged.

Costs

47. The mother seeks an order that the father pays her costs of and occasioned by the appeal and the associated applications. The costs schedule quantifies those costs at a

total of £27,364.20 including VAT. A summary assessment in accordance with FPR PD 30A 17.1(b) and (c) is sought.

48. Mr Day accepts that the starting point in relation to costs on an oral application for permission to appeal is that if the court does not request submissions from or attendance by the respondent costs will not normally be allowed to a respondent who volunteers submissions or attendance [FPR PD30A 4.22]. However he says in this case the court did in effect request submissions from the mother (the order is framed if so advised) and when the matter was listed for an oral hearing she was not required to attend. The order also said that she was not required to attend as the court had her written submissions under costs estimate. It noted that the father should be aware that, if unsuccessful, he may be required to pay her costs in connection with this appeal. Mr Day notes that CPR PD 52B para 8.1 supplements FPR PD 30 A. Whilst it notes that costs will not be awarded to the respondent where they attend an application for permission to appeal that is subject to the proviso where the court has ordered or requested attendance by the respondent or where the court has ordered that the application for permission to appeal be listed at the same time as the determination of other applications or where the court considers it just in all the circumstances to award costs to the respondent. Mr Day notes that there has been significant non-compliance by the father with the procedural requirements (for instance failing to provide the statement required setting out what points would be taken at the oral permission hearing) and that the late filing of the application of the 1 October 2020 with the associated application to adjourn this hearing meant that the mother's team had to attend.

49. Ms Julyan submitted that the court ought to apply the usual rule for costs on oral permission hearing. She characterised the other applications as ancillary and only requiring a response by the mother in the substantive appeal had they been allowed. In relation to the amount of costs she referred to an earlier costs schedule which she thought had been served last week. I note that a costs schedule appears to have been served in June and it may be that which she was referring to. She said that costs schedule was substantially lower than this and that the increasing costs in the course of a week was inexplicable. She also noted that the costs schedule claimed for various items which appeared excessive including seven hours attendance at court for today's hearing.

50. I am satisfied that this is an appropriate case to make a costs order. The court in effect requested submissions from the mother in the paper application which were plainly of significant assistance to Knowles J in determining that, as they have been to me. Whilst the mother's attendance at this hearing was not requested the listing of the two other applications in particular that of 1 October 2020 made her attendance in effect unavoidable. As the father submitted the effect of granting that application would have been to further adjourn the hearing of the appeal which has now almost reached the first anniversary of the making of the order under appeal. It was therefore entirely appropriate and indeed inevitable that the mother's team would attend in order to oppose that course of action. I'm satisfied that they were right to do so. I'm therefore satisfied that the situation falls within that contemplated by both the FPR and the CPR and that it is just in all the circumstances to award costs to the mother. The disparity in the parties' financial positions adds further force to my conclusion that this is the just result. The costs schedule covers the period from February through till today,

incorporating the written submissions on the original application for permission, the written submissions on the June application and the preparation for and attendance at today's hearing. I note that Counsel's fee for attendance today is £1,250. I do not have a costs schedule from the father against which to benchmark the mother's costs but they do not appear to me to be excessive given the amount of paperwork which has had to be considered in relation to these applications. Ms Julyan is right to point out that seven hours attendance by the solicitor for today's hearing has not proven necessary, the oral submissions only lasting some two hours. Subject to that the other amounts claimed seem to me to be reasonable and so I will summarily assessed the solicitors costs at a total of £15,500 together with counsel's fees of £5,750 plus VAT making a total in my calculation of £25,500. That will be payable within 14 days of today.

51. That is my judgement~~.~~