Neutral Citation Number: [2019] EWHC 421 (Fam)

Case No: 2018/0149

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2019

Before :

THE HONOURABLE MR JUSTICE COBB

- -
- -

Re P & N (Section 91(14): Application for Permission to Apply: Appeal)

- -

Miss Kate Hughes (instructed by **Full Stop Law, Solicitors**) for the Appellant (mother)
The father appeared in person

Hearing dates: 21 February 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public. The judge has given permission 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.

The Honourable Mr Justice Cobb :

Introduction

1. At the centre of this family dispute are two boys: P, now aged 8, and N, now aged 6. They live with their mother, the Appellant. They currently have no contact with their father, the Respondent.

2. Private law (*Part II Children Act 1989: 'CA 1989'*) proceedings relating to P and N began in 2013, at the instigation of the father, shortly after the parents' separation, when N was not yet one year old. In January 2015, following a fact-finding hearing (August 2014) and multiple welfare hearings, a district judge sitting in the Family Court at Worcester determined, exceptionally, that it was in the best interests of the boys that the father should have no further direct or indirect contact with them; the boys were then aged 4 and 2.

3. Within months, the father made a second application for a child arrangements order, seeking to spend time with the boys. In July 2016, the district judge dismissed this renewed application, and imposed an order under *section 91(14) CA 1989*, prohibiting the father from making a further application for an order under *section 8* of the *CA 1989* in respect of the boys without obtaining the prior permission of the court. The *section 91(14)* order was expressed to last for a period of 3 years (i.e. to 26 July 2019).

4. In the period since July 2016, the father has made several further applications to the Family Court in Worcester; I identify and briefly discuss these in considering the history (see [23] below).

5. Materially for present purposes, in March 2018, the father made an application for permission to apply for a *section 8* ('spend time with' or 'contact') order in relation to the boys; this was the *second* such application since the imposition of the *section 91(14)* order in July 2016. The application was heard by His Honour Judge Plunkett on 5 July 2018, without formal notice to the mother, or to the solicitor for the child (the boys having been joined to the earlier proceedings and represented by a Children's Guardian under *rule 16.4 Family Procedure Rules 2010;* '*FPR 2010*'). The Children's Guardian, whose role at the conclusion of the proceedings had converted to one of named 'officer' under a Family Assistance Order, had been invited to attend the hearing on 5 July, but was not in fact present. By order of 28 August 2018, the judge granted the father's application.

6. Once notified of the outcome of the father's application, the mother sought permission to appeal the 28 August order. Her single ground of appeal is that the Judge was wrong to grant the father's application without hearing from her, or receiving her representations. On 30 October 2018, Williams J granted permission to appeal. I heard the appeal on 21 February 2019, and announced at the conclusion of the hearing that I would allow the appeal and remit the case to Mr Justice Keehan as Family Division Liaison Judge of the Midlands Circuit.

7. This judgment sets out my reasons.

The relevant law

8. *Section 91(14)* of the *CA 1989* provides:

> "(14) 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."

Where 'leave' is sought (I use the word 'permission' in this judgment in place of 'leave', as is now the custom) the application is made in accordance with the *Family Procedure Rules 2010, Pt 18*.

9. Orders under *section 91(14)* are very much the exception not the rule, and are only made where the welfare of the child requires it, having regard in particular to the guidance given by the Court of Appeal in *Re P (Section 91(14) Guidelines)(Residence and Religious heritage)* [1999] 2 FLR 573 ('*Re P (Section 91(14) Guidelines)'*). As it happens, this appeal does not give rise to specific consideration of whether the order was rightly made in the first place, but the procedure adopted when the judge considered the father's renewed application for permission to make a *section 8* application on 5 July 2018.

10. To set the legal context:

i) Nothing in the *CA 1989* or the *FPR 2010* specifically prescribes how the court should approach an application for permission to apply for a *CA 1989* order following the imposition of a *section 91(14)* order; I do not regard this as an application to which *section 10(9) CA 1989* applies as the father would be 'entitled' (*section 10(4)(a)*) to apply for an order were it not for the court-imposed restriction;

ii) A judge sitting in the Family Court generally enjoys a wide spectrum of procedure when determining applications under the *CA 1989* (*Re B (Minors) (Contact)* [1994] 2 FLR 1 at p.6[1]);

iii) That there is no more recent or authoritative pronouncement on the appropriate procedure under review here than the Court of Appeal's judgment in *Re S* [2006] EWCA Civ 1190, [2007] 1 FLR 482 ('*Re S*');

iv) *Section 1(1)* and *section 1(3)* of the *CA 1989* do not apply to an application for permission to apply for an order, although the welfare of the child will be a relevant consideration. The court should, however, have some regard to the 'overriding objective' of family court process, and the obligations arising under *rule 1 FPR 2010* – in particular to deal with application "justly",

[1] "There is a spectrum of procedure for family cases from the ex parte application on minimal evidence to the full and detailed investigations on oral evidence which may be prolonged. Where on that spectrum a judge decides a particular application should be placed is a matter for his discretion": Butler Sloss LJ

> "fairly", "ensuring that the parties are on an equal footing" and "saving expense"[2].

11. In determining the issue arising in this appeal, I have separated out, and considered, two linked questions:

    i) What test should the court apply on an application for permission to make an application following the imposition of an order under *section 91(14)*?

    ii) Should the application for permission be determined on notice to the other party or parties to the original litigation or not?

What is the test on an application for permission to apply for an order?

12. In *Re P (Section 91(14) Guidelines)* at p.593 Butler Sloss LJ described the order under *section 91(14)* as a "partial restriction" on access to the court in that:

> '… it does not allow him the right to an immediate *inter partes* hearing. It thereby protects the other parties and the child from being drawn into the proposed proceedings unless or until a court has ruled that the application should be allowed to proceed. On an application for leave, the applicant must persuade the judge that he has an arguable case with some chance of success. That is not a formidable hurdle to surmount. If the application is hopeless and refused the other parties and the child will have been protected from unnecessary involvement in the proposed proceedings and unwarranted investigations into the present circumstances of the child" (my emphasis by underlining).

I would venture to suggest that, for clarity, the word 'substantive' should be read as appearing between the words 'proposed' and 'proceedings' in the fourth line of the quote above in order to maintain consistency with the authorities which follow.

13. In *Re A (Application for Leave)* [1998] 1 FLR 1, Thorpe LJ proposed a marginally different test, at p.4:

> *"*"It seems to me undesirable to over-complicate the judicial task where a bar has been imposed and where the person restrained seeks leave to move. In that instance, I would favour the simplest of tests. Does this application demonstrate that there is any need for renewed judicial investigation? If yes, then leave should be granted." (my emphasis by underlining).

14. A test which blended these two approaches was devised by Wall and Thorpe LJJ in *Re S* at [78], wherein they declared that on such an application, the applicant has to demonstrate that there is a need for renewed judicial investigation on the basis that he has an arguable case; they were of the view that the earlier approaches

[2] The *FPR 2010* of course post-date the decision in *Re S*. In my view, the judgment in *Re S* should be read in the light of the overriding objective.

'complemented' one another. I set out in full below the passage in which this test was formulated:

> "[78] … Thorpe LJ's test in *Re A (Application for Leave)* [1998] 1 FLR 1 set out at para [53], above: ('Does this application demonstrate that there is any need for renewed judicial investigation?') and Butler-Sloss LJ's test in *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573 … ('the applicant must persuade the judge that he has an arguable case with some chance of success'). In our judgment the two complement each other. A judge will not, we think, see a need for renewed judicial investigation into an application which he does not think sets out an arguable case.
>
> [79] It is self-evident that a party who is the subject of an order under *s 91(14)* of the Act which has been made because of particular conduct by that party must have addressed that conduct if his application for permission to apply is to warrant a renewed judicial investigation or to present an arguable case. Thus, to take an obvious example, a man who has been made the subject of a *s 91(14)* order following findings of fact by the court of both persistent domestic violence to his former partner and his children and a fixed and delusional belief that his children are the victims of parental alienation syndrome, is unlikely to succeed in an application for permission to apply for contact or residence if he makes it without any acceptance of the court's previous findings" (emphasis by underlining added).

Should the application be heard on notice to the party or parties or without notice?

15. In the passage cited from *Re P (Section 91(14) Guidelines)* above (see [12] under 'test'), Butler Sloss LJ appears to contemplate that in the first instance an application for permission may well be considered on a without notice basis, for the court to assess whether the application is "hopeless" or whether there is "an arguable case with some chance of success". I do not read Butler Sloss LJ as saying that all applications for permission should be dealt with *ex parte* / without notice; only that the applicant should not expect an "immediate" *inter partes* hearing, and that the respondent is entitled to the court's protection from being 'drawn' into further *substantive* proceedings.

16. There then followed *Re N (Section 91(14) Order)* [1996] 1 FLR 356 where Hale J (as she then was) sitting as an additional judge of the Court of Appeal said this:

> "… the object of making such an order is to prevent unnecessary and disruptive applications to the court. It is, therefore, most undesirable in those circumstances that applications for leave pursuant to such a provision, particularly in a case such as this, are made *ex parte*. It would be much more satisfactory if the applications for

> leave had to be heard *inter partes* so that it could be ascertained whether there was a genuine need to invoke the court's assistance in the problem that had arisen.
>
> I say that because there are indications in the papers in this case of the court's assistance being invoked *ex parte* in circumstances where it was far from clear that there was a genuine need so to do. It may well be in this case that there is a need to have further definition of the contact order. It is desirable that if there is an order under *s 91(14)*, leave should not be granted lightly and that it should be generally granted *inter partes* in cases of clear need. There should also be some obvious way in which the existence of such an order is drawn to the attention of those who have to consider *ex parte* applications of the sort that seem so frequently to have been made in this case."

17. A short while later, the Court of Appeal considered the issue again in the case of *Re A (Application for Leave)* [1998] 1 FLR 1, in which Thorpe LJ said this:

> "… it seems to me that where a bar has been imposed on future applications under the statute, the appropriate procedure for either applying for the bar to be discharged in its entirety or for advancing a lesser application for leave notwithstanding the bar, is to issue the application on form C2 for a direction in existing family proceedings. That application will be determined *inter partes*. If the applicant succeeds, he or she will proceed to issue an application for an order in form C1. If the application is refused, then no further form is required"

18. The procedural issue was comprehensively re-considered in *Re S* by Wall LJ sitting with Thorpe LJ. The key passage is at [94] but it is helpful for me to cite the entire context, for it illustrates the emphasis on the importance of the '*inter partes*' hearing, albeit allowing for an '*ex parte*' review "in the first instance" (see [92]/[94]):

> **"[91]** We are in complete agreement with those authorities which make it clear that before a *s 91(14)* order is made, the person affected by it should have a proper opportunity to consider it and be heard on it. In practice, however, the need for an order under *s 91(14)* may only become apparent during the course of a hearing, or otherwise at relatively short notice. Where this happens, the court must ensure, if need be by a short adjournment, that the person on the receiving end, particularly if he or she is a litigant in person, has had a full opportunity to consider the making of such an order, and to voice objections to it.
>
> **[92]** We think a greater degree of flexibility is permissible where the question is whether or not a resident parent needs to be served in the first instance with an

> application for permission to apply. We think there is much sense, in certain sensitive circumstances, for the court to direct, in the first instance, that the application be not served on the other party until such time as the court has had the opportunity to consider it and to decide whether it is necessary for the other side to be served.
>
> **[93]** An obvious example is a case in which the stress of previous litigation has destabilised the family, and in which the fragile capacity of the resident parent may well be adversely affected by the service of an application for permission to apply, particularly if that application is unmeritorious or unlikely to succeed. Plainly, if the court takes the view that there is sufficient merit in the application to make it appropriate for the other party to be served, and that an *inter partes* hearing is appropriate, that is another matter.
>
> **[94]** We would therefore respectfully urge caution before following to the letter the passage from Hale J's judgment in *Re N (Section 91(14) Order)* [1996] 1 FLR 356 which we have set out at para [47] of this judgment, and the statement by Thorpe LJ in *Re A (Application for Leave)* [1998] 1 FLR 1 that an application for permission to apply should be determined *inter partes* (at 3E–F). It is, in our view, open to a judge when making a *s 91(14)* order to direct that any application for permission to apply during its operation shall not, in the first instance, be served on the respondent to it, but should be considered by the judge on paper. The judge will then decide whether or not an *inter partes* hearing is required." (emphasis by underlining added).

19. Finally, the Court of Appeal in *Re S* at [95][3] acknowledged that the application for permission could be determined on the papers, but if an applicant seeks an oral hearing, he/she should not be denied this:

> "We do not, however, think that an applicant for permission to apply should be denied an oral hearing if that is what he or she seeks. Whilst a judge may properly, therefore, direct that the application will, in the first instance, be considered by him or her on the papers, we take the view that if the litigant is dissatisfied with a paper refusal, he or she should be afforded an oral hearing, however, unmeritorious the application may prove to be".

[3] This was a point which was considered and confirmed one week later in the applications for permission to appeal in *Re Bradford, Re O'Connell* [2007] 1 FLR 530 at [16].

Background

20. The case has a long history; it is unnecessary to reproduce it here in detail. It is perhaps sufficient for me to record the following key information, which serves to give a flavour of the case:

    i) Litigation concerning the boys started in 2013, shortly after the parents' separation, and has been ongoing with few interruptions since that time;

    ii) In the course of the litigation "dozens of court orders, multiple evidential hearings, and ultimately hundred of pages of evidential material" have been generated (HHJ Plunkett: December 2017);

    iii) The order which was sealed following the July 2016 hearing at which the *section 91(14)* order was made, recites that the father had acted "inappropriately throughout the court hearing to include using foul and extremely abusive language towards counsel for the mother and towards the judge", that the father did not desist from using foul language when warned of the risk of contempt, and "that he had to be removed from the court by security staff";

    iv) For extended periods of time, the father has been subject to a non-molestation orders (under the *Family Law Act 1996*) to protect the mother and children;

    v) In a judgment delivered on 3 December 2017, HHJ Plunkett described the proceedings as "amongst the most toxic I have encountered in decades of practice and on the bench. [The *CA 1989* proceedings] have been characterised by ill-temper within the court room, by abuse and by threats… exchanges between [the mother's] advocate and [the father] had the characteristic of two protagonists at each other's throats".

21. At a relatively early stage of the substantive proceedings (at a hearing in 2014), the district judge had found that the father had shaken N as a baby (2013). The father had denied this incident, and had challenged the evidence surrounding it; he appealed the finding at the time, though the appeal was dismissed. He maintained his vehement rejection of this finding before me when making submissions at this appeal hearing. The judge had further found that the father had harassed the mother.

22. At the time of making the *section 91(14)* order in July 2016, the district judge recorded that "unless and until the father engages the services of a medical/therapeutic or child care professional in dealing with the issues" identified in the January 2015 judgment "then any application made by the father for leave to issue a child arrangements order [application] is likely to be unsuccessful".

23. The first application for permission to apply for a child arrangements order, following the imposition of the *section 91(14)* order, was issued by the father on 1 December 2016; it was accompanied by a second application for permission to appeal various case management and substantive orders (many out of time), an application "for judicial review" and an application to seek the re-opening of the findings of fact (in accordance with the principles in *Re ZZ & O'rs* [2014] EWFC 9) made in 2014. The case was listed before HHJ Plunkett who, on 17 February 2017, joined the children to

the applications; he stated that the application for permission to apply for a *section 8* order was not to be served on the mother, but directed that all of the documentation should be served on the children's solicitor.

24. The application was listed again for directions by HHJ Plunkett in April 2017. The order of the 17 April 2017 reads as follows:

> "Upon noting:
>
> 1. [The father] is the subject of a *section 91(14)* order;
>
> 2. Any application he makes is subject to filtering by the Judge before the application requires a response from [the mother];
>
> 3. That filtering is normally carried out on paper;
>
> 4. In this case, because of the exceptional material relied upon by [the father], the exceptional volume of historical paperwork consideration of which is required, the absence of prior involvement by this court, and the overall pressure on court time currently, the court determined that it was justified in exercising its 'filtering' function to have the assistance of the solicitor for the child;
>
> 5. The solicitor for the child has now, inadvertently, notified [the mother] of the filtering hearing…
>
> 6. [The father's] application does not call for a response from [the mother] because the court has not granted permission to him to pursue his application.
>
> IT IS ORDERED THAT:
>
> 1. Notice of the 'filtering hearing' should now be provided to [the mother]
>
> 2. [The mother] is not required to attend the said hearing, and any advocate instructed on her behalf may not be heard at that hearing without permission of the court, for the contrary would be converse to the policy and principles that inform the use of *section 91(14)* orders…".

25. There are at least three notable features of this order:

i) The Judge appears to be of the view that the mother would not be expected to respond to the father's application for permission to apply for *section 8* order, until or unless permission had been granted for the father to pursue his application (preamble (6) in the order at [24] above);

ii) In view of the fact that the mother was now aware of the application, the mother was to be served with notice of the hearing, but could not expect to be heard without the court's permission (Order (1)/(2) set out at [24] above);

iii) The Judge was of the view that this corresponded with the "policy and principles which "inform the use of *section 91(14)* orders" (Order (2) set out at [24] above).

26. On 8 June 2017, the Judge further considered the father's other application – for permission to appeal out of time, and his application for permission to make an application for a child arrangements order. In respect of these applications, he gave directions which made a different provision for the mother's participation, which included the following:

> "The bundle shall be [served by] the solicitor for the child on the respondent mother. Her attendance at the hearing is excused however, permission for her to attend and be represented if so advised." (The words in square brackets are missing from the original, but the direction only makes sense if they are introduced).

27. The application for permission to appeal out of time was heard on 20 July 2017, along with the father's application for permission to make a further application for a *section 8* order. The mother was represented, but it appears that her advocate did not "in light of the nature of the hearing seek to make any submissions" (this comment is extracted from the judgment). In adjourning the applications for further evidence, the Judge made the following comments:

> "A judge normally determines whether or not to grant permission to make an application, when a *section 91(14)* bar is in place, on paper".

He added later:

> "[The mother] has not been heard on the *section 91(14)* bar <u>in the usual way</u>…" (my emphasis by underlining).

28. After two more case management hearings, the judge finally disposed of the father's multiple applications by a judgment delivered on 8 December 2017, confirmed by orders made on 5 January 2018. Much of the judgment is devoted to the application to re-open the findings of fact; having analysed the material with great care, the judge refused that application. In dismissing the application for permission to appeal against the *section 91(14)* order, he said this:

> "Looking at the toxicity of this litigation; looking at the duration of the litigation (which has encompassed almost all of [P]'s life and most of [N]'s), looking at the children's welfare needs (which include their need to have their primary carer safe and untroubled) and bearing in mind the guidance set out by Butler-Sloss LJ in *Re P* [1999] 2 FLR 573, I cannot see any prospect of success in any appeal

> against the principle of the making of the *section 91(14)* order; nor, in light of that history and the significant levels of animosity remaining, in the duration of the order made".

29. Finally, in refusing the application for permission to make a apply for a child arrangements order, he said:

> "There have been signs … that [the father] is beginning to moderate his behaviour … However, it is very far from clear to me that [the father] truly understands how his conduct has contributed to the situation in which two young boys have no contact with their father. He is very much bound up on his own perception of injustice and how the system has let him down. I accept the system has, on occasion, let him down… However whilst acknowledging those matters it seems to me that until he acquires some insight into how his behaviour has contributed to the current state of affairs, it is hard to see how beneficial contact can be arranged. That is, no doubt, why [the district judge] in making the *section 91(14)* order, including the recital 'unless and until the father engages the services of a medical/therapeutic or child care professional in dealing with the issues identified in the judgment dated 6 February 2015 then any application … is unlikely to be successful[4].
>
> I cannot see, in those circumstances, that it is in the children's current welfare interests to give permission to [the father] to make a further application for a child arrangements order at this stage. I can only urge him to try and stand back from his deeply held conviction as to the injustice done him, to step aside from his obvious and enormous frustration and o try and reflect on how he might have contributed to where he is, and how might contribute to a better way forward".

30. In the course of his judgment, he referred again (see [25]/[26]/[27] above) to the procedure which he adopted in his court for determining an application for permission to apply, following the imposition of a *section 91(14)* order:

> "… in the normal course, an application for a *section 91(14)* 'permission' is dealt with by a judge on paper".

Adding:

> "… although [the mother]'s advocate would not normally be heard on the question of permission to make a fresh application in the face of a *section 91(14)* bar, the questioning of re-opening the facts did give rise to a right to be heard…".

[4] This is the passage quoted at [22] above.

31. On 5 January 2018, the judge made a six-month Family Assistance Order (*section 16 CA 1989*) and appointed the *rule 16.4* Children's Guardian as the relevant officer to work with the family. The focus of the Family Assistance Order was for the court to undertake life story work with the boys. The judge made an order (by agreement between all the parties) for the father to have very limited indirect contact (delivery of birthday and Christmas cards).

32. These applications had taken over one year to resolve. The Judge commented, with considerable under-statement, that: "these proceedings are time-consuming in a way that grossly outstrips the resources available within the Family Court".

The current application for a section 91(14) permission

33. Just over ten weeks later (20 March 2018), the father made a further application for permission to apply for a child arrangements order, by which he sought (among other orders) the re-introduction of direct contact ("no obstacles to direct unsupervised contact"). In his application, the father asserted that "there has been ample time between the last order and this application to progress contact", and claimed that he "now … has insight into how his behaviour has contributed to the current state of affairs". Given the extensive review of the evidence and the arguments at the end of 2017, and the very recent dismissal of a number of applications (5 January 2018), HHJ Plunkett would have been perfectly entitled, in my judgment, to have given this application fairly short shrift.

34. The father's new application was listed for an oral hearing on 8 June 2018. Prior to the hearing, the court office sent a copy of a notice of hearing of the father's application to the mother's solicitors, who responded questioning the procedure which the court had engaged. In their letter, they made the point that:

> "The court will be aware that we have already raised concerns in relation to the escalating costs resulting from this matter and the potential for our client's costs to rise even further should additional proceedings ensue".

The court office replied confirming that the order should not have been served on them; the letter from the court office concluded: "[p]lease be assured that you will be served with all further applications and orders should the application for leave to apply succeed" (my emphasis). This suggests (particularly the words underlined) that it was never contemplated by the court that the mother would have an opportunity to be heard on the application for permission; this was in line with the practice earlier adopted and referred to at [25]/[26]/[27]/[30] above. So far as I know the mother's solicitors did not question this. At the hearing on 8 June, the judge directed a report on the life story work from Cafcass officer working under the Family Assistance Order. A substantive hearing was listed for 5 July 2018; the Cafcass officer was directed to attend "if possible". No provision was made in the order for the mother to attend, or be heard.

35. At the hearing on 5 July 2018 (coincidentally the final day of the six-month Family Assistance Order), the only fresh material available for the judge was a short report

from the Cafcass officer, and a skeleton argument from the father. The note from the Cafcass officer concluded with these significant words:

> "I have spoken to both parents during the six-month order and I would assess that little has changed in the overall position and mood of the parents on this matter. The areas in dispute remain and the case appears polarised."

The Cafcass officer attached copies of original drawings and messages generated in direct work with P and N. P had written in his own hand "I do not want him [the father] to stop me changing my name! Not OK that he goes to school and has photos!". The Cafcass officer did *not* attend the hearing.

36. In his skeleton argument, the father referred to the fact that the Cafcass officer had advised him that the mother now supported contact. The mother, through counsel at this appeal hearing, disputes that she had ever said this.

37. In a short reserved judgment, delivered on 28 August 2018, the judge set out his reasons for granting the father's application. In doing so, the judge traversed old ground, by reviewing the original 2014 findings of fact; of the shaking incident he concluded that "the incident was plainly at the bottom end of the scale of such incidents"; of the harassment finding: "[the father]'s conduct appears to have changed for the better", though this was not verified by the mother or independently. He appeared materially to change his opinion (see [29] above) on the need for the father to have benefited from therapeutic work before re-applying for an order: "the court must be cautious about raising barriers to contact that are not vitally necessary … 'lack of insight' is not itself a bar to contact". He said that "nothing in the previous findings seem to me to rule out he possibility of safe contact if properly arranged"; he referred to the *Article 8* rights of the boys, and "the longer this matter is left in abeyance the harder it will be to recommence contact". He concluded:

> "I decide, therefore, that it is in the children's welfare interests to grant permission for this application to be made, notwithstanding the unexpired *section 91(14)* order."

He went on to give directions, including the appointment of the *rule 16.4* Children's Guardian, although he proposed that the previous Guardian / Cafcass officer appointed under the FAO should be replaced.

Conclusion

38. *Rule 30.12(3)* of the *FPR 2010* provides that an appeal may be allowed where the decision was wrong or unjust for serious procedural or other irregularity. I have reached the conclusion that the approach and decision of this experienced judge was both seriously unjust for procedural irregularity and wrong. I identify three material flaws:

    i) *Wrong procedure in principle*: I take the view that once the judge had formed the view on the papers (or at the oral hearing on 8 June) that the father's application was not hopeless, and that he had established a *prima face* case, he should have afforded the mother the opportunity to make representations on

that application. That indeed should be the usual practice on such applications. In denying her that opportunity, the procedure was neither fair nor just; there was a real risk that the proceedings would be re-launched on a false premise;

ii) *Flawed procedure on the facts of this case*: Even if not, strictly speaking, procedurally irregular (in the sense that the rules do not prevent the judge from considering the application on a 'without notice' basis), I am of the view that, *on the facts of this case*, it was wrong not to have given the mother the opportunity to respond to the application;

iii) *Reasoning*: The judge's rationale for granting the application was wrong (see [37] above). He appears to have reached his decision on pure welfare grounds. *Section 1(1) CA 1989* does not apply to this question; this is not a 'best interests' decision.

39. *Wrong procedure in principle*: As I indicated at [10](i) above, there is nothing in the *CA 1989* or the *FPR 2010* which prescribes how a court should approach an application for permission to apply for a *CA 1989* order in these circumstances; the judge is not precluded from granting the applicant his/her relief on a 'without notice' basis. However, the circumstances in which a grant of permission will be made following the imposition of a *section 91(14)* order *without notice* should, I suggest, be very rare indeed.

40. The appropriate procedure for a court to follow when presented with such an application, in my judgment, is that laid out in the judgment in *Re S* (see [18] above), namely that the application should be considered 'in the first instance' on the papers, or at on an oral hearing which can be 'without notice' to the respondent particularly if there are concerns about the effect on the respondent of learning of a fresh application (what Wall LJ referred to in *Re S* at [92]/[93] as "certain sensitive circumstances… a case in which the stress of previous litigation has destabilised the family, and in which the fragile capacity of the resident parent may well be adversely affected by the service of an application for permission to apply"– see [18] above). If the applicant seeks an oral hearing, he/she should not be denied this. If the application is without merit, then it can be dismissed at that stage, and the potential respondent may well have been spared any engagement with the process. However, if the application shows sufficient merit (i.e. the applicant has demonstrated a *prima facie* case that there is a need for renewed judicial investigation on the basis that he has an arguable case), the court should list the application for an 'on notice' hearing to allow the respondent to make representations. This procedure is clearly indicated from the judgment in *Re S* but it was not followed here.

41. I would like to make three further points, which strongly support the approach outlined in [40] above. First, the grounds laid out in an application for permission to make a fresh application may not tell the whole, or indeed a true, story; the situation 'on the ground' may not be as the applicant asserts. Before a judge opens the gateway to fresh litigation – in circumstances when a court has earlier taken the exceptional course of imposing a restriction on further applications – an opportunity should be given to the respondent to fill any factual gaps, or correct any factual errors (deliberate or unwitting), in the material on which the judge is being asked to consider the application, and to respond on the merits. On this point, it is illustrative to

reconsider what I set out at [36] above. Secondly, as Hale J contemplated in *Re N* (see [16] above), there may be no "genuine need to invoke the court's assistance in the problem that had arisen" – a point which Thorpe LJ repeated in *Re A* (see [13] above: he referred to there being no need for "renewed judicial investigation"). It may be that the issue – when analysed with the benefit of *both* parties' contributions – does not warrant the expense and time of court intervention, thereby saving the parties' and the court's limited resources. Thirdly, and yet more significantly, only by offering the respondent an opportunity to be heard will the judge, in my view, be fulfilling his or her obligation under the 'overriding objective' under the *FPR 2010* to deal with case "justly" and "fairly" (see [10](iv) above): there will be few, if any, situations in which the respondent is not likely to be materially affected by the grant of the application to re-open the litigation. Justice and fairness surely require that the respondent is given the chance to inform and influence the decision whether further litigation should be instigated.

42. *Wrong procedure on the facts of this case*: There are powerful reasons why the approach outlined above should, in my judgment, have been followed in the instant case:

i) These private law proceedings had a long and 'toxic' history; very considerable caution should therefore have been exercised (more than was shown) before re-igniting that litigation; as at 5 July 2018, the parties remained 'polarised' (per the Cafcass officer: [35] above). It is highly predictable (as indeed is the case) that the launch of further substantive proceedings would stir up very considerable ill-feelings between the parties;

ii) The Judge had considered the issues as recently as 5 January 2018; at that stage the judge had made a substantive (albeit very limited) order for indirect contact between the father and the children; no opportunity had yet been given to put that order into effect;

iii) In his judgment of 8 December 2017, the Judge had expressed the view that the children had a "need to have their primary carer safe and untroubled"; there was no evidence placed before the court on which the court could take a materially different view;

iv) When imposing the *section 91(14)* order in 2016, the district judge had made it plain that unless the father "engaged the services of a medical/therapeutic or child care professional in dealing with the issues" (which had been identified in the January 2015 judgment) "then any application made by the father for leave to issue a child arrangements order [application] is likely to be unsuccessful". In December 2017 HHJ Plunkett had cited this passage with apparent approval (see [29] above: in particular the passage from "… it is very far from clear…" to "unlikely to be successful."). HHJ Plunkett's approach in December 2017 entirely and correctly corresponds with the guidance in *Re S* at [79] quoted at [14] above ("It is self-evident that a party who is the subject of an order under *section 91(14)* of the Act which has been made because of particular conduct by that party must have addressed that conduct if his application for permission to apply is to warrant a renewed judicial investigation or to present an arguable case"). However, when granting the application on 28 August 2018 HHJ Plunkett appeared to attach little, if any,

weight to this point, retreating from his previous position. It is, indeed, notable that the father had not provided such evidence;

v) The only new material before the court was a report from the Cafcass Family Assistance Officer and a skeleton argument from the father; the Cafcass officer was of the view, having spoken with both parents, that "little has changed in the overall position and mood of the parents on this matter". Furthermore, it appears that P's own expressed view to the Cafcass officer was not supportive of a re-introduction of contact (see [35] above);

vi) The court was on notice of the mother's concerns about the likely impact on her of legal costs which would be incurred in the event that litigation was re-instituted; the launch of further proceedings would inevitably have an impact on the private and public purse (the children were publicly funded); the mother's solicitor had, in my judgment, made a fair point in correspondence that the court would need to be very clear about allowing further litigation where "escalating costs" have already arisen and where there is "the potential for our client's costs to rise even further should additional proceedings ensue" (see [34]). Under the *FPR 2010*, the judge was obliged to have regard to 'saving expense' (see [10](iv) above).

43. A subsidiary but not unimportant point, relevant on the particular facts of this case, is that the mother *in fact* had notice of the father's application to apply for a *CA 1989* order because the court had sent her a copy of the directions order setting up the hearing (see [34] above). In the circumstances she did *not* benefit from the application being dealt with on a 'without notice' basis; indeed, ironically, she was then in a worse situation because – knowing of the application – she was then advised that she could not participate in it, and was therefore powerless to try to influence its outcome.

44. *Reasoning:* The judge's rationale for granting the application was ostensibly wrong. While child welfare may be relevant to the issue, *section 1(1)* does not apply to the issue which he had to decide; this is not a 'best interests' decision. Although this is not central to my decision, I am satisfied that the judge erred in this respect.

Conclusion

45. I do not underestimate the challenges to HHJ Plunkett, an extremely experienced judge in this field, of dealing with the issues in this difficult and 'toxic' private law children's case, which were wide-ranging and complex. These are, in my judgment, some of the most demanding cases in family law. The judge had understandably, and at his own direction as the Designated Family Judge for the court, assumed responsibility for this case from one of the district judges in his court; by the time he inherited the case, two of the most exceptional and Draconian orders available in private law compendium had already been made. I have no doubt that he conscientiously analysed the issues raised by the father over a prolonged period, and in the context of multiple different applications. I am firmly of the view, however, that on the father's application for permission to apply for a *section 8* order, which is under challenge in this appeal, he adopted, as it appears he had in the past[5], a flawed

[5] See [24] and [25](i) above.

procedure, particularly on these facts. I have further concluded that his ultimate reasoning was erroneous. The appeal must therefore be allowed.

46. I propose to remit the application for hearing before Keehan J (as FDLJ for the Midlands Circuit) for him to determine, on notice to the mother and children's solicitor, the father's application for permission to make a *section 8* application. As I advised the parties at the conclusion of the hearing, I have requested that the application be listed as soon as possible; I am conscious that, for the second time, and wholly unacceptably, the father's application for permission to make his *section 8* application will have taken more than one year to resolve.

47. That is my judgment.