R v F (SCHEDULE ONE: CHILD MAINTENANCE: MOTHER'S COSTS OF CONTACT PROCEEDINGS)

[2011] 2 FLR 991

Family Division

Bodey J

10 December 2010

Financial remedies – Schedule 1 – Payments for benefit of child – Legal expenses in contact proceedings – Mother found to have unreasonable attitude to contact – Whether costs for benefit of child

The father, who was internationally famous, denied paternity until DNA testing confirmed that the child, now 10 years of age, was his. Following a declaration of parentage, the court made a consent order concerning financial support for the child. Thereafter, the father had contact with the child on a number of occasions; however, all contact stopped when the child was about 6 years old. Ten months after the breakdown in contact the father issued contact proceedings. During the proceedings a judge found that the mother's attitude towards contact was unreasonable, but also criticised the father in a number of respects. The court subsequently ordered family therapy. The child was about 9 when she eventually renewed contact with the father, but after only one session she refused to attend further contact, and, with the mother, stopped attending therapy sessions. Eventually the direct contact order was suspended, and the court ordered a report from a child psychiatrist. The mother then asked the father to pay her legal costs of the contact proceedings, both the costs she had incurred but not yet paid, about £113,000, and her future costs, estimated at £95,000. When he refused to do so, the mother applied to court under Schedule 1 to the Children Act 1989 for either a lump sum or an increase in the periodical payments for the benefit of the child (currently being paid at the rate of £70,000 pa) in respect of those legal costs. The mother argued that without the additional funds she would be unable to afford legal representation for the forthcoming 5-day hearing; her solicitors were not prepared to act for her unless the outstanding fees were paid. The father resisted the mother's application, arguing that: (i) such an order would not be for the benefit of the child; (ii) it was not clear that the mother lacked funds with which she could reasonably pay her costs; (iii) the mother's stance in the contact proceedings was unreasonable.

Held – ordering the father to pay a lump sum of £113,000 to the mother's solicitors in respect of their outstanding fees, subject to a 'solicitor own client' assessment; requiring any overpayment to be restored to the father; ordering the father to pay a second lump sum of £25,000 in respect of future costs, against invoices rendered by the mother's solicitors for work actually done –

(1) Schedule 1 was not a costs jurisdiction, but a financial relief jurisdiction exercised for the benefit of the child. Cases of this sort required a careful analysis of the benefit to the child by way of the representation of the applicant parent at the expense of the respondent parent, and of the broad merits of the applicant parent's case in the relevant proceedings. When considering the reasonableness of the applicant parent's position, it was almost always simplistic to suggest that one party or the other was independently to blame for the underlying relationship problems that generated 'high conflict' contact cases. In complex cases even a parent who had been criticised in the past might be able to show merit in the proper representation of his or her views to the court, where this was in the overall interests of the child, and also merit in being properly represented against adversarial criticism. In particular, it would not be in the child's best interests for the child or the applicant parent to perceive the ongoing contact proceedings as 'unfair' (see paras [17], [31], [34], [44]).

(2) Schedule 1 applications were possible only when the applicant had exhausted every reasonable way of funding herself, and when the respondent had the wealth to

provide such funding. However, the court had to make a broad assessment of the financial situation, to avoid applications of this kind turning into the equivalent of full-on disputed finance hearings with full discovery, cross-examination and findings of fact, which would not be proportionate (see paras [21], [45]).

(3) If a Sch 1 application in respect of legal costs was going to be necessary, it should be issued without delay: the existence of costs already incurred had the potential to complicate the issue and to make it more difficult for the court to maintain a measure of incremental control over the quantum and accrual of the costs. However, there was no compelling reason in this case to differentiate in principle between incurred unpaid fees and future fees, except in as much as the mother's future funding was to be considered incrementally. The mother should be aware that the court would from now on be considering the mother's ongoing progress in complying with expert advice at each stage (see paras [39], [43], [45]).

Statutory provisions considered

Children Act 1989, s 8, Sch 1

Cases referred to in judgment

CF v KM (Financial Provision for Child: Costs of Legal Proceedings) [2010] EWHC 1754 (Fam), [2011] 1 FLR 208, FD

G v G (Child Maintenance: Interim Costs Provision) [2009] EWHC 2080 (Fam), [2010] 2 FLR 1264, FD

M-T v T [2006] EWHC 2494 (Fam), [2007] 2 FLR 925, FD

S (Child: Financial Provision), Re [2004] EWCA Civ 1685, [2005] Fam 316, [2005] 2 WLR 895, [2005] 2 FLR 94, FD

T (Order for Costs), Re [2005] EWCA Civ 311, [2005] 2 FLR 681, [2005] All ER (D) 335 (Mar), CA

Charles Hyde QC for the applicant
Madeleine Reardon for the respondent

Cur adv vult

BODEY J:

[Judge's note: This version of the judgment has been extensively edited and made deliberately vague, in order to achieve anonymity.]

Introductory

[1] This is an application by F (whom I will call 'the mother') against R (whom I will call 'the father') pursuant to Sch 1 to the Children Act 1989 (the 1989 Act). She seeks a lump sum or sums or an increase in periodical payments for the benefit of their child, B, who was born in 2000 and is now 10 years old. The purpose of the application is to enable her, the mother, to fund pending contact proceedings in which she is the respondent (and potentially proceedings about B's schooling) brought by the father under s 8 of the 1989 Act.

[2] The mother's case is that, without an award under Sch 1 to the 1989 Act, she will be unable to have legal representation at a 5-day contested contact hearing, presently earmarked for March 2011. The father's response, in a nutshell, is that such an award would be 'extraordinary', unfair to him and wrong. His case is:

(i) that the mother is the one solely responsible for the huge contact problems and consequential costs;
(ii) that he is already shouldering all the expenses set out at para 19 of his counsel, Miss Reardon's, skeleton argument, including the costs of expert psychiatric (and other) input to try to resolve the difficulties over contact and the costs of the children's guardian;
(iii) that, if the mother were to apply for her costs at the end of the March 2011 hearing, she would not be (or would be highly unlikely to be) awarded them; and
(iv) that any sums used by the mother for costs, could not be recouped by him at the end of the day.

[3] The father is internationally well-known and certain matters concerning the mother and himself have attracted media coverage over the years. I mention this only because it matters very much within the underlying dynamics of the contact proceedings and so indirectly in respect of this Sch 1 application. It is apparent from the papers that the mother has felt herself humiliated and denigrated by the father's attitude to her. She says she has sustained genuine hurt. That in turn appears to have fed B's attitude towards the father, such that she (B) now expresses herself strongly opposed to any contact with him. This is an over-simplification of the difficulties which the case has presented over several years (engaging leading counsel on both sides and two eminent child psychiatrists) but it suffices for this introductory purpose.

Brief background

[4] By way of background, the father did not initially admit paternity of B and DNA testing was required to establish the fact. One can imagine that this reluctant start to the father's acceptance of his relationship to B would have caused the mother anger and upset. In 2001, Sumner J made a declaration of parentage, following which the mother's original Sch 1 application for financial support for B was compromised. By a consent order made by Johnson J on 21 January 2002, the mother and B were enabled to live in accommodation in central London, subject to the sort of trusts which are usual in cases like this and the father assumed responsibility to pay the mother periodical payments for B's benefit. Following an agreed increase in February 2009, such periodical payments for her are now at the rate of £70,000 pa.

[5] Contact took place on a number of occasions but broke down in December 2006. In October 2007, the father issued his application for contact and parental responsibility. Parental responsibility was granted by consent, but contact still remains a major issue 3 years on. Various orders for contact have been made, including in particular at the end of a 5-day hearing in March 2009 before Her Honour Judge Vera Mayer. She gave a long and careful judgment in April 2009, making assessments of the parties and generally. Those assessments are relied on by the father to support his case:

(i) that the mother's attitude towards contact has been and is unreasonable; and
(ii) that no provision for her legal costs should be made.

[6] Under a subsequent order by Her Honour Judge Mayer in April 2009, the parents agreed to undertake such work as was required by child and adolescent psychiatrist, Dr Berelowitz. Contact was to be as he might advise. In addition, the mother agreed to both herself and B undergoing therapy although, as mentioned in para [34] below, it turned out to be short-lived.

[7] On 28 July 2009, one year and 5 months ago, contact took place between B and the father in San Remo; but B refused to go to the next intended contact on 11 September 2009. That contact in San Remo has turned out to be the last direct contact between them there has been.

[8] In or after December 2009, the mother ceased paying her solicitor's fees in respect of the contact proceedings. She says she ran out of funds. Since then her outstanding fees to her solicitors and counsel have accrued in the present sum of about £113,000. She hopes effectively to recoup this sum as against the father by way of this Sch 1 application. In addition, her solicitors estimate that their fees for the ongoing contact proceedings down to the end of the hearing in March 2011, will be about £95,000.

[9] On 17 March 2010, Her Honour Judge Mayer suspended her direct contact order and, by consent, ordered consultant child psychiatrist, Dr Cameron, to prepare a report. On 19 May 2010, the mother's solicitors wrote to the father's solicitors requesting that he pay her legal costs, both: (i) those already incurred and outstanding; and (ii) those estimated through to the final hearing. The father declined to do so and on 14 July 2010, the mother's solicitors issued this Sch 1 application.

The principles

[10] The principles to be applied in applications of this type have been explored in various authorities and are not in dispute between counsel, Mr Hyde QC, who appears for the mother, and Miss Reardon (whom I have already mentioned) who appears for the father. As put to me, they are as follows.

[11]

(i) First, it is essential, if the court is to have jurisdiction, that the order sought can properly be seen as being '... for the benefit of the child'. Those are the prescribed words in the relevant paragraphs of Sch 1 (which I do not need to set out) empowering the court to order one parent to pay periodical payments or a lump sum or sums. The father disputes that this requirement ('... for the benefit of the child') is satisfied here, particularly as B has a children's guardian in the contact proceedings and thus her own legal representation.

(ii) Secondly, it is necessary that the applicant does not have access to public funding and has no other source of funds which could reasonably be used to pay her costs. The latter of these requirements is also in issue, with Miss Reardon criticising the evidence supplied by the mother as to her finances and describing it as 'opaque'.

(iii) Thirdly, it is plainly necessary that the respondent to an

application of this type can reasonably afford to pay the sums claimed to enable the applicant to pay her costs. This is not in dispute here.

(iv) Fourthly, the court has to consider broadly the reasonableness of the stance taken in the contact proceedings by the Sch 1 applicant and whether that stance has merit. If such stance is unreasonable in the overall circumstances and taking a broad view, then an order under Sch 1 to the 1989 Act will not be made or (if that is putting it too high) then would be very unlikely to be made and would require some feature or circumstance making an order nevertheless just and necessary. Otherwise the payments would simply go to '... satisfy the applicant's taste for litigation' (per Charles J in *M-T v T* [2006] EWHC 2494 (Fam), [2007] 2 FLR 925, at [18]) which would scarcely be for the benefit of the child or fair on the paying party.

[12] In *Re S (Child: Financial Provision)* [2004] EWCA Civ 1685, [2005] Fam 316, [2005] 2 FLR 94, Thorpe LJ spoke at para [19] of the need to give that expression ('for the benefit of the child') '... a wide construction'. In *G v G (Child Maintenance: Interim Costs Provision)* [2009] EWHC 2080 (Fam), [2010] 2 FLR 1264, Moylan J reviewed the authorities and continued at para [50]:

> '... I am entirely satisfied that I have jurisdiction to make an award of interim maintenance directed towards providing the mother with funds to enable her to meet her legal costs of these proceedings, if I consider it appropriate to do so for the benefit of the children in this case.'

He too spoke of this as 'a very broad jurisdiction'. As regards the mother's case there, he said, at para [61]:

> '... I am also satisfied that her stance in the proceedings, having regard to the merits of the claims, can be fairly described at this stage as sufficiently reasonable to justify my making an award in respect of costs. Or to put it in another way, her stance is not such that the proceedings cannot be said to be for the benefit of the children.'

[13] In the most recent case of *CF v KM (Financial Provision for Child: Costs of Legal Proceedings)* [2010] EWHC 1754 (Fam), [2011] 1 FLR 208 Charles J said as regards the circumstances there:

> '[92] ... all cases are different, or have different aspects, but in my view, it is clear that it is more likely than not that it would benefit the child if the mother was represented in both the section 8 proceedings and the Sch 1 proceedings ... In large measure, this view is based on the generally recognised advantages flowing from competent representation and there being an "equality of arms" in an investigatory as well as an adversarial process.
>
> [93] In both sets of proceedings, the mother will be under significant emotional pressure and this adds to the likelihood that the child will

> benefit from the mother being represented, both in respect of the preparation of the case and in argument.'

He went on to refer to the 'balance of fairness' (at para [95] and of the need to keep well in mind the 'risk of an award in respect of costs being unfairly burdensome on [the paying party] particularly if it cannot be recouped' (at para [95](ii)).

Consideration and determination of the issues which arise here in applying the above principles

Would an award under Schedule 1 be for the benefit of B?

[14] Miss Reardon says that an award would not be for the benefit of B, as the mother's oppositional stance is unreasonable and B anyway has her own legal representation. It is thus not necessary or fair that the mother should herself be represented at the father's expense. She could and should act in person. Mr Hyde makes two points in answer.

[15] First, he points to the specific way in which the father is putting his case in the contact proceedings, namely that it is the mother who is responsible for the ongoing contact difficulties, thereby prolonging the legal process and generating costs. I shall consider this issue further below on the question of the reasonableness of the mother's stance. What it means, though, Mr Hyde submits, is that the mother's role in the overall dynamics is going to be criticised and that she is going to be under attack as the cause of the problems and high costs. He relies on a letter from the father's solicitors to the mother's solicitors dated 22 July 2010 where they refer to Her Honour Judge Mayer's findings in April 2009 (see further below) and continue:

> '... the fact that matters have not progressed and that regular contact is still not taking place, is due to your client's unreasonable and unjustified hostility towards our client.'

Mr Hyde also points to Miss Reardon's skeleton argument which relies on the findings of Her Honour Judge Mayer criticising the mother (see below) and which asserts that the mother's alleged failure in late 2009 to engage in therapy (a point which is in issue) '... underscores the mother's failure to accept that she herself must take responsibility for B's current predicament'. He refers too to para 62 of Miss Reardon's skeleton argument, where there is reference to the continuation of the contact litigation as being 'the mother's responsibility alone'. So, says Mr Hyde, the mother needs her own representation to deal with a case of this adversarial nature against her, which could not be (or would not necessarily be) dealt with satisfactorily by the advocate representing the children's guardian. He stresses that she is the respondent as to contact: it is not as though she has chosen to litigate.

[16] Secondly Mr Hyde submits that the mother's considerable anxiety about and vulnerability within the legal process make it particularly desirable that she should have the support of legal representation, not only at the hearing itself in March 2011 but also in the important intervening months between now and then. Lawyers would be a professional and objective source of calm, support and advice for the mother. They would encourage her to

participate in the process and would act as intermediaries, avoiding her having to deal directly with those who act for the father. They would ensure 'a level playing field', in that which Charles J described in *CF v KM (Financial Provision for Child: Costs of Legal Proceedings)* as an 'investigatory as well as an adversarial process' (at para [92]). All this, says Mr Hyde, would be of self-evident benefit to B, whose welfare, although not paramount under Sch 1 to the 1989 Act, must be of considerable significance in the court's approach. Miss Reardon counters this second point by observing that the mother has had her present solicitors throughout the proceedings and yet they do not seem to have managed to persuade her to adopt a more reasonable attitude towards the father or towards contact.

[17] On consideration of both sides' stances as expressed by their counsel, I am persuaded by Mr Hyde's arguments. From what I have read, I consider that this mother would be in a nigh-impossible position:

(i) in having to defend herself in person against the severe criticisms which will be mounted against her by leading and junior counsel for the father;
(ii) in having to advance her own case; and
(iii) in trying to give a balanced account of her strong and deep-rooted feelings in this highly emotive area.

Moreover, it is a part of the dynamic of this particular case that the father's wealth and celebrity status are perceived by the mother, and thus by B, as part of what makes him objectionable. It would create a real risk of compromising the children's guardian's and Dr Cameron's efforts to work co-operatively out of court with the mother and B, if B became aware (as she surely would) that the mother was being 'unfairly treated' in litigation which will help shape her (B's) future. Likewise, whatever order the court makes in March 2011 needs to be such that it will work for B's benefit, which presupposes that it would carry the mother with it so far as possible. That would have a lesser prospect of happening the more she felt disadvantaged and aggrieved by the way she had been treated within the litigation process.

[18] In these circumstances I am persuaded that a Sch 1 financial order would be for the benefit of B, broadly construed as per the authorities above mentioned. Thus, I am satisfied that I have jurisdiction to make an order and I go on to consider whether in the court's discretion such an order should be made and, if so, of what type.

Is there any other source from which the mother could secure funding?

[19] The mother's case is that she has spent all her savings of around £100,000 on responding to the father's contact application. On top of that she says she has borrowed £100,000 from Miss S, a friend, which has also gone to pay her lawyers' costs. There was a further sum of £39,000 paid to the mother by the father pursuant to a Sch 1 consent order dated 13 February 2009 which she undertook to use for a replacement kitchen and other furnishings in the home. That, too, she says she had to put towards her legal costs. Thus she has paid out around £239,000 on costs regarding contact. She asserts in an affidavit of 4 November 2010 that she now has '... no assets against which to borrow'. She has been unable to get a bank loan, unsurprisingly if she has

nothing to offer by way of security. Her London home is no use in that respect because it is not her's, being subject to trusts back to the father in due course. She does maintain what is described as a small flat in fashionable South of France where she and B take holidays, but it is rented by her for (as I am told) about €12,000 pa.

[20] Miss Reardon challenges the mother's financial disclosure. She rightly points out that the mother's friend, Miss S, has given inconsistent details as to the period over which she lent the mother the £100,000 and she (Miss Reardon) says that no sign of any such cash payments in the alleged individual sums of about £5,000 can be seen in the mother's bank accounts. She also says that the mother's bank statements show no debit sums for ordinary household outgoings like utilities (although the mother maintains that she pays these in cash). Miss Reardon's submission is that what she calls the mother's 'lavish lifestyle' means that the mother must have some other undisclosed account or means of resource. She also relies on the mother having told Dr Cameron that the father has 'stolen money' from her (namely by causing her to spend her savings on the contact litigation) and that she wants the father to repay it. She (Miss Reardon) suggests that the mother may see this Sch 1 application as a way of getting back at the father in respect of the savings which she (the mother) has had to spend. Mr Hyde responds by pointing out the fact that on 15 June 2010, the mother told Dr Cameron that, when she goes to places like the South of France or Venice, '... our friends pay for us to go, their secretaries organise it all'. If the mother had resources, she would not want or need to be reliant on the generosity of friends in that way, says Mr Hyde.

[21] Miss Reardon's submissions on this point (the mother's ability to pay) are not without force. It is for an applicant to demonstrate her case, which includes that she would not be able to pay her legal costs herself. On the other hand, as Moylan J said in *G v G (Child Maintenance: Interim Costs Provision)*, this is and has to be a broad jurisdiction. The court has to make a broad assessment of the situation, otherwise applications like this would turn into the equivalent of full-on disputed finance hearings with full discovery, cross-examination and findings of fact. No one has applied for this or suggested such an approach here, and it would be difficult to see it as proportionate. Miss Reardon urged me to be 'cautious' in the light of her criticisms of the mother's financial disclosure and I accept that I should be so. Nevertheless, the mother is on affidavit that she now has no assets: as is Miss S on affidavit about having lent her substantial sums in cash. Absent what I will call in common parlance some 'killer point' on the documents showing the mother's financial presentation to be false or probably false (and I do not find strong enough points to have been so demonstrated here), it would not in my judgment be just, on taking a broad view, to hold that the mother has undisclosed resources. Without such a conclusion, she falls to be taken for these purposes as someone with neither resources nor borrowing capacity. She asserts too that she would not be entitled to public funding by reason of the payments of £70,000 pa made by the father for B, and that has not been challenged. Accordingly, I am satisfied that the mother has shown she could not obtain legal representation for herself except by way of an order under Sch 1 to the 1989 Act.

Would the mother's solicitors represent her without being in funds?

[22] The father suggests that, if this application were to be unsuccessful, the mother's solicitors would in fact continue to act for her. Their willingness to let her run up costs of around £113,000 on credit with no obvious means to pay, is said to support this suggestion. The mother's solicitors say in terms that they will not continue to represent or support her without funding. Her solicitor is Alison Hayes. She is a partner in Levison Meltzer Pigott, a respected and experienced firm of family law specialists. She has sworn an affidavit in which she deposes to the sums of money already owed by the mother and as to her firm's fees likely to be incurred down to the 5-day hearing in March 2011. She says on oath that her partners are not prepared for her to continue acting without payment of the outstanding fees of about £113,000 and without funding being arranged to cover the estimated costs of around £95,000 down to the March 2011 hearing.

[23] The father's challenge to the mother's solicitors' stated position arises from the fact that on 28 April 2010, the mother entered into a deed of assignment (a 'Sears Tooth' type agreement) with her solicitors in respect of any sums which she might achieve for legal costs in these Sch 1 proceedings. Clause 2 reads:

> '... In consideration of the legal services provided and to be provided to [the mother] by [Levison Meltzer Pigott] in the action and otherwise ... [the mother] with full legal title guarantee [sic] assigns unto LMP Solicitors that part of her right, interest, benefit and advantage in the financial provisions and costs orders and interest thereon as will settle any lawful claim for payment they make against her in relation to such legal services.'

Those legal services are defined as those which '... have been and continue to be provided by LMP'. When the mother's solicitors disclosed this agreement to the father's solicitors, they did so under cover of a letter dated 20 September 2010, the relevant part of which reads:

> 'The Agreement dated 28 April 2010 states that our client must only repay her costs if she recovers anything in the Schedule 1 proceedings.'

That is what has led to the suggestion on the father's behalf that the mother's solicitors will or should continue to act for the mother on the basis that she would 'only have to pay them' if she is successful in these Sch 1 proceedings. Conversely, if she is unsuccessful, they will continue to represent her unfunded.

[24] I do not accept that suggestion. The mother's solicitors' letter was not well-phrased and I am not persuaded it accurately represents the understanding between the mother and themselves. In my judgment, it is sufficiently unlikely that they would have meant that they would continue to act for her without her having to pay them (except if she succeeded in this application) that I can safely discount that possibility. This is particularly so since the firm's position is clearly set out by a solicitor on oath. It is just that, by way of *security*, the mother has assigned to them anything which she may achieve within this Sch 1 application. Accordingly, I accept that the mother is

liable to her solicitors for all her costs, both those incurred and unpaid for and those for work done from now on regarding the contact dispute.

Can the father pay the sums sought by the mother?

[25] I have already dealt with this. He has taken the 'millionaires defence' and accepts that he can pay any order which the court would make.

Is the mother's stance in the contact proceedings reasonable and does she have merit?

[26] Miss Reardon has put in a small table analysing the reported cases where awards like this have been made. She extrapolates from it that awards have only been made where the applicant under Sch 1 has had a good case; or at least where there have not yet been any factual findings and where the parties have appeared to stand in a similar position as to merit. That, she says, is not the position here, where the court has already conducted a long hearing and made findings. She relies strongly on the various criticisms of the mother made by Her Honour Judge Mayer in her judgment of April 2009 [mostly omitted from this version of this judgment, but including that B's negative views of the father were influenced by the mother and were unacceptable and damaging].

[27] Miss Reardon described these findings in April 2009 as 'pivotal' and as justifying the father's claim that the mother is responsible for the difficulties which have led to the need for these costly contact proceedings. She also asserted that the mother has not co-operated with the spirit of a recent 'Plan for Contact' dated 4 October 2010, which has been put forward by Dr Cameron and Mrs Gupta, the children's guardian.

[28] Dr Cameron has since translated the general aims of that plan into the following four concrete suggestions:

(i) that work should be done with Karen Woodall of the Centre for Separated Families;
(ii) that the mother herself should engage in supportive therapy outside of the litigation process, to gain 'listening professional support';
(iii) that the mother should meet again with Dr Cameron for advice about the professional support which is available; and
(iv) that the mother should meet with an acquaintance of Dr Cameron's who is the former headmistress of a girl's boarding school, to talk about the options for B's future schooling.

[29] Miss Reardon's criticism of the mother was that she has only agreed one of these, namely to work with Karen Woodall, and has declined the other three proposals. In reply, however, Mr Hyde produced a letter dated 8 September 2010 sent to Dr Cameron by the mother's solicitors and copied to the father's solicitors, which states that the mother agrees to meet with him (Dr Cameron) again and to discuss matters with the suggested headmistress. I was further told by Mr Hyde that since that letter, the mother has in fact met with the headmistress. This seems to suggest that the mother is co-operating with the spirit of the October 2010 'way forward' proposed by Dr Cameron

and the children's guardian, although I do have well in mind Miss Reardon's comment that this may be only 'cosmetic'.

[30] During the argument, I raised with Miss Reardon the fact that the court is dealing in the contact proceedings here with a mother's strongly held feelings, which (whilst they have rendered some of her attitudes and behaviours objectively unreasonable – per Her Honour Judge Mayer's findings) are nevertheless genuine and present an unavoidable dynamic as regards the contact difficulties. In response Miss Reardon referred me to *Re T (Order for Costs)*, where the Court of Appeal upheld a circuit judge's costs order against a mother in contact proceedings. Her point was that, if a genuine but unreasonable mother may be ordered to pay the father's costs, then it cannot be right that such a father should be ordered under Sch 1 to pay the mother's costs upfront. In *Re T* itself, the mother had been found by the circuit judge to have behaved unreasonably, particularly in making unjustified allegations of sexual abuse and in reneging '... for no good reason' on a contact agreement. Wall LJ said in the Court of Appeal:

> '[50] ... we recognise that irrational behaviour is commonplace in complex contact disputes and that such behaviour may well be exacerbated by the personality of the individual parent. There is, however, in our judgment, a limit to which allowance can be made for a parent who deliberately and unreasonably obstructs contact by the other parent in circumstances where, on any objective analysis, contact is in the interests of the child and should take place.'

The circuit judge in *Re T(Order for Costs)* had 'found in terms that the child enjoys a good relationship with the non-resident parent [the father]; that there was no reason for the resident parent [the mother] to have any concerns' (at para [51]. It was held by the Court of Appeal that the mother could not in such circumstances '... rely on her own irrational anxieties to bring her conduct within the reasonable band' (at para [52].

[31] I acknowledge the force of Miss Reardon's point that *Re T (Order for Costs)* was a case where, far from having to pay the mother's costs, the father actually secured costs against the mother. It is an extreme example of the fact (which is 'a given' in Sch 1 applications of this type) that a party who would almost certainly not otherwise get a costs order, effectively gets his or her costs paid. This reflects the fact that Sch 1 to the 1989 Act is not a costs jurisdiction, but a financial relief jurisdiction exercised for the benefit of the child. Further, it goes without saying that every case is acutely fact-specific, and the case of *Re T* is clearly distinguishable from this type of case. There the child was only 4, had a good relationship with the father and did not have profoundly developed negative feelings about him which had become entwined with those of the mother. The mother there, having unreasonably resiled from a contact agreement, then proceeded to deny the father contact. Those features place that case into a different category from this one, where the child and the mother's feelings have become symbiotic and where (whilst the mother may have been unreasonable in the past) she is now seemingly willing to co-operate with an expert-led out of court approach to the contact difficulties: further where (as she would no doubt see it) she finds herself in the conflicted position of either standing by B or appearing to B to be letting

her down. I make no judgment about any of these matters, I merely comment that these are factors which I have to try to take into account as best I can in assessing the reasonableness or merit of the mother's forensic stance in opposing the father's application for contact.

[32] Mr Hyde strongly resists the suggestion that the mother is solely responsible for the contact difficulties. He points to the concluding paragraphs of Her Honour Judge Mayer's judgment of April 2009, where she said that both parents bore some measure of responsibility for B's situation. This, Mr Hyde submits, is the antithesis of the father's case at this hearing that full responsibility for the contact difficulties rests with the mother.

[33] Further, in assessing the mother's position within the contact proceedings, and repeating that B's attitude towards the father is considered to be enmeshed with the mother's, I must pay regard to the most recent comments of Dr Cameron and Mrs Gupta about the mother and B in the October 2010 Plan for Contact already mentioned. As regards B, they describe her as 'mature and articulate and well able to express her wishes and feelings', which appeared to be genuinely held by her. They say that she made it '... very clear both verbally and in writing that she did not want to see her father and will not go to any planned sessions'. She wrote to them that '... being forced to see him only makes me feel worse about him and about everyone else who is helping him, such as courts and psychiatrists'. She said that being forced to see the father '... brought back those feelings of pain and humiliation'. Then as regards the mother, Dr Cameron and Mrs Gupta comment:

> '... she clearly loves B, and B's positive developmental progress is testimony to her parenting. She presents as being very anxious and depressed by the ongoing court process. She, like B, expressed a deep sense of being humiliated and denigrated by the father ... She does not feel that B should be forced to have contact, is strongly against boarding school and is extremely concerned about the impact on B should she (B) be forced to go [to a boarding school].'

As long ago as July 2010, Dr Cameron spoke of the mother's '... sombre demeanour and tearfulness indicating vulnerable lower mood and notable disappointment when her grandiose social cravings prove out of reach'. He described her even back then as '... worn out by these proceedings'.

[34] It is against this overall background that I must consider broadly:

(a) the mother's reasonableness in opposing the father's application for contact and the overall merits of the position she is adopting;
(b) her reasonableness in being anxious to have legal representation; and
(c) the reasonableness of its being ordered to be funded by the father, as being for B's benefit.

These 'high conflict' contact cases are never straightforward. They depend on a complex mix of dynamics, perceptions and behaviours. It is almost always simplistic to suggest that one party or the other is independently to blame for the underlying relationship problems which contribute to the engrained

attitudes involved and to the things people say and do. Her Honour Judge Mayer's findings about the mother in 2009 justify the father's case that her (the mother's) perceptions and attitudes were, at that point in time, objectively unreasonable. Even so, however, the judge made criticisms of both parents, not just of the mother and I do not see that the father can point the finger at the mother with impunity. This is particularly so in the light of certain ill-advised comments made by the father to the media since Her Honour Judge Mayer's judgment, which would further have upset the mother and probably have contributed to the breakdown of the therapy referred to at para [6] above.

[35] It is practically a foregone conclusion that B will suffer in her emotional welfare and development if she continues to hold such profoundly negative views about her father; growing up with no counterbalance from her mother and denied knowledge of her father as he really is, or of her relatives on his side of the family. For this to be avoided, both the mother and B need help to change their deeply engrained attitudes and perceptions. This goes for the mother in particular, since her influence over B is understandably strong. She (the mother) appears on the face of it to be accepting such help and to be broadly co-operating with Dr Cameron and Mrs Gupta's plan for contact. Only time can tell whether and to what extent this is 'cosmetic'; and in any event there would seem to be no other way out of the present impasse. Having weighed all these various considerations, I am content to follow the approach that Moylan J adopted in *G v G (Child Maintenance: Interim Costs Provision)*, where he said that the applicant's stance (or one might say the overall case which she wishes to place before the court) could be fairly described as sufficiently reasonable to justify a Sch 1 award; and as not being such that an award could not be said to be for the benefit of the child. To the contrary, for the mother to be represented here is very much for the benefit of the child.

[36] I find accordingly that the above requirements for a Sch 1 order in respect of the mother's costs have been made out. I now come to how the order is to be structured and quantified.

Nature and quantification of the Schedule 1 order

[37] This is not something on which I received any significant submissions, as the competing arguments of counsel concentrated on the principle of whether a Sch 1 order in respect of the mother's costs should or should not be made here. There was a point during the argument when it struck me and I said that a possible approach might be to allow the mother her costs for the future, but not her unpaid costs already incurred, ie, the £113,000 or so (which I will call the 'unpaid incurred costs/fees'). The rationale for this would be:

(a) that her solicitors had allowed her to run up those unpaid incurred costs when (at least as we now know) she had no means of paying them; and

(b) that an award under Sch 1 would have the effect of benefiting them by retrospectively putting them in funds.

It is an approach which appealed to Charles J in *CF v KM (Financial Provision for Child: Costs of Legal Proceedings)*, at [77]. However, I have to

accept that the mother's solicitors are not willing to work for her on that basis (ie, on the basis that she would have funding for the future, but that the unpaid incurred costs would remain outstanding): and they cannot be made to do so. For an award of future costs alone to be of any benefit to the mother, she would effectively have to change solicitors and then manage to keep at bay any enforcement proceedings which her present solicitors might choose to take against her, targeted at the award, to recover the fees due to them. That position is compounded by the deed of assignment already referred to, whereby the present solicitors have a contractual right to claim from the mother anything awarded on this Sch 1 application up to the amount of their outstanding fees at any given point in time.

[38] Recognition of these considerations caused me to reflect further on the rationale of distinguishing between the mother's unpaid incurred costs and her future costs. Logically, the father is in no worse position by the fact of certain costs having already been incurred by the time of this hearing than he would have been if the mother's solicitors had acted instantly in about January 2010 (when she first failed to pay their fees) such that the fees now accrued would still then have been prospective. As it is, the father was on notice of an intended application under Sch 1 by virtue of the mother's solicitor's letter of 19 May 2010 (at which time her unpaid incurred fees were apparently in the region of only about £35,000) and her notice of application under Sch 1 followed quite soon thereafter on 14 July 2010. Thus much of the unpaid incurred fees accrued after the father was at least on notice of an intended application.

[39] The juridical basis of a Sch 1 award is, as stressed earlier, that it is and must be for the benefit of the child. If it is for the benefit of B that the mother should be represented, as I have found it to be, then logically that applies equally as to the mother's unpaid incurred costs as it does to her future costs. I accept that I need to exercise caution, given that an award in respect of the mother's incurred unpaid costs will effectively benefit the mother's solicitors in circumstances where they would otherwise be unable to recover their fees, or would have great difficulty doing so. That said and done, I have come to the conclusion that there is no compelling reason here to differentiate in principle between the incurred unpaid fees and the future fees.

The incurred unpaid costs

[40] As regards the incurred unpaid costs of £113,000, I propose to direct that they be paid by a single lump sum to the mother for the benefit of B. To protect the father's interests, I propose three conditions:

(a) The first is that the money should in fact be paid direct to the mother's present solicitors, to be used by them exclusively in satisfaction of their unpaid fees regarding the father's contact application at the date of this application.

(b) The second condition is that, if on more detailed scrutiny of the computer print outs and fee notes, there should turn out to have been any over-payment, then that is to be restored to the father with liberty to either side to apply (I suggest to a district judge) in the event of an issue as to the precise sum actually due.

(c) The third condition is that, if the father so wishes, the fees

should be subjected to a 'solicitor own client' assessment. That way, if there is anything about the mother's solicitor's fees which would have enabled her to achieve a reduction in her liability by a challenge to their bills, then the father would be in a similar position.

[41] I have considered if there should be a 'party and party' (or the modern equivalent) assessment, as would be ordered if the mother were awarded her costs against the father at the final hearing. This would not, however, be logical, as the award is conceptually one of financial support for B's benefit, the benefit being that her mother is represented, which involves the mother paying her solicitors' fees. I am sure I would have been told if the father's cost bills were significantly less than the mother's, and I was not. In circumstances where accrued fees seemed extremely high and especially if out of all proportion to the paying party's costs, then there might have to be court scrutiny of the quantum of a Sch 1 award as regards past fees, but not otherwise.

Future costs

[42] As regards the future fees, there are competing considerations as to how an award might best be crafted in an attempt to achieve maximum fairness, or minimum perceived unfairness. On the one hand it can be seen as best for the mother to have the comfort of full funding (£95,000) down to and including the March 2011 hearing. That would give her certainty and control within the process. It would serve to reduce her financial anxieties and might thus make her more likely to co-operate with Dr Cameron's and Mrs Gupta's 'out of court' way forward. This is the approach contended for by Mr Hyde. On the other hand, such an approach may be unfair to the father since, paradoxically, it might only serve to increase the mother's contempt for him and encourage her to feel that, so long as she pays lip-service to co-operation, she is financially empowered to be subtly difficult with relative impunity. If that be right, then the fairer approach would be to limit, for now, the funding which the mother is to be allowed at the father's expense, by making a sufficient award to take her some way towards the March 2011 hearing, but not actually to fund it. Her attitude and approach to the Plan for Contact in the meantime could then be reviewed by the court, absent agreement, and a further Sch 1 order made (or not made) according to how things had gone in the meantime.

[43] In my judgment, the approach the more likely to work and that most likely to minimise the unfairness which will be perceived by the father, is for the mother's funding to be considered incrementally. She will then be aware that the court would be considering her attitude to the 'out of court' approach of Dr Cameron and Mrs Gupta when it came to make any necessary determination as to further funding nearer the time of preparation of the March 2011 hearing. On this basis, I consider that a lump sum of £25,000 towards future fees would be reasonable, with the reservation that it be paid only against invoices rendered by the mother's solicitors for work actually done by them on the contact case up to that limit. If, as things turned out, less than that sum were needed for costs, then the lump sum would be so worded as to abate to that extent.

[44] The last paragraph of Miss Reardon's skeleton argument reads as follows:

> '... [the father's] case is that were the court to make an award in [the mother's] favour in these proceedings, it would be extending the remit of a Schedule 1 costs award far beyond that endorsed in the decided authorities, and would be reducing the test for litigation funding in section 8 proceedings to a bare analysis of the applicant's means and the respondent's ability to pay.'

Attractively though that is put, I do not accept it. The process is much more sophisticated and requires a careful analysis of the benefit to the child by way of (here) the mother's being able to be represented at the father's expense and of the broad merits of the mother's case in the contact proceedings. In complex cases, even a parent who has been criticised in the past may show merit in her views or feelings being properly represented to the court, where this is in the overall interests of the child, and in her being properly represented against adversarial criticism.

[45] Where I would sound a note of caution, however, is as regards any idea that Sch 1 applications to fund contact or residence or similar proceedings may be a neat way of circumventing the court's usual approach of 'no order as to costs' at the end of a final hearing. That is certainly not the case. These Sch 1 applications only get to the starting-block when the applicant has exhausted every reasonable way of funding herself and when the respondent has the wealth to provide such funding. So they are likely to be relatively rare. I would add further that, if it looks as though a Sch 1 application is going to be necessary, then it should be issued without delay. The existence of costs already incurred has the potential to complicate the issue and to make it more difficult for the court to maintain a measure of incremental control over the quantum and accrual of the applicant's costs.

Order accordingly.

Solicitors: *Levison Meltzer Pigott* for the applicant
Schillings for the respondent

PHILIPPA JOHNSON
Law Reporter

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