NEUTRAL CITATION No: [2022] EWFC 88 **Case No: ZW19P01451**

IN THE WEST LONDON FAMILY COURT
BETWEEN: **Applicant**

A
- and -

R **Respondent**

JUDGMENT IN RESPECT OF COSTS - HEARING 12 OCTOBER 2020
JUDGMENT DATED 16 NOVEMBER 2020 (treated as handed down 10am 17 November 2020)

HHJ CORBETT sitting as a Section 9 Deputy Judge of the High Court

---

Introduction

1. The hearing on 12 October was listed to consider a costs application by the applicant father (F) against the respondent mother (M). The child concerned is D born in 2013. The court delivered a written judgment on 20 July 2020 following a contested hearing on 24 June 2020 concerning F's application dated 14 October 2019 for child arrangements orders, specific issue orders and prohibited steps orders. The order drawn arising from that judgment has not been appealed by the M.

2. In this judgment I do not propose to rehearse the matters set out in my previous judgment, nor to set out in detail the submissions made by each party. Suffice it to say that I have considered with care the written and oral submissions of both parties.

3. The F seeks his costs in relation to his application dated 14 October 2019 as follows: Form N260 dated 22 June for all work carried out up to the conclusion of the final hearing on 24 June, a total of £24,864.24. This N260 was served on 22 June, in advance of the hearing on 24 June. The F had expressly put the M on notice when his solicitors sent a draft order to her on 15 June 2020, which was personally served, that he would seek his costs if no substantive response (to the draft order) were received. A further N260 dated 29 September for all work carried out from 25 June until the conclusion of the 12 October costs hearing, a

total of £3770. This N260 was served on 30 September, in advance of the hearing on 12 October. The total costs sought by the F are £28,634.24.

4. There have been 5 hearings:

20 January 2020 First Hearing Dispute Resolution Appointment before DJ Rollason

12 May 2020 Directions hearing before me (sitting, as I have throughout, as a Deputy High Court Judge) whereby the F sought a penal notice to be attached to the previous order

24 June 2020 one day Final hearing before me

24 July 2020 handing down of the Judgment

12 October 2020 Costs hearing

5. The F made an open offer in respect of costs on 30 September 2020, he was prepared to accept a sum of £20,000, the M did not respond.

6. I had not directed further position statements/ submissions to be filed for the costs hearing. Nonetheless, the F's written submissions (drafted by his Counsel Ms Hartley) were helpfully sent to the M on 8 October 2020. At 8.41h on the morning of the hearing, due to start at 10h, M's Direct Access Counsel Ms Tyler sent a position statement to the court. Until that morning it was not known that the M would have any legal representation. I am very grateful to Ms Tyler for providing a detailed document given her late instructions. The written documents and case law referred to by both Counsel has been of great assistance.

7. <u>Summary of the F's arguments:</u>

(a)M's conduct is relevant under r.44.2(4)(a) Civil Procedure Rules 1998 (CPR), and in fact all of the examples of conduct stated at r.44.2(5) apply.

(b)The decision of the court is relevant pursuant to r.44.2(4)(b) CPR, the F submitting that the orders F sought have been granted with very limited modification.

(c)The F's efforts to resolve the proceedings and the costs application are relevant pursuant to r.44.2(4)(c) CPR.

(d)At the FHDRA on 20 January a general order was made in relation to that hearing namely 'no order as to costs'. There was no specific provision in respect of the costs of the immigration expert directed. F submits that the court has the power (under r.3.1(7) CPR) to vary this interlocutory decision on costs, and that I should exercise my discretion to do so. As to the costs of the expert, the F submits that given that the order was silent about the costs of this instruction, that the court retains a residual discretion to impose a costs decision later.

8. <u>Summary of the M's arguments:</u>

(a) Costs orders are rarely made in private law children proceedings and the established criteria of unreasonable or reprehensible conduct are not satisfied in this case.

(b) In the mother's personal circumstances, it would not be just to make a costs order against her.

(c) The welfare implications of a costs order will fall most heavily on D and will be to his detriment.

(d) If the court were minded to order costs:
(i) the costs of and incidental to the FHDRA on 20 January should be deducted
(ii) the M should not bear the costs of the instruction of an expert (whose instruction was directed at the FHDRA) which was required and commissioned by him
(iii) the M should not bear the costs of the F's application to attend the final hearing by videolink
(iv) there should be a reduction generally to reflect b and c above.

9. Other than her arguments summarised above, the M does not argue that the costs proposed are not proportionate, reasonably incurred or reasonable in amount. In my judgment, that is a realistic submission given the variety and gravity of the issues involved in the F's application namely (child arrangements orders, temporary removal to a non-Hague Convention (HC) country, temporary removal to HC signatories, prohibited steps orders) and the fact this was allocated to a High Court Judge and heard by me sitting as a deputy HCJ. In fact, I agree with the F's Counsel that the sum claimed is lower than one would expect bearing in mind the issues and the fact there have been 5 hearings.

10. In respect of the FHDRA, the M submits that DJ Rollason's order clearly states 'no order as to costs' and can only be disturbed on appeal. Regarding the expert the order is silent in the paragraph which directs it, but that must be subsumed in the overall 'no order as to costs', further that the M had no involvement in the instruction.

<u>The relevant Law</u>

11. Section 51(1) of the Senior Courts Act 1981 provides that: *'subject to rules of court, costs…shall be in the discretion of the court'.*

12. This broad discretion is reflected in the Family Procedure Rules r. 28.1: '*The court may at any time make such order as to costs as it thinks just'* and CPR r.44.2(1): *'The court has discretion as to – (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.'*

13. Pursuant to r.28.2 FPR 2010, Parts 44, 45 and 47 of the CPR 1998 are imported to the present application, with prescribed exceptions (being r.44.2(2) and (3), r.44.10(2) and (3)). The general rule in CPR 44.3(2)(a) 'that the unsuccessful party should pay the costs of the successful party' is disapplied.

14. The court is guided by following principles in the exercise of its discretion:

a. In deciding what, if any, order to make the court will have regard to all the circumstances, including the checklist set out at r.44.2(4) CPR 1998:

r.44.2(4)…

(a) the conduct of all the parties
(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

b. For the purposes of r.44.2(4)(a) above, **'conduct' shall include** (per r.44.2(5) CPR 1998):

r.44.2(5)…

*(a) conduct **before**, as well as **during,** the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;*
*(b) whether it was **reasonable** for a party to raise, pursue or contest a particular allegation or issue; and*
*(c) the **manner** in which a party has pursued or defended its case or a particular allegation or issue; and*
(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim
(my emphasis)

c. The court's wide-ranging discretion includes powers to make any of the following alternative orders (pursuant to r.44.2(6) CPR 1998):

r.44.2(6)…

(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and
(g) interest on costs from or until a certain date, including a date before judgment.

d. In ordering a party to pay the costs of the other the court can, at its election, either make a summary assessment of costs, or order a detailed assessment. In the latter case, the court should order the paying party to pay a reasonable sum on account of costs, unless there is good reason not to do so (r.44.2(8) CPR 1998).

15. The Supreme Court has twice given guidance on the costs principles applicable to first instance children proceedings: Re T [2012] UKSC 36; [2012] 1 WLR 2281; and Re S [2015] UKSC 20; [2015] 1 WLR 1631.

In Re T (supra) at para 1 – Lord Phillips states

[11] (4)(b) is relevant in relation to a regime where the general rule in (2)(a) applies. For this reason we do not see that it has any direct relevance to family proceedings. (4)(c) can have no relevance to public law proceedings and can thus be disregarded in the present case. The other rules are simply examples of circumstances that will be relevant when considering the result that justice requires in the individual case. In family proceedings, however, there are usually special considerations that militate against the approach that is appropriate in other kinds of adversarial civil litigation. This is particularly true where the interests of a child are at stake. This explains why it is common in family proceedings, and usual in proceedings involving a child, for no order to be made in relation to costs. The reasons for departing from the principle that costs normally follow the event differ, however, depending upon the nature of the family proceedings. On this appeal it is necessary to identify the policy considerations that should inform the approach to costs that is required in the interests of justice in care proceedings.

Reasons for making no order for costs in family proceedings that are not relevant in the present case

[12] The Court has been referred to a number of authorities dealing with costs in family proceedings. In order to see the wood from the trees it is helpful to remove from the forest the timber that does not bear on the issues raised by this appeal. The following reasons for not awarding costs in family proceedings are not relevant:

i) In ancillary relief proceedings each party's liability for costs will be taken into consideration when making the substantive award. This approach has the advantage of discouraging the parties from running up unnecessary costs – see Baker v Rowe [2009] EWCA Civ 1162; [2010] 1 FCR 413, paras 20 to 23 per Wilson LJ.

ii) Orders for costs between the parties will diminish the funds available to meet the needs of the family – see Gojkovic v Gojkovic [1992] Fam 40, 57, per Butler-Sloss LJ and R v R (Costs: Child Case) [1997] 2 FLR 95, 97, per Hale J. (This could, of course, be a good reason not to award costs against a family member in care proceedings).

iii) It is undesirable to award costs where this will exacerbate feelings between two parents, or more generally between relations, to the ultimate detriment of the child: see B (M) v B (R) (Note) [1968] 1 WLR 1182, 1185 per Willmer LJ; Sutton London Borough Council v Davis (No 2) [1994] 1 WLR 1317, 1319 per Wilson J. (Once again this could be a good reason not to award costs against a family member)…..

[44] For these reasons we have concluded that the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice and which should not be subject to an exception in the case of split hearings. Judge Dowse's costs order was founded on this practice. It was sound in principle and should not have been reversed by the Court of Appeal.

16. It was said in Re S (supra) by Lady Hale

[17] As was pointed out in In re T, rule 44.2(4)(b) is relevant in a situation where the general rule applies but has no direct relevance where it does not (para 11). This is not, of course, to

say that success or failure is irrelevant in children's cases: no-one has suggested in this case that the successful party should have to pay the unsuccessful party's costs (although, as will be seen, there may be circumstances where this would be appropriate). Nor does rule 44.2(4)(c) readily fit the conduct of children's cases, save as an aspect of the general desirability of the parties co-operating and negotiating to reach an agreed solution which will best serve the paramount consideration of the welfare of the child. As such, it is part of the general conduct of the proceedings, some aspects of which are listed in rule 44.2(5).

[18] As long ago as Gojkovic v Gojkovic (No 2) [1992] Fam 40, at 57B, the Court of Appeal observed that it was unusual to make an order for costs in children's cases. In Keller v Keller and Legal Aid Board [1995] 1 FLR 259, at 267-268, Neill LJ went further:

"In the last decade, however, it has become the general practice in proceedings relating to the custody and care and control of children to make no order as to the costs of the proceedings except in exceptional circumstances."

He did, however, go on to say that it was "unnecessary and undesirable to try to limit or place into rigid categories the cases which a court might regard as suitable for such an award".

[19] Nevertheless, the cases which might be regarded as suitable may be deduced from the reasons why the courts have adopted the "no costs" approach. The classic explanation is that given by Wilson J in Sutton London Borough Council v Davis (No 2) [1994] 1 WLR 1317, at 1319:

"Where the debate surrounds the future of a child, the proceedings are partly inquisitorial and the aspiration is that in their outcome the child is the winner and indeed the only winner. The court does not wish the spectre of an order for costs to discourage those with a proper interest in the welfare of the child from participating in the debate. Nor does it wish to reduce the chance of their co-operation around the future life of the child by casting one as the successful party entitled to his costs and another as the unsuccessful party obliged to pay them. The proposition applies in its fullest form to proceedings between parents and other relations; but it also applies to proceedings to which a local authority are a party. Thus, even when a local authority's application for a care order is dismissed, it is unusual to order them to pay the costs of the other parties." …….

[22] It can also generally be assumed that all parties to the case are motivated by concern for the child's welfare. The parents who dispute with one another or with the local authority over their children's future do generally love their children dearly and want the best for them as they see it. There are of course some wicked, neglectful, selfish or merely misguided parents who are not motivated to do their best for their children, but these are not the generality of parents, even those whose children are the subject of care proceedings. Local authorities are not motivated by love, in the way that parents are motivated by love, but they do have statutory duties to investigate and take action to protect children if there is reasonable cause to suspect them to be suffering or likely to suffer significant harm: Children Act 1989, section 47. They will be severely criticised by press and public alike if they fail to take action when they should have done.

[23] Another consideration is that, in most children's cases, it is important for the parties to be able to work together in the interests of the children both during and after the

proceedings. Children's lives do not stand still. Their needs change and develop as they grow up. The arrangements made to cater for those needs may also have to change. Parents need to be able to co-operate with one another after the case is over. Unless there is to be a closed adoption they also need to co-operate with the local authority and the people who are looking after their children. The local authority need to be able to co-operate with them. Stigmatising one party as the loser and adding to that the burden of having to pay the other party's costs is likely to jeopardise the chances of their co-operating in the future.

[24] There is one final consideration. In certain circumstances, having to pay the other side's costs, or even having to bear one's own costs, will reduce the resources available to look after this child or other children. Thus, for example, if a mother who is bringing up the children on modest means had not only to bear her own costs but also to pay the father's costs, when unsuccessfully resisting his application for more contact with the children, the principal sufferers might well be the children. Nor can it be ignored that, if local authorities are faced with having to pay the parents' costs as well as their own, there will be less in their budgets for looking after the children in their care, providing services for children in need, and protecting other children who are or may be at risk of harm……

[26] All the reasons which make it inappropriate as a general rule to make costs orders in children's cases apply with equal force in care proceedings between parents and local authorities as they do in private law proceedings between parents or other family members. They lead to the conclusion that costs orders should only be made in unusual circumstances. Two of them were identified by Wilson J in Sutton London Borough Council v Davis (No 2): "where, for example, the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable: Havering London Borough Council v S [1986] 1 FLR 489 and Gojkovic v Gojkovic [1992] Fam 40, 60C-D" (p 1319). Those were also the two circumstances identified in In re T, at para 44……..

[31] I do not understand that Lord Phillips, giving the judgment of the court in In re T, was necessarily intending to rule out the possibility that there might be other circumstances in which an award of costs in care proceedings might be appropriate and just. That would be to ascribe to para 44 of the judgment the force of a statutory provision. Such a rigid rule was unnecessary to the decision in that case and cannot be treated as its ratio decidendi.

17. In the course of the costs hearing, M sought to rely on Timokhina v Timokhin 2019 EWCA Civ 1284, I allowed some time following the hearing for the parties to consider this authority and make brief written submissions. This relates to the F's application that the cost of the FHDRA on 20 January 2020 including the cost of the expert directed on that day, be paid by the M.

The Court of Appeal stated in that case that the Judge in the lower court did have jurisdiction by a residual discretion to make an order for costs even though the earlier order was silent as to costs.

In the course of this part of submissions I was referred by Counsel for the F to Tibbles v SIG 2012 EWCA Civ 518 in support of his argument that the FHDRA decision as to costs can be varied under r.3.1(7) CPR. The Court of Appeal (Rix LJ) gave guidance on the exercise of r.3.1(7) CPR.

[39] In my judgment, this jurisprudence permits the following conclusions to be drawn:

(i.)Despite occasional references to a possible distinction between jurisdiction and discretion in the operation of CPR 3.1(7), there is in all probability no line to be drawn between the two. The rule is apparently broad and unfettered, but considerations of finality, the undesirability of allowing litigants to have two bites at the cherry, and the need to avoid undermining the concept of appeal, all push towards a principled curtailment of an otherwise apparently open discretion. Whether that curtailment goes even further in the case of a final order does not arise in this appeal.

(ii.)The cases all warn against an attempt at an exhaustive definition of the circumstances in which a principled exercise of the discretion may arise. Subject to that, however, the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated.

(iii.)It would be dangerous to treat the statement of these primary circumstances, originating with Patten J and approved in this court, as though it were a statute. That is not how jurisprudence operates, especially where there is a warning against the attempt at exhaustive definition.

(iv.)Thus there is room for debate in any particular case as to whether and to what extent, in the context of principle (b) in (ii) above, misstatement may include omission as well as positive misstatement, or concern argument as distinct from facts. In my judgment, this debate is likely ultimately to be a matter for the exercise of discretion in the circumstances of each case.

(v.)Similarly, questions may arise as to whether the misstatement (or omission) is conscious or unconscious; and whether the facts (or arguments) were known or unknown, knowable or unknowable. These, as it seems to me, are also factors going to discretion: but where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate.

(vi.)Edwards v. Golding is an example of the operation of the rule in a rather different circumstance, namely that of a manifest mistake on the part of the judge in the formulation of his order. It was plain in that case from the master's judgment itself that he was seeking a disposition which would preserve the limitation point for future debate, but he did not realise that the form which his order took would not permit the realisation of his adjudicated and manifest intention.

(vii.)The cases considered above suggest that the successful invocation of the rule is rare. Exceptional is a dangerous and sometimes misleading word: however, such is the interest of justice in the finality of a court's orders that it ought normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation.

Decision

18. In deciding what order if any to make about costs, I must have regard to all the circumstances. I have a wide discretion which I must apply in accordance with the rules as set out above. Costs order are rarely made in private law proceedings, but this was a case where, in my judgment, the M's conduct was unreasonable. My previous judgment is relevant in its entirety in consideration of this costs application, but I will make some specific references to parts of it below.

19. The M's unreasonable conduct includes (the numbering in square brackets refers to my earlier judgment)

• The M's withdrawal of consent to travel to Z was first made a week prior to the financial remedy proceedings in August 2019. Following the events in August 2019 as set out in my paragraphs 5-7, he issued his application. I found that to be entirely understandable as he did not want a repetition of the uncertainty as to when, how and where he spends time with D.

• [13] Both prior to and since issuing the application, F's solicitor has made strenuous efforts to set out for the M what child arrangements and orders for foreign travel F sought (in letters dated 16 September, 19 November, 7 February, 16 April, and with his draft order sent on 15 June 2020). Further letters were sent in an effort to obtain M's compliance with the court's directions (letters of 24 February, 27 February, 9 March, 17 March, 3 April, 16 April, 6 May, 11 May and 13 May). F has set out his proposals and reasons he sought orders from the court in his statements dated 10.2.20 and 9.6.20.

• [14] Every possible effort was taken by the F to secure the M's compliance with the directions and to respond to the F's application. The F applied for a penal notice on 9 March 2020, which came before the court on 12 May 2020. On that day, my clerk tried to connect the M to the call three times but there was no response. The court gave the M an extension to 27 May 2020 to file her first statement (with a penal notice attached) and extended time for the second statement to be filed to 9 June 2020. The court further directed that the Children Act application should proceed on 24 June on the basis of oral submissions only, unless otherwise decided by the trial judge before the hearing. The order I made on 12 May 2020 records that F's solicitors contacted M on nine separate occasions between 24 February 2020 and 11 May 2020 without receiving any response. His solicitors wrote again on 13 May (which was sent by personal service).

• The M had been directed (at the FHDRA in her presence) to file and serve a statement by 24 February. Even when extended by order of the 12 May to 27 May, backed by a penal notice personally served, the M failed to comply or even to contact the court (my clerk's email address being on the order). It was wholly unreasonable of the M to ignore court orders including those with a penal notice attached. I have seen the raft of letters sent by the F's solicitors to the M over the many months prior to and during this litigation. They are polite and aimed at securing her co-operation.

• This educated and intelligent mother did not contact the F's solicitors nor write to court before 19 June 2020 to ask for an extension (either to the order of DJ Rollason or to the extended deadline given by my order on 12 May), nor to say she was unwell nor to explain why she had not complied with the court's orders including the penal notice.

• When M eventually made contact with F's solicitor on 19 June 2020, she stated that she intended to file a statement but did not say when. She said that she had not done it previously because she had been unwell.

• [20] Until she began to address the court neither F's legal team nor I knew what her position was on the draft order, since she had not filed any evidence as directed, despite the penal notice, nor had she responded to the draft order emailed to her.

• [22] My observations on what the M told the court: She knew from attending the 20.1.20 hearing about the orders for her to file evidence. She knew from before that hearing that F had solicitors who were trying to engage her in the proceedings. The M has a demanding professional career and is highly intelligent. It is inconceivable that she had no mobile telephone for a 'couple of months' as she asserts in her email on the day before the hearing. Her email sent to my clerk at 16.17h on the day before the hearing indicates she had tried to contact the Judge, the court and Ms Blake my clerk. No emails had been received by my clerk or myself, and M had Ms Blake's email address in the order and used it on the day before the hearing. The M had email access, yet did not reply to the F's solicitors countless [justified] communications. She chose to ignore the letters sent by the solicitors for F as she regarded them as harassing which they were not at all.

• [23] I am satisfied that the true reason for non response is as she said – she thought that the case would be adjourned due to CV19. The M has ignored these court proceedings hoping that they would go away. She has chosen not to communicate to the court until over 5 months later, the day before the hearing listed on 24.6.20. She has not made any attempts to email the F or his solicitor or the court – a simple email could have been sent setting out that she was ill and sought more time. The GP letter contains information that she had had symptoms of a viral illness. The assertion that she could not respond to court proceedings as a result is likely to have come from the mother. The letter does not say when the mother saw the GP for this illness, when the symptoms arose nor when it was diagnosed, the letter is merely dated 2 days prior to the court hearing. The mother was able to talk animatedly almost without stopping for an hour before me, she appeared very able to set out her case and arguments. It is not necessary to adjourn the final hearing. The M has had ample opportunity to read the papers, and put her case prior to the listed final hearing and has chosen not to. In any event I heard from her in detail and at length when she eventually arrived in the hearing on 24 June.

20. Having considered the 2 Supreme Court authorities cited above I am not satisfied that the 'outcome' of the application (CPR r.44.2(4)(b)) has direct relevance to the exercise of my discretion on costs. What is of much greater relevance, is that in order to provide a clearly understood and lawful way to spend time with D, it was necessary for the F to issue this application and to progress it through to a final hearing, such was the M's lack of response to his solicitor's reasonable correspondence and to the orders of the court. At the FHDRA an issue which remained to be resolved was whether D should be permitted to travel to Z with his F, his statement being directed to his response to the M's case that he presents an abduction risk. That remained an issue at the final hearing.

21. I found the F's proposed order to be generally sensible, and noted that he could not have suggested more. In contrast the M has chosen to ignore these court proceedings. The manner in which they respectively dealt with (or failed to deal with) this application is highly relevant.

22. The Judgment sets out the parties' competing positions on the various matters in issue, including the major matter of the leave to remove D for holidays to Z.

23. At the final hearing the M made a raft of allegations orally including that the F held her 'hostage', posed a 'risk of abduction' to D, or 'harassed' her with correspondence.

My judgment records (amongst other matters)

[7] I cannot accept that [F] was, at all, holding [M] or D 'hostage.

[26] In my judgment there is no risk of abduction by F… I do not accept that the mother has any genuine belief that the F will abduct D. In her submissions to me the mother said that the F held her and D hostage in Z in August 2019. This is simply not made out.

[26] The M has never in fact alleged that F has threatened not to return D to her. I find that the M does not hold any genuinely perceived risk of abduction, she allowed 3 holidays with F in Z, choosing during the last one to go to W on business, leaving D with his F and making no complaint on her return or since about anything the F said or alleged or did when in Z

[26] Given the correspondence I have seen, and the fact that she regards entirely conciliatory letters as harassing, I am satisfied that unless I make this order, the mother will continue to ignore or delay replying to the F's reasonable requests about their son. I will make this order as sought save that the requests are to be 'reasonable requests'. 48 hours to reply is not unreasonable given telecommunications in the modern age.

24. I must note that it was not alleged that the M has been motivated by malice or ill will towards the F, nor that she has conducted this litigation deliberately to increase his costs.

25. Whilst it might be said that many parents oppose a holiday overseas, especially to those countries not signatories to The Hague Convention, what is palpably different about this case is that the M's allegation of her fear of abduction led to solicitor's correspondence which she ignored, leading to a necessary application being issued. Added to that is her refusal after the FHDRA to discuss the matters in issue which might have led to an agreement between the 2 parents. Further, I found that she did not have any genuine fear of abduction.

26. The F's efforts to end the proceedings has potential relevance under r.44.2(4)(c) CPR; whilst also M's lack of response to his efforts relate to conduct. The F made a number of attempts pre-issue and right up until the middle of the final hearing (when M joined the remote hearing) to try to resolve his application by agreement. These include his solicitors 'strenuous efforts' as I have found them. The M made no response (not even a counter-proposal) to any of these written proposals from F. When the M joined the court hearing which was underway on 24 June 2020, I suggested that the parties take some time to discuss matters, in order to see if agreement could be reached now. It was to the F's credit that he was willing to discuss matters despite the M's lack of engagement to that point, and given that the hearing had begun. Some matters were agreed, others remained in dispute.

27. The F has continued to try to compromise by making an open offer as to costs to the M on 30 September 2020 (on the basis that if he could avoid this hearing it would be accepted. He left it open for acceptance until 7 October 2020). His total costs claimed came

to £28,634.24, he made a proposal to accept £20,000. The M has not responded to this letter at all.

28. Would a costs order be just?

Both parents are intelligent, talented and highly qualified, they each have the potential to earn good salaries. The M is now unemployed from an NGO where she held a professional role with a net monthly salary of £2360 (in August 2019). I have seen an undated letter produced by the M from the NGO stating that her fixed term contract is to end on 30.9.20 and she would receive 148 hours of accrued annual leave to be paid in her final pay. The Judge hearing the financial remedy case was 'comfortable in concluding that on a balance of probabilities the [M's]'s income is likely to increase'. The F was said at the same time to have an income from all sources, working abroad, of around £200,000, but if he returned to Europe to work, of around £90-96,000 pa net. The Judge awarded a lump sum of £310,000 to the M plus £24,000 pa by way of child maintenance. The initial part of the lump sum namely £240,000 was paid as directed and remains intact.

29. I heard only limited submissions on the question of the parties' finances. It is a fact that the F is the higher earner, and that the M has D living with her most of the time.

30. I have taken into account that the parties need to work together as parents in the future, and the question of the costs of these proceedings and how they are to be borne might affect their chances of co-operation in the future. This works both ways, in that the F has had to expend legal costs in order to obtain the orders he sought.

31. The M said at the final hearing that she had told the F in early March that she was ill. I deal with this at paragraphs 22-23 of the earlier judgment. When no response was received to many communications from his solicitors and the court, the F had to proceed.

32. With the advantage I have of being the trial Judge, I can conclude that the M's conduct in these proceedings has gone far beyond what is reasonable, and that a costs order is entirely just.

33. It has not been necessary for me to trawl through the statements of costs, as it is accepted that they are proportionate (and I agree), other than the matters below relating to the 20 January FHDRA.

34. FHDRA

Paragraph 8 of the order dated 20 January directs the F to obtain an expert legal advice from a relevant immigration expert. There is no reference as to who bears that cost. Paragraph 21 of the order states 'no order as to costs'.

35. The F submits that the court can and should revisit the 'no order as to costs' made at the FHDRA. I agree that r3.1(7) CPR gives the court the power to vary or revoke an order. The Court of Appeal gave guidance on the exercise of this *power* in Tibbles v SIG Plc 2012 EWCA Civ 518, including that 'successful invocation of the rule is rare…such is the interests of justice in the finality of a court's orders that it ought normally take something out of the ordinary to lead to variation or revocation of an order especially in the absence of a change of

circumstances in an interlocutory situation'. In the instant case, the issues at the FHDRA were clear on the face of the order, and continued to be the main issues at the final hearing. Further the M's poor co-operation up to that point was known, so the fact that it continued is not a change of circumstances. I am not persuaded there is something out of the ordinary to justify that that I revise/revisit the 'no order as to costs' specifically ordered on 20 January, save as below.

36. The costs of the immigration expert are not dealt with at all in the order save that the F is directed 'to obtain' advice from an immigration expert (as above). There is no express costs order about this nor about any other directions made.

37. Pursuant to r.28.1 FPR the court may at any time make such orders as to costs as it think just. CPR r.44.10 (1) provides that where the court makes an order which does not mention costs, …the general rule is that no party is entitled to his costs.

38. The interrelation of the 2 rules was considered in Timokhina v T (supra) by the Court of Appeal where the order under consideration was silent as to costs. King LJ at paragraph 45 states:

[45] In my judgment the starting point to the issue of jurisdiction is FPR r.28. The rule is the overarching provision and says in terms that the court may at any time may make such order as to costs as it thinks fit. I do not accept that the rule prohibits the making of a retrospective order where no order has been made. Whether a court will in fact make such an order will depend upon the circumstances of the case and where costs have not been mentioned in the original order, an application will be necessarily considered by the court against the backdrop of CPR 44.10 (i)(a) that as a general rule, the party seeking the order for costs, is not entitled to an order.

Given its incorporation into FPR 28, the court's approach is informed by the proper interpretation of CPR 44.10 (i)(a), an interpretation which will be the same for all purposes regardless of whether or not the application is made under the umbrella of the FPR.

And then at paragraph 52

[52] In my judgment the position is clear; CPR 44.10 is exactly what it says it is - a general rule. When the statutory instruments are traced through, it becomes apparent that following the amendment to the rule by statutory instrument on 25 March 2002 the rule ceased to be an absolute rule. Had the intention been to restore that position, the word "general" would have been removed when the exceptions were added in 2008. Further, as noted above, the principle that costs follow the event does not apply in family proceedings. The exclusion of CPR 44.10(2) therefore fits logically into the wholly discretionary approach to costs in family proceedings and reinforces the view that, in referring to a "general rule" in CPR 44(1)(i), the intention of the draftsman was to leave the court with a residual discretion.

39. Given that the FHDRA direction as to the expert does not mention the question of costs, other than that it was to be obtained by the F, I consider that I do have a residual discretion to make such orders as to costs about that report as I think is just. The general 'no order as to costs' refers to the preparation for and attendance at that hearing. It does not, for example, relate to the costs of preparing the statements directed by that order.

40. On 20 January the M's case was that the F presents an abduction risk, the order makes that clear at paragraph 7b. Given that issue, DJ Rollason (correctly) decided that it was necessary for there to be an expert instruction in order to determine the application. At the final hearing I found that there was no risk of abduction and I did not accept that the M had any genuine belief that the F would abduct D. In those circumstances I consider that it is just to include the costs of the expert report in the overall costs to be paid. It would be entirely unjust for the F to have to bear the entire costs of the expert given the issues at the FHDRA and my findings.

41. The 12 May 2020 hearing was primarily concerned with the F's application for a penal notice although also considered the F's application to attend by videolink due to the advice then in force against international travel. The order made on that day included attaching a penal notice to the order of DJ Rollason in an effort to obtain evidence from the M. The costs of the hearing were reserved. The hearing would not have been necessary had the M complied with the order dated 20 January, and unfortunately, she did not comply with my order of 12 May despite the penal notice.

42. Conclusion

Total sum claimed by F: £28,634.24

Remove costs of the FHDRA (Counsel and solicitor) £3600

Balance £25,034.24

43. The M's conduct went far beyond what is reasonable, she made barely any effort to engage in these proceedings which were justifiably commenced by the F. In my judgment, taking all matters referred to herein into account, it is just to order her to make a contribution to the F's costs in the sum of £15,000. This is to be paid by 31 December 2020.