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Neutral Citation Number: [2024] EWHC 1512 (Fam)

Case No: FD23P00175

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

-

The Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 13 June 2024

Before :

Mr Justice Moor

- -

Between :

B R — **Appellant**

-and-

S N — **Respondent**

- -
- -

The **Appellant** appeared in person
Ms Jacqueline Renton (instructed by Forsters LLP) for the **Respondent**

Hearing dates: 12th and 13th June 2024

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JUDGMENT

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MR JUSTICE MOOR:-

1. This is an application for permission to appeal and, if permission is granted, the appeal itself from an order made by HHJ O'Neill sitting in the Family Court at Bristol on 19 February 2024.

2. In essence, HHJ O'Neill made a Hadkinson order, prohibiting the Appellant, BR (hereafter "the Father") from pursuing his application for a Child Arrangements Order ("CAO"), including a change of residence, of two children, save in relation to their schooling, until he has purged his contempt of an order made by Peel J on 18 September 2023. The Respondent, SN, is the children's mother (hereafter "the Mother").

3. The two children are NM, a boy, who will soon be twelve years old and MM, a girl, who will soon be aged 8.

4. Unfortunately, the case has a very significant litigation history. I am quite sure that the battle that has taken place between the parents over many years has caused nothing but distress and harm to the two children.

5. The Father is from Country A. He can best be described an entrepreneur, with a background in commodities. He has children by a previous marriage and a baby with his new partner. The Mother is from Country B. She is a child-carer and home-maker.

6. The Mother came to the United Kingdom in 2010. A relationship commenced with the Father in 2011. They never married. Their life together could be described as peripatetic with spells in South America, Denmark and the United States of America as well as in this country. In late 2018, the Father said that his business had all but collapsed, but there is a finding of Peel J that his lifestyle continued unabated.

7. The relationship broke down in 2020. The Father's case was that the Mother had brought the children to this country wrongfully. The Mother said that they were habitually resident here at their very substantial rented home in the West Country.

8. On 22 February 2021, the Father applied pursuant to the Hague Convention for the children's peremptory return to Denmark. The application was determined by Theis J in August 2021. It is clear that she gave a strong judicial indication that there had been no wrongful removal or retention of the children. In consequence, the Father withdrew his Hague Convention application on 10 August 2021. He cannot complain that he was unfairly treated as he was represented by very experienced leading counsel. Theis J made an order that the children were to live with both parents in this

jurisdiction, but primarily with the Mother and attend school here. To that extent, welfare orders were made, although I accept not after a full welfare investigation. The Father indicated that he intended to make an application for a relocation order. He undertook to pay school fees; agreed to continue to pay the Mother's rent; and pay her child maintenance of £7,500 per month. He was ordered to pay £59,326 towards her costs, which he did.

9. He makes a complaint that the English court has never determined a full welfare application in relation to the children, but he had the clear opportunity to make such an application, as recorded in the order of Theis J, in 2021. He did not do so. Instead, he applied for sole custody of the children in Denmark on 1 September 2021. I find this quite inexplicable. Inevitably, the Danish court refused to accept jurisdiction, although I understand that the Father even attempted to appeal that ruling.

10. The Father stopped paying the child maintenance, something that he has since said he regrets, and the rent on the home in the West Country. The Mother therefore applied on 7 February 2022 for orders pursuant to Schedule 1 of the Children Act 1989. On 31 March 2022, Peel J determined that this court had jurisdiction. The Father sought permission to appeal but it was refused by the Court of Appeal. On 13 April 2022, Peel J directed that the Father should reinstate the periodical payments of £7,500 per month and the rental payments. The Father again applied for permission to appeal but that application was also refused. The Mother applied to enforce these orders. The day before the hearing on 27 May 2022, the Father paid the arrears of periodical payments, but a further application for enforcement had to be made on 22 November 2022, by when it was said that there were unpaid legal fees of £167,287 and £34,500 in unpaid rent.

11. Peel J conducted a five day hearing of the Mother's Schedule 1 application in February 2023. I have read the judgment with care. Following the judgment, the Father gave undertakings to pay the Mother's rent, once she and the children had moved, either in the West Country (up to £70,000 per annum) or in London (up to £96,000 per annum); and £60,000 per annum per child by way of general maintenance. He was ordered to pay the rent for her existing property until she moved and the children's school fees. There was also provision for the purchase of a property on trust in due course. The judgment says that the children primarily live with their Mother, but spend substantial time with their Father. I do not propose to outline the detail of the judgment in so far as it relates to the finances, other than to note that the Father made an offer of financial support that was not that far removed from the eventual order. He said he had net income from employment abroad of £135,000 per annum and expected a bonus of at least $500,000 by the end of 2024. He had an interest in a Danish property valued at just under £1 million. He had been loaned large sums during the proceedings by his friends and business associates. He had not complied with an order for legal services funding ("LSPO") as he resented the principle, but the judge found he had the money to pay. The judge was satisfied that, although the Father was difficult, he had no concealed resources. The judge said that he cherishes his children and does not want to jeopardise his relationship with them. The Father told the judge he

could borrow $100,000 per month from three friends for the next three years. The judge found that the Father will re-establish himself and, until then, he will continue to borrow money. The judge ended his judgment by saying that he believed the Father would comply with the order and that, if he did not, his words about cherishing his children would ring very hollow. The judge was very complimentary about the ability of the Father to conduct litigation and to appear in court as a litigant-in-person.

12. On 20 March 2023, the Father made his application for a CAO. It is clear that he seeks for the children to live with him. Inevitably, the issue of the Mother's legal fees to defend the application, as well as a further enforcement application in relation to arrears, had to be determined by Peel J. He did so on 18 September 2023. The judge indicated, as a recital to his order, that he remained seized of LSPO funding and enforcement issues but that any application under the Hadkinson jurisdiction should more properly be dealt with in the CAO proceedings. At the time, the Father owed the Mother £124,614 in relation to unpaid costs. He was directed to pay these by 16 October 2023. He was ordered to pay £17,500 by way of LSPO funding on 1 October 2023 and monthly thereafter, until the conclusion of CAO proceedings. This means that he should have paid £87,500 by the time of the February 2024 hearing before HHJ O'Neill. He made no payments at all pursuant to that order. The Father did give an undertaking as to the proceeds of sale of the Danish property but it is his case that he has received nothing from that property and has now lost his interest as a result of a failure to pay a second tranche of the purchase price.

13. Various expert reports were obtained in the CAO application. One was a psychological report dated 18 September 2023 from a Clinical Psychologist, Dr Hessel Willemsen. He found that the children were subject to continued conflict between their parents. He said that the parents need to think more about their role. Both children have been adversely affected by the parental conflict. He produced an addendum report, dated 2 November 2023, in which he referred to the importance of the parents taking themselves out of the conflict in the interests of the children. He said the children's interests have been lost in the endless conflict.

14. An Independent Social Worker ("ISW") was directed to file a section 7 report. It was from Judith Bennett and is dated 3 November 2023. It is in exactly the same form as a Cafcass Report. NM wanted to be resident with his Mother midweek but to have contact with his Father. He also wanted weekends and holidays to be split between his parents. MM made it clear to the ISW how much she loved her Mother. She wished to remain in her Mother's care with contact to her Father. There are some references to things the Mother had said to the children which might be considered to be inappropriate concerning the Father. The ISW considered that both children were emotionally troubled by the parental conflict. She said that the Mother is their primary carer and the children describe her meeting their needs. The acrimonious conflict between the parents does compromise the children's emotional well-being. Their attachment to their Mother is quite enmeshed. Without emotional containment, boundaries and guidance, the children will suffer harm. The

report says, quite clearly, that the Father told the ISW that he wished for the children to remain in the Mother's care, although he denied saying this in his oral submissions.

15. The ISW did consider that a detailed CAO is likely the only way forward. In her professional judgment, the children desperately need the parents to provide emotional containment, boundaries and direction. Her recommendation was that the children should remain in the Mother's care. She is their primary carer and it is in the interests of the children's overall wellbeing that this should continue. She made recommendations about schooling. She said there should be fortnightly staying contact. If the Father ended up living close to the Mother, there was scope for midweek contact. Finally, she said this, at Paragraphs [70] and [71]:-

> "*[70] (NM and MM) have stated clearly that their home is (their current property) with the mother and although they have contact with the father, they do not see themselves as living with the father similarly.*
>
> *[71] The mother is the primary carer and the children describe her as meeting their needs. The children are already expressing a great deal of worry about the prospects of moving from (their current home) to alternative accommodation. I therefore envisage that the mother no longer being their primary carer would have a devastating impact on both children."*

16. The matter was heard by HHJ Wildblood KC in Bristol on 9 November 2023. A recital to the order indicated that the Father intended to seek a change of residence. There had been a long standing issue as to therapy for NM. The Father agreed to pay for this therapy. I take the view that this means that the principle of therapy has already been dealt with. It is merely the practicalities that need to be worked out. The judge noted that it was said that the Father owed the Mother £221,657 at the time. The judge made it clear that the Father should comply with financial orders and the Mother remains entitled to take enforcement action. I am of the view that this was not the judge refusing a Hadkinson application. Such an application was not before him. The judge did refuse an application by the Father for a transfer of the children to his care if the Mother was not able to move to London. His application to join the children pursuant to Rule 16.4 was also refused. The judge directed a five day hearing of the CAO application before HHJ O'Neill on 19 February 2024.

17. The Mother made her application for a Hadkinson order on 26 January 2024. A statement in support by her solicitor, Simon Blain, said that the Father now owed her £285,842. There would be no equality of arms if the Father did not pay the LSPO orders as his firm could not act for a five day hearing without payment. He said that the Father had made no LSPO or costs payments since September 2023. Indeed, on 13 February 2024, he stopped paying the child periodical payments. As I understand it, he has only made two payments since in the sum of £6,000 each, which were paid in the days before this appeal hearing and said to have come from loans from his sister.

18. The Mother's application was heard by HHJ O'Neill in the Family Court at Bristol on 19 February 2024. The Father appeared in person. The Mother was represented by Ms Renton, as today. The order recites that the Mother's solicitors, Forsters LLP, will come off the court record and only return to the record when the LSPO order is paid. Various recitals were made that are not relevant to this appeal. The judge made a Hadkinson order in relation to the CAO application. She prohibited the Father from pursuing his CAO application, including for a change of residence, save in relation to schooling, until he has purged his contempt by paying £229,854 plus interest of £5,503 of LSPO funding, a total of £235,357, pursuant to the order of Peel J dated 18 September 2023. In the event that he paid by 21 March 2024, the proceedings would be restored for directions. The final hearing listed on 29 April 2024 with a time estimate of five days was reduced to one day to hear the schooling application. The Mother's application for an order pursuant to section 91(14) was adjourned. The judge then gave various directions as to the issue about the children's schooling. Again, the Father's renewed application to join the children pursuant to Rule 16.4 was refused. He was refused permission to appeal. He had to pay the Mother's costs of the application in the sum of £16,818.

19. In her judgment, Judge O'Neill said that, Hadkinson v Hadkinson [1952] P 285, is authority for the proposition that the court can prevent a litigant, who is in contempt, from proceeding with an application until the litigant has purged his or her contempt. An apology is not good enough. It is a matter of public policy but can only be imposed if the contempt impedes the course of justice and there is no other means of securing compliance with the court's order. She noted that it is the Mother's case that the Father is deliberately putting pressure on her via her finances. She said that the Father was ordered to pay the Mother's legal costs. He had failed to comply and there was no dispute that £297,099 was owing. I have not gone into the apparent discrepancy between the various figures as there is no dispute that there is a significant amount outstanding. In answer to the Father's argument that a Hadkinson order should not be made in a children's case, where the welfare of the child is paramount, she made the point that Hadkinson itself was a children's case. She accepted that it is an exceptional and Draconian case management order.

20. She set out the five questions that the case of Mubarak v Mubarak [2004] 2 FLR 932 require to be satisfied. She found that they are all satisfied in this case. She said that the Court of Appeal case of De Gafforj v De Gafforj [2018] EWCA Civ 2070 is on all fours with this case. She accepted that the jurisdiction should be exercised judicially, sparingly and proportionately. She found that the Mother is a vulnerable litigant, noting that Peel J has already deprecated the pressure put upon her by the Father, whereas the Father is especially skilled at representing himself. She noted that the Father does not pay any heed to the observations of judges. She made findings that the Father is in contempt; that he is motivated by his antipathy to the Mother's lawyers; that his contempt is deliberate and contumacious; that it led to a clear impediment to the course of justice; and that there were no identifiable assets of his in this jurisdiction. She then refers to the recommendations of the ISW,

who recommends an outcome contrary to the Father's aspiration. She comes to the conclusion that, other than in relation to the issue of schooling, there is no urgency to hearing the application as there is no need for safeguarding the children. She therefore made the Hadkinson order.

21. The Father's Notice of Appeal is dated 15 March 2024. Whilst this was out of time, it is clear that the Father was told, initially, by both the High Court and the Court of Appeal that the other court had jurisdiction. Eventually, it was accepted that the High Court had jurisdiction and the appeal was issued. In any event, Henke J extended the Father's time for appeal so there is no need for me to do so. His Grounds of Appeal are that the judge failed to investigate and establish the facts before making a major determination on the children's welfare. He argues that the order caused an injustice to the children. He refers to the decision of Peel J in DS v HR [2019] EWHC 2425 (Fam). He argues that the order of HHJ O'Neill is directly counter to the order of HHJ Wildblood KC in November 2023. He says that the impact of all the conflict on the children is causing them the greatest damage. On the face of it, this might be an argument against the litigation proceeding, but I assume he means that the failure to conclude the litigation with a full hearing is causing them damage. He contends that Judge O'Neill erred when she found there was no urgency. He argues that any breeches should be dealt with by enforcement in the High Court and refers to Judge Wildblood KC saying the arrears "simply have to be paid". He complains that the judgment fails to hold the children's welfare as the paramount consideration of the court. He makes the point that delay is prejudicial to the welfare of children [section 1(2)].

22. In his Skeleton Argument dated 2 April 2024, he says that there has been no court led investigation into the children's welfare since February 2021. He adds that Theis J highlighted the need for this in August 2021. Whilst he may be right about that, he has only himself to blame as he did not issue proceedings immediately after August 2021, but instead applied in Denmark. His application here was not made until March 2023, over 18 months later. He refers to a report from Dr Ana Aguirregabiria in early 2023 which found that NM was experiencing high levels of distress and low self-esteem. NM had an urgent need for therapy and treatment. This is correct, but it was dealt with when the Father agreed to fund the therapy. He then argues that both the ISW and the clinical psychologist considered the children were suffering harm but this was, of course, due to the continuing litigation and animosity between the parents. He argues that HHJ Wildblood KC said the Mother should enforce the LSPO order, rather than making a Hadkinson application, and refused the Hadkinson application. I consider that this is completely incorrect. HHJ Wildblood KC did not have a Hadkinson application before him. He did say that the Father should pay the money owing and that the Mother was entitled to take enforcement proceedings but that is a very different thing to saying she must do so. I have to say that I consider it is extremely unattractive for a litigant to say that the other party should take enforcement proceedings against that very litigant. It almost implies that he will only pay if enforcement proceedings are taken against him. Moreover, the Mother has taken enforcement proceedings in the past without much success. The Father ends by saying that the case now needs to be litigated, complaining that HHJ

O'Neill said the opposite. He refers to a judgment of Peel J in CD v EF [2021] EWHC 955 when Peel J made reference to the welfare of the child being paramount and that a Hadkinson application should not disentitle a judge from considering welfare issues. I will deal with this when I consider the law.

23. Henke J considered the application for permission to appeal on 26 April 2024 and directed that it be listed for an oral hearing with appeal to follow if permission is either not required or granted. She made various directions. She granted the Father an extension of time to validate his appeal, which was clearly the right order to make in the circumstances. In her reasons, she acknowledged that a Hadkinson order is a draconian order of last resort.

24. Also on 26 April 2024, HHJ O'Neill adjourned the hearing to deal with the children's schooling but only to a further listing in May or June 2024. The reasons for this are now, in my view, immaterial. The Father applied for permission to appeal that order. On 3 May 2024, Henke J refused permission to appeal but she did not certify the application as being totally without merit. She therefore accepted that the Father could apply to renew the application orally. If he did so, she directed it be heard by me today. The Father did indeed renew the application for an oral hearing on 10 May 2024. As it has turned out, there is absolutely nothing in that appeal, as HHJ O'Neill has already heard the education issue, although the Father is seeking permission to appeal that as well. I will make directions in relation to that latter application when I hand down this judgment, but I am absolutely clear that an appeal from the adjournment on 26 April 2024 would achieve absolutely nothing. I therefore refuse permission to appeal in relation to that. This is now a final decision.

25. Consequent upon the directions given by Henke J, the Father filed a Supplementary Skeleton argument on 10 May 2024. The Father argues that the Judge was focussed not on the children's welfare but on the Mother's situation. He added that her vulnerability can only impair her ability to focus on the welfare of the children. He refers to unjustified absences from school by the children, asserting this is primarily when the children are with their Mother.

26. The Mother's Skeleton Argument, drafted by Ms Jacqueline Renton, who appears on her behalf before me, is dated 24 May 2024. It is argued that the fact that the Father has stopped paying child maintenance is both strategic and punitive. It is asserted that the Father is pursuing this litigation as part and parcel of his "high end coercive control". It is said that the decision of HHJ O'Neill is unassailable on the law and the facts as she applied the law correctly and then exercised a discretion and reached a conclusion it was open to her to make. The entire purpose of the LSPO was to achieve equality of arms and, by not paying, the Father was creating a clear impediment to the course of justice. The order was not a blanket ban on litigation as the necessary litigation in relation to schooling was allowed to proceed. It is further argued that the Father's conduct has been lamentable. Ms Renton refers to the conclusions of the ISW that the Mother "no longer being their

primary carer would have a devastating impact on both children". It makes the point that HHJ Wildblood KC did not consider a Hadkinson application as no such application had been made and he did not consider any of the authorities on such applications. He was, however, highly unimpressed with the Father's contempt of court.

27. Turning to the law, it is submitted that there is now a clear need for the Family Court to have available to it the ability to manage cases effectively and curtail litigation in certain circumstances. Ms Renton reminds me that procedural fairness is a component of Article 6 and 8 rights. Her document accepts that the position is different if the Hadkinson order is made in Children Act proceedings, whilst the breach is of a financial remedy order, but she says that this is not the position here as the breach is of a LSPO directly referrable to the Children Act proceedings. Ms Renton makes the point that there are other mechanisms now for restricting access to the court even in Children Act proceedings, such as directing Alternative Dispute Resolution, or the filter on applications provided in section 91(14) of the Children Act 1989. Finally, she makes the point that an appeal judge must be cautious when interfering with the exercise of discretion, referring to such a decision not being open to challenge unless the conclusion reached was not one which was reasonably open to the court.

28. On 29 May 2024, HHJ O'Neill refused the Father's application to adjourn the specific issue application in relation to schooling until after the hearing of his Hadkinson appeal. I merely note that this application made by him was flatly in contradiction to his application for permission to appeal her decision on 26 April 2024 to adjourn the hearing of the schooling issue.

29. A contested hearing took place before HHJ O'Neill on 31 May 2024 in relation to the specific issue application. The judge ordered that, from autumn term 2024, the children should attend a school in the London area. The Father was to sign the acceptance form for the school by 4pm on 31 May 2024. A penal notice was attached to the order. He did not sign, presumably because it was not the school chosen by him. Whilst he has the right to attempt to appeal the decision, he has no right to refuse to comply with an order that is made but has not been stayed. Indeed, I am clear that signing would not prejudice his appeal. It was another example of his apparent refusal to comply with any order with which he disagrees, but I do note that he sent me an email this morning saying that he would now sign the acceptance form, having been reassured by me that it does not compromise his appeal.

30. He filed a Notice of Appeal against the decision on schooling. Again, he argued that the issue of schooling should be heard after his appeal on the Hadkinson issue. He makes an application to see all correspondence between the judge and the Mother's counsel. He accepted before me that this was a preliminary application to a submission of judicial bias against him.

31. On 4 June 2024, the Mother applied to Peel J to enforce the Schedule 1 order. I take the view that this is primarily in relation to the arrears of periodical payments, rent and school fees, which have also not been paid for

approximately the last two terms, but she did include an application for enforcement of the LSPO orders. The point is made that she is wholly reliant on maintenance and that she was owed £40,000. She repeats her contention that the Father maintains a lifestyle that belies his outward presentation of impecuniosity.

32. On 7 June 2024, Peel J made an order that the Father complete a Form E1 by 12 June 2024, with a hearing on 19 June 2024, at which he was to answer questions put to him. He wrote to Peel J on 9 June 2024 saying that he had managed to borrow some money from his sister in the last few days to make payments to the Mother of £12,000 in total. He said that he would apply to vary the order as his "financial situation could not be worse".

33. Henke J considered the Father's application for permission to appeal the schooling issue on 10 June 2024. She directed that it be heard by me at the conclusion of this hearing but I am in considerable difficulties in doing so, given that I do not have the judgment of HHJ O'Neill as yet. Henke J refused a stay.

The law on appeals

34. I now turn to the law on appeals. FPR 2010 Rule 30.3 provides that:-

> *(7) – Permission to appeal may be given only where –*
>
> *(a) The court considers that the appeal would have a real prospect of success; or*
>
> (b) *There is some other compelling reason why the appeal should be heard.*

35. In Re: R (A Child) [2019] EWCA Civ 895 decides that there must be a realistic, as opposed to a fanciful, prospect of success. There is no requirement that success should be probable, or more likely than not.

36. If permission is granted, Rule 30.12 states that:-

> *(1) Every appeal will be limited to a review of the decision of the lower court unless –*
>
> *(a) an enactment or practice direction makes different provision for a particular category of appeal; or*
>
> *(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.*
>
> *(2) Unless it orders otherwise, the appeal court will not receive –*
>
> *(a) oral evidence; or*
>
> *(b) evidence which was not before the lower court.*

> (3) *The appeal court will allow an appeal where the decision of the lower court was –*
>
> *(a) wrong; or*
> *(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.*

37. Where a court exercises a discretion, it is well established that the appellate court should be cautious when interfering with a first instance judge's determination. Lord Reed said in Re R (Children) [2016] AC 76 at [18]:-

> "*…Where the lower court has applied the correct legal principles to the relevant facts, its evaluation is not generally open to challenge unless the conclusion which it reached was not one which was reasonably open to it".*

The law in relation to Hadkinson applications

38. The law in relation to Hadkinson applications, particularly in relation to children's cases, is not quite so clear. There is no doubt that the Hadkinson jurisdiction can apply in children's cases. After all, Hadkinson itself was a children's case. The mother had abducted the child of the family to Australia in breach of what would now be termed a prohibited steps order to prevent his removal from the jurisdiction. Wallington J ordered the mother to return the child. She did not do so. When she tried to appeal, the Court of Appeal refused to hear her appeal until she had purged her contempt. Denning LJ said:-

> *"The fact that a party to a cause had disobeyed an order of the court was not of itself a bar to his being heard, but, if his disobedience was such that, so long as it continued, it impeded the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it might make, then the court might in its discretion refuse to hear him until the impediment was removed. The present case was a good example of a case where the disobedience of the party impeded the course of justice."*

39. I entirely accept that, in the case of Hadkinson, the Court of Appeal was, in effect, saying that it was in the interests of the child to be returned to this jurisdiction before the appeal was heard.

40. There is no doubt that the law has moved a long way since 1952. In particular, the Human Rights Act 1998 has enshrined the European Convention on Human Rights into English and Welsh law. Article 6 (the right to a fair trial) and Article 8 (the right to family life) are of particular relevance to Hadkinson applications. I also remind myself of section 1(1) of the Children Act 1989 that, when the court determines any question with respect to the upbringing of a child, "*the child's welfare shall be the court's paramount consideration*". I am clear that this section does apply when the court is considering an

application for a Hadkinson order, if only because the effect of the order may be that the court will, as a result, be unable to make necessary orders pursuant to section 8 of the Act.

41. This does not, of course, mean that Hadkinson orders can never be appropriate in Children Act proceedings. Indeed, the Father in this case, in his very compelling submissions, accepted that this must be the case. He suggested, however, that the jurisdiction could only apply after "the facts had been found". I consider he meant by this that it could only apply after there had been one complete determination by a court of the welfare of the children. This might be thought to be analogous to my own view that Hadkinson applications have a very limited role to play in financial remedy applications until after the court has conducted a final hearing and considered the factors set out in section 25 of the Matrimonial Causes Act 1973.

42. Ms Renton, in support of her contention that Hadkinson orders are a necessary and potent weapon in the armoury of the judge hearing Children Act applications, reminds me of other developments that have clearly recognised the court's need to be able to manage children's litigation effectively and curtail that very litigation where necessary. She points to section 91(14) orders that restrict the ability of a parent to invoke the jurisdiction of the court without obtaining permission from a judge. She also refers to new amendments to the FPR 2020 that mandate consideration of ADR before litigants resort to court, with potential cost consequences for those litigants who do not comply. She also makes the point that Hadkinson orders are not indefinite bans. Such an order only prevents the litigation from continuing until the litigant purges his or her contempt.

43. I entirely accept that the Hadkinson jurisdiction has survived the Human Rights Act. The decision of Ryder J in Mubarak v Mubarak [2004] EWHC 1158 set out five requirements that an applicant has to satisfy before a Hadkinson order can be made. This test has subsequently been endorsed by the Court of Appeal in cases such as De Gafforj [2018] EWCA Civ 2070 where at [11], Peter Jackson LJ set out the following requirements:-

> (1) The Respondent is in contempt;
> (2) The contempt is deliberate and continuing;
> (3) As a result, there is an impediment to the course of justice;
> (4) There is not other realistic and effective remedy; and
> (5) The order is proportionate to the problem and goes no further than necessary to remedy it.

44. Jackson LJ added at [16] that there was an impediment to the course of justice in that case because:-

> "*...compliance with the legal services payment is essential to enable the wife to participate fairly in the husband's appeal...*"

45. He added that there was not another realistic remedy as the process of enforcement against the husband's likely available assets could not remotely

take place within the appeal timescale, adding that "*Nothing less than the order sought has any chance of being effective.*" At [17], he added that "*Non-payment of the outstanding maintenance and costs is not an insuperable impediment to the course of justice; non-payment of the legal services payment is.*"

46. I do, of course, accept that virtually all the authorities on Hadkinson, other than Hadkinson itself, are from financial remedy cases, although DS v HR [2019] EWHC 2425 (Fam) related to a Family Law Act case. The one case where an application was made in children's litigation was CD v EF [2021] EWHC 955 (Fam), where Peel J refused the application. At paragraph [37] of his judgment, he did so because the application was raised too late and it related to breach of a financial remedy order not an order directly relating to the Children Act proceedings. He did, however, say this:-

> *"Before me, the welfare of the child is paramount and I would not consider it appropriate to make a Hadkinson order which would have the effect of disentitling me from considering Z's welfare needs".*

47. I do, however, accept that the order in this case, although made by a different judge, did relate directly to the Children Act proceedings as it was a LSPO order to cover the costs of those very proceedings. I must though consider carefully the observations of Peel J set out above.

My conclusions

48. I will deal first with the question of permission to appeal. I am satisfied that I should grant the Father permission to appeal. The applicability of Hadkinson orders to Children Act proceedings has not been subject to appellate consideration since Hadkinson itself, seventy two years ago. The dicta of Peel J in CD v EF strongly suggests that it is right to apply a different test in Children Act cases than in financial remedy cases before making such an order.

49. I have come to the conclusion that there does need to be an additional requirement that must be added, in cases proceeding under the Children Act, to the five named by Peter Jackson LJ in relation to financial remedies. The sixth requirement is that the Hadkinson order must accord with the welfare of the children. This is, in my view, essential, given the paramountcy principle in section 1 of the Act. In other words, a court should not make a Hadkinson order in Children Act cases unless it is in the interests of the children to do so. The question I will have to ask myself is whether that additional requirement is satisfied here.

50. I do, of course, entirely accept that HHJ O'Neill applied the five requirements set out by Peter Jackson LJ in De Gafforj entirely correctly. She cannot possibly be criticised for her findings as to those requirements. She rightly accepted that Hadkinson is a draconian remedy as it goes directly to the litigant's right of access to a court. She found that the Mother is vulnerable. That finding cannot be challenged. At paragraph [40] of her judgment she

found that the Father is in contempt of the orders. There really cannot be any doubt about that either. He has not paid anything pursuant to the most recent LSPO order of £17,500 per month, designed to cover the costs of his Children Act application. Judge O'Neill found that the contempt was clearly continuing and was deliberate as it was motivated by the Father's antipathy to the Mother's lawyers. She found that the contempt caused an impediment to the course of justice as there would not be equality of arms between one of the most exceptionally competent litigants-in-person and the vulnerable mother in this case. She considered there was no other realistic and effective remedy, given that the Father has no assets in the jurisdiction. She thought that an application for enforcement would achieve nothing other than waste more costs as it could not obtain the money within a realistic timeframe. This is a complete answer to the Father's submission that the Mother should have applied to enforce rather than pursue the Hadkinson remedy.

51. Finally, she dealt with the requirement that the order must be proportionate to the problem and go no further than necessary to remedy it. She was so satisfied. She accepted that the fact that the children's welfare was at stake was relevant, but she was of the view that it was not urgent to hear the case as there were no safeguarding issues and the ISW recommended an outcome contrary to the Father's aspirations. She made the point that, if the Father were to comply with court orders, he would have an opportunity of challenging that. She added that the very reason for the LSPO orders was to ensure equality of arms. Peel J had found the Father to be oppressive of the Mother. She was satisfied that the contempt would, if the case proceeded, cause grave impediment to equality of arms. She reminded herself of the Domestic Abuse Act 2021 and the whole philosophy underlying protective measures and participation of vulnerable witnesses. She concluded that it would be so unfair on the Mother to be forced to be a litigant-in-person as a result of the Father's deliberate contempt, that the Hadkinson order needed to be made.

52. She did not, of course, directly ask herself the question whether the order was in the interests of the children as the existing authorities did not require her to do so. I am clear that this failure to consider directly the welfare of the children, although not her fault, does mean that I am entitled to set aside her order. I further take the view that requiring the Father to pay £235,357 before the case could proceed was wrong, such that the order must be set aside. I do, however, take the view that I am entitled to look at the matter afresh and I intend to do so.

53. If HHJ O'Neill had directly asked herself the question, I consider that she would have decided that a limited order was in the children's welfare in the exceptional circumstances of this case. It goes without saying that it is not in the interests of children to have their future decided in a trial that is unfair and flawed in terms of Article 6. I do accept that a judge is able to regulate a trial to a certain extent, but it has already been decided that this Mother requires legal representation to give her equality of arms and it is entirely down to the Father that she does not have that representation.

54. I am clear that, if the position was that the children's circumstances needed urgent resolution, a judge would be unable to make a Hadkinson order at all. Although HHJ Wildblood did consider the case was urgent, I am of the view that he meant that the litigation should be brought to an end swiftly, rather than that there was necessarily a serious issue that needed to be decided urgently.

55. In this particular case, the judge would have been entitled to pay particular regard to the report of the ISW and, most importantly, her conclusions at [70] and [71]. The children regard their home as being with their Mother; she is their primary carer; she is meeting their needs; and if she was no longer their primary carer, it would have a devastating impact upon them. In the light of that, I find that a limited Hadkinson order would be in the interests of the children. By making a limited order, the court would be protecting the Article 6 unfairness of requiring the Mother to appear in person, whilst giving the Father a realistic opportunity of bringing the matter before the court.

56. The Father wishes to challenge the conclusions of the ISW. He may well have an uphill struggle to be able to do so successfully, but I accept that he is entitled to do so, provided he puts the Mother in funds to secure some legal representation. I am clear that this does not mean that he has to discharge the entirety of the money owing for the case to proceed. To that extent, I will allow the appeal. A proportionate approach would be to say that the Hadkinson order should be discharged if he makes available £25,000 plus VAT, namely £30,000 to cover the costs of the Mother being represented at the hearing itself. This would give equality of arms, even if it did not give the Rolls Royce service permitted by the order of Peel J.

57. I consider it is quite impossible for the Father to say that he cannot make such a payment. Whilst he was failing to pay the LSPO instalments of £17,500 per month, he paid the final quarter's rent on his flat in Central London, in one of the most expensive areas in the Capital. He told me, during his oral submissions, that the rental cost was £1,450 per week or £75,400 paid annum. He therefore paid quarterly rent in the sum of £18,850 to the landlord in December 2023, whilst making no LSPO payment to the Mother whatsoever. Moreover, there is the finding of fact of Peel J from February 2023 that the Father accepted he could borrow $100,000 per month for three years, which would continue take him to early 2026.

58. I do consider that, in general, Hadkinson orders will be extremely rare in Children Act proceedings. Nevertheless, I am of the view that a limited Hadkinson order was appropriate in the exceptional circumstances of this case, but the one made was considerably too onerous.

59. I therefore allow the appeal and replace the existing order with a more limited order that the Father's CAO application is stayed until he pays the Mother the sum of £30,000 (£25,000 plus VAT) to enable her to have representation for the five day hearing itself.

60. Finally, I do make the point that the orders of Peel J remain in force. The Father continues to have an obligation to pay the higher sums. The Mother can take whatever enforcement steps she considers appropriate. The court is not condoning the breach of the orders. The sole point is that the conditions imposed in making a Hadkinson order must be proportionate and in the welfare interests of the children.

61. I am very grateful to the Father and Ms Renton for the very considerable help they have given me with this appeal. Nothing more could have been said or done on behalf of either party.

Mr Justice Moor
13 June 2024