

Neutral Citation Number: [2011] EWCA Civ 1125

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM PRINCIPAL REGISTRY OF THE FAMILY DIVISION
MR JUSTICE HEDLEY
FD10C00404

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/10/2011

Before :

LORD JUSTICE THORPE
LORD JUSTICE MOORE-BICK
and
LADY JUSTICE BLACK

Between :

KM	<u>Appellant</u>
- and -	
LAMBETH LONDON BOROUGH COUNCIL	<u>Respondent</u>

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Richard Clough (instructed by **Children and Families Law Firm LLP**) for the **Appellant**
Miss Georgina Clark (instructed by **London Borough of Lambeth Legal Services**) for the
Respondent

Mr Julien Foster (instructed by **Ziadies Solicitors**) for the **Mother**
Mr Philip McCormack (instructed by **Harris Temperley LLP**) for the **Children's Guardian**

Hearing dates : 19th May 2011

Judgment

Black LJ:

1. K, a baby boy, is the subject of care proceedings at the Principal Registry of the Family Division. His mother (M) and his father (F) do not live together and are no longer in a relationship. Each wishes to have sole care of him. If neither is suitable, he will have to remain in the care of the local authority.
2. A fact finding hearing was directed in order to resolve factual issues in relation to F's conduct towards M and generally. In the run up to that hearing, M applied to the district judge for directions in relation to a psychiatric report prepared on her by Dr Cohen for use in connection with her immigration status ("the report"). M wished to file the report with the court as part of the care proceedings and sought permission to do so. She did not want it to be seen by F and therefore sought permission to withhold it from him, although she was prepared for the other parties (the local authority and K's guardian) to have access to it.
3. The district judge took the view that the issue required determination by a High Court judge and arranged for it to be listed, at short notice, before Hedley J on 10 March 2011.
4. This appeal from the order that Hedley J made that day was listed urgently because it needed to be determined prior to the commencement of the fact finding hearing which was to take place on 26 and 27 May 2011. As a result, it was not possible for us to have a formal transcript of Hedley J's judgment but we did have counsel's note which provided us with sufficient information as to his decision and the reasoning for it.
5. Another consequence of the urgency of the matter was that we announced our decision on the appeal immediately at the conclusion of the hearing on 19 May 2011, reserving our reasons. The decision was to allow the appeal and to order the disclosure of the entire report to F whereas Hedley J had required only specified paragraphs of it to be disclosed to him. The reasons for our order follow.
6. The appeal was by F. The local authority and K's guardian took a neutral stance in relation to it; we are grateful to them for the submissions that they nonetheless made. M actively opposed F's appeal and sought to uphold Hedley J's order.
7. The hearing before Hedley J took a pragmatic and sensible course. It began with an ex parte application by M's counsel to adduce the report in evidence. The judge then read the report in order to determine whether it was relevant and admissible as evidence in the care proceedings at all. He determined that it "was clearly relevant to the issue of the future welfare of [K]" and was relevant to the fact finding hearing. The matter therefore had to be considered on an inter partes basis.
8. In order to safeguard F's interests during this part of the hearing, F's counsel obtained his approval for her to see the report and make submissions to the judge about it on his behalf but without having to disclose the contents to him if, in the event, the judge did not order its disclosure to him. She was therefore able to take a full part in the debate before the judge as to disclosure. The local authority and the guardian had free access to the whole report.

9. Nothing that was said in the inter partes hearing disrupted the judge's view that the report was relevant. He concluded, however, that it was not necessary for the whole of the report to be disclosed and for that reason, ordered disclosure of specified paragraphs only.
10. M's opposition to the disclosure of the report was based upon her fear that if F gained access to it, he would disclose its contents, which included profoundly sensitive and personal information, to people outside the confines of the case and it would then be misused to embarrass her or otherwise to imperil her in the community. She alleged that F had already disclosed other material concerning the case to third parties and relied upon this to establish the existence of the risk of disclosure of the report.
11. F denied that he had disclosed other material to third parties. His counsel submitted that there would therefore have to be a finding, based on oral evidence, as to whether he had done so. Hedley J did not consider that appropriate. He said that there had to be strict limits on the oral evidence that is adduced in a case and that that was particularly so where the matter was bound to be canvassed in the oral evidence at the forthcoming fact finding hearing. He was not prepared to permit a dress rehearsal before him. A formal transcript of judgment would have enabled a better understanding of how he approached the matter but it appears that he took a two stage approach, first asking himself whether the evidence that M advanced about F's disclosure of other material was potentially credible with a view to proceeding to stage two (whether to limit disclosure of the report) only if it was. Although he did not express his conclusion about the credibility of the evidence in terms, he must have found M's evidence potentially credible and he must also have thought that it provided a foundation for the argument that there was a risk of F disclosing the psychiatric report because he proceeded to stage two.
12. He then considered various options. At one end of the spectrum, he could order disclosure of Dr Cohen's report to F in full. At the other end, he could refuse to order its disclosure to him at all. Other possibilities were partial disclosure only or disclosure only on terms, specifically an undertaking (which F was willing to give) that the document would not be taken by F from the custody of his solicitors.
13. Hedley J was not prepared to keep the entire report from F because there were matters in it which were highly relevant for the fact finding hearing. He did not favour disclosure on terms which he regarded as a course which was artificial, difficult and to be avoided if possible. He concluded that there should therefore be disclosure but limited to those parts of the report that were relevant in relation to the allegations made against F by M which would be resolved at the fact finding hearing and in relation to the question of M's fitness to care for K which would be explored at the later welfare hearing. His order identified the passages that were to be disclosed and he coupled it with an injunction against both parties prohibiting them from disclosing the contents of the report to anyone other than their legal advisors and, in M's case, her general practitioner.
14. The judge made it quite clear that he expected the question of disclosure to be kept under review by the district judge, particularly in the light of the fact finding hearing and any conclusions the district judge reached about F's conduct in relation to earlier misuse of information from the proceedings.

15. The appeal grounds that F advanced before us included a complaint about the procedure adopted by Hedley J, in particular his decision not to hear evidence about M's allegation that F had improperly disclosed case papers and not to make an express finding about it. They also attacked the substance of the judge's decision about disclosure of the report on the basis that it deprived F of vital material that could be used to attack M's credibility. M's opposition to F's proposal that he should have sole care of K included allegations that F was a drug dealer involved with violent criminals and that he had been violent to her on several occasions. The professional assessments of F were largely positive but indicated that if M's allegations were true, there would be very serious concerns for the safety of any child placed in his care. The grounds of appeal asserted that, in the circumstances, M's credibility was of central importance and the fact finding hearing before the district judge would be unfair to F if he were denied access to material that could be used to probe it.
16. In seeking to support Hedley J's decision, M submitted that harm of three kinds might flow from the entire report being disclosed to F. First, there was the emotional trauma she would suffer if personal information of the kind contained in the report were to be made public. Secondly, she asserted that there was a risk that if F disclosed the report it would dissuade people who would otherwise offer evidence in support of her case from doing so. Thirdly, she relied on "the possible consequences [to K] of people knowing these things as he is growing up and if he grows up in the local area" (see paragraph 10 of M's statement).
17. I cannot accept that the second and third of the matters upon which M relied carry any real weight in a consideration of the issue of disclosure of the report in this case. I find the assertion that witnesses will be deterred from coming forward by the way in which F may handle the information in the report unpersuasive. If M is right in what she says in her statement (see paragraphs 7 et seq), the damage has already been done in this respect by F's dissemination of other court materials and there is no evidence that the situation will be made significantly worse by further unauthorised disclosure. If M seeks to rely on reluctant witnesses, she can take formal steps to require them to attend court. As for potential harm to K, the feared consequences for him are not self evident and were not spelled out further in argument. In reality, therefore, M's case turned on the trauma that she may suffer if intimate private information about her were to be spread about by F.
18. The question of withholding evidence from a party to proceedings has been considered by the courts in a number of different legal contexts and I think it is fair to say that it can present considerable difficulties. Amongst the authorities to which we were referred was A Local Authority v A [2010] EWCA Civ 1057 in which this court quite recently had the opportunity to consider some of the applicable principles in the family law context. It has not been necessary for us to delve further into the authorities, whether in the family law field or in other areas of the law, in order to determine this appeal. We reached the clear view that in order to be able to address the issues in the case effectively, and in particular in order to be able to probe M's credibility as he needed to do given the potentially pivotal nature of her allegations about him, F required access to the report as a whole in order that he could give such instructions as he may turn out to have on what M is reported to have told Dr Cohen and so that his counsel (and others) can explore the various issues arising from the

report freely during the hearing without paralysing logistical difficulties. Even if M were right in saying that F had inappropriately disclosed other case papers and that there was therefore a risk that he would improperly disseminate the contents of the report, the harm that would flow from this (whilst no doubt discomfiting and unpleasant for M who would be embarrassed by the spreading of very personal information) would not be such as could outweigh the need in this case for the evidence to be properly probed and evaluated with the assistance of F and his legal representatives both in F's interest and in K's.

19. We indicated at the conclusion of the oral appeal hearing that we were only setting aside paragraph 1 of Hedley J's order. The order that Hedley J had made forbidding F from disclosing the contents of the report to any other person save his legal advisors remains. We indicated that it should be backed by a penal notice and stressed that F is at risk of imprisonment should he contravene the order.
20. Accordingly, as we said at the conclusion of the oral hearing, F's appeal is allowed to the extent that Hedley J's order for limited disclosure of the report is discharged and replaced with an order for disclosure of the entire report. The judge's order otherwise remains unamended.

Moore-Bick LJ:

21. I agree.

Thorpe LJ:

22. I also agree