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Case numbers omitted

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 September 2015

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the matter of the Human Fertilisation and Embryology Act 2008
(Cases A, B, C, D, E, F, G and H)

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Miss Deirdre Fottrell QC and Miss Lucy Sprinz (instructed by Goodman Ray) for the applicants in Cases A, B, C, D, E and G
Mr James Turner QC and Miss Helen Williams (instructed by Osbornes Solicitors LLP) for the applicant in Case F and (instructed by Hughmans) for the applicants in Case H
Miss Janet Bazley QC and Miss Sharon Segal (instructed by Russell-Cooke LLP) for the children's guardian
Miss Samantha Broadfoot (instructed by the Government Legal Department) for the Secretary of State for Health
Miss Dorothea Gartland (instructed by Bevan Brittan) for Barts Health NHS Trust in Cases A, F and H
Mr Martin Kingerley (instructed by Mills & Reeve LLP) for Bourn Hall Clinic in Case B
Mr Andrew Powell (instructed by Myerson) for Manchester Fertility Services Limited in Cases C, D and E
Miss Sarah Tyler (instructed by Hempsons) for IVF Hammersmith Limited in Case G

Hearing dates: 13-17, 20-21 July 2015

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Approved Judgment

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

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was handed down in open court

Sir James Munby, President of the Family Division :

1. This judgment relates to a number of cases where much joy but also, sadly, much misery has been caused by the medical brilliance, unhappily allied with the administrative incompetence, of various fertility clinics. The cases I have before me are, there is every reason to fear, only the small tip of a much larger problem.

The background

2. The creation, storage and implantation of human embryos is controlled and regulated by the complex provisions of the Human Fertilisation and Embryology Act 1990, as amended by the equally complex provisions of Part 1 of the Human Fertilisation and Embryology Act 2008. The statutory regulator is the Human Fertilisation and Embryology Authority, which I shall refer to as the HFEA.

3. The question of who, in law, is or are the parent(s) of a child born as a result of treatment carried out under this legislation – the issue which confronts me here – is dealt with in Part 2, sections 33-47, of the 2008 Act. It is, as a moment's reflection will make obvious, a question of the most fundamental gravity and importance. What, after all, to any child, to any parent, never mind to future generations and indeed to society at large, can be more important, emotionally, psychologically, socially and legally, than the answer to the question: Who is my parent? Is this my child?

4. The decision of Cobb J on 24 May 2013 in *AB v CD and the Z Fertility Clinic* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357, brought to public attention and, more particularly, to the attention of the HFEA, the lamentable shortcomings in a clinic identified only as clinic Z which, in the judge's view (para 74), had fallen "far short" of its obligations and which (para 88) had failed to comply with the conditions of the licence granted to it by the HFEA.

5. I must return in due course to explain in more detail the relevant statutory requirements. For the moment I merely indicate two fundamental prerequisites to the acquisition of parenthood by the partner of a woman receiving such treatment. First, consents must be given in writing *before* the treatment, both by the woman and by her partner. The forms required for this in accordance with directions given by the HFEA are Form WP, to be completed by the woman, and Form PP, to be completed by her partner. Secondly, both the woman and her partner must be given adequate information and offered counselling.

6. Following Cobb J's judgment, the HFEA required all 109 licensed clinics to carry out an audit of their records. The alarming outcome was the discovery that no fewer than 51 clinics (46%) had discovered "anomalies" in their records: WP or PP forms absent from the records; WP or PP forms being completed or dated *after* the treatment had begun; incorrectly completed WP or PP forms (for example, forms not signed, not fully completed, completed by the wrong person or with missing pages); and absence of evidence of any offer of counselling. At the time of the hearing, I did not know how many cases there might be in all, how many families are affected and how many children there are whose parentage may be in issue – so far as I was aware the HFEA had never disclosed the full numbers – but it was clear (see below) that some clinics reported anomalies in more than one case. Since the hearing, the HFEA in a letter dated 1 September 2015 has indicated that there are a further 75 cases.

7. As it happens, we are best informed about the St Bartholomew's Hospital Centre for Reproductive Medicine, operated by Barts Health NHS Trust, which I shall refer to as Barts. It was the subject of a judgment given by Theis J on 13 February 2015: *X v Y (St Bartholomew's Hospital Centre for Reproductive Medicine Intervening)* [2015] EWFC 13. Moreover, it has been commendably open and frank about its failings (others seem to have been more coy), sharing its findings with the wider medical community as long ago as September 2014 when, at the instigation of the HFEA, they were published on the HFEA's *clinicfocus* e-newsletter. Of 184 patients who had undertaken fertility treatment with donor sperm since April 2009, when the 2008 Act was implemented, there were 13 cases (7%) where legal parenthood was in issue.

8. The picture thus revealed, and I am referring not just to Barts, is alarming and shocking. This is, for very good reason, a medical sector which is subject to detailed statutory regulation and the oversight of a statutory regulator – the HFEA. The lamentable shortcomings in one clinic identified by Cobb J, which now have to be considered in the light of the deeply troubling picture revealed by the HFEA audit and by the facts of the cases before me, are, or should be, matters of great public concern. The picture revealed is one of what I do not shrink from describing as widespread incompetence across the sector on a scale which must raise questions as to the adequacy if not of the HFEA's regulation then of the extent of its regulatory powers. That the incompetence to which I refer is, as I have already indicated, administrative rather than medical is only slight consolation, given the profound implications of the parenthood which in far too many cases has been thrown into doubt. This is a matter I shall return to at the end of this judgment.

<u>The litigation</u>

9. I am concerned with eight cases, A, B, C, D, E, F, G and H, all brought to light following the HFEA audit and each raising the question of whether there were valid consents as required by Part 2 of the 2008 Act. They are but a small fraction of the many cases identified by the audit. For reasons which I need not go into here, Case G, which related to treatment at the IVF Hammersmith Limited clinic, has been adjourned for hearing on a future date. I say no more about it.

10. Of the seven other cases, five (Cases A, B, C, E, H) relate to a couple consisting of a man and a woman, two (Cases D, F) relate to a couple consisting of two women. Three cases (Cases A, F, H) arise out of treatment at Barts, three cases (Cases C, D, E) from treatment at the Manchester Fertility Service clinic (MFS) and one case (Case B) from treatment at the Bourn Hall clinic (BH).

11. In each case the relief sought is a declaration of parentage in accordance with section 55A of the Family Law Act 1986, that is, a declaration that the applicant (in Case F, the respondent) is the child's parent. In no case is the grant of that relief challenged by the other partner, by the child's guardian or by the relevant clinic.

12. It is elementary that a declaration cannot be granted by consent or by default. There must be a proper examination by the court of the relevant facts, assessed in the light of the applicable law, before a judge can be satisfied, as he must be if the relief sought is to be granted, that the claim for the declaration is indeed made out: see, for example, *Wallersteiner v Moir* [1974] 1 WLR 991.

13. I have been greatly assisted in that task by the submissions I have had, both written and oral, from Miss Deirdre Fottrell QC and Miss Lucy Sprinz for the applicants in Cases A, B, C, D, E and G, from Mr James Turner QC and Miss Helen Williams for the applicants in Cases F and H, from Miss Janet Bazley QC and Miss Sharon Segal for the children's guardian, from Miss Dorothea Gartland for Barts in Cases A, F and H, from Mr Martin Kingerley for BH in Case B, from Mr Andrew Powell for MFS in Cases C, D and E, and from Miss Samantha Broadfoot for the Secretary of State for Health. The hearing was lengthy and the process rigorous.

The statutory scheme

14. I need not deal at this stage with the regulatory scheme under the 1990 Act. I go straight to the relevant provisions of Part 2 of the 2008 Act.

15. Part 2 of the 2008 Act (sections 33-58) is entitled Parenthood in Cases Involving Assisted Reproduction. Subject to various matters which are not material for present purposes, section 33(1) provides as follows:

> "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child."

Section 34(1) provides that:

> "Sections 35 to 47 apply, in the case of a child who is being or has been carried by a woman (referred to in those sections as "W") as a result of the placing in her of an embryo or of sperm and eggs or her artificial insemination, to determine who is to be treated as the other parent of the child."

16. Sections 35-47 distinguish between four different cases: section 35, as amended by the Marriage (Same Sex Couples) Act 2013, applies where W was married to a man at the time of treatment; section 42, as amended by the 2013 Act, applies where W was in a civil partnership or marriage with another woman; section 36 applies where the "agreed fatherhood conditions" apply; and section 43 applies where W agrees that a second woman is to be a parent.

17. Sections 35 and 42 provide in very similar terms that the other party to the marriage or civil partnership, as the case may be, "is to be treated as [in the case of section 35, "the father"; in the case of section 42, "a parent"] of the child unless it is shown that [section 35 "he"; section 42 "she"] did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be)."

18. The schemes under sections 36 and 43 are very similar to each other, but I need to set out the relevant provisions in full.

19. First, the scheme under section 36. So far as material for present purposes section 36 provides that:

> "If no man is treated by virtue of section 35 as the father of the child and no woman is treated by virtue of section 42 as a parent of the child but –
>
> (a) the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person to whom a licence applies,
>
> (b) at the time when the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, the agreed fatherhood conditions (as set out in section 37) were satisfied in relation to a man, in relation to treatment provided to W under the licence,
>
> (c) the man remained alive at that time, and
>
> (d) the creation of the embryo carried by W was not brought about with the man's sperm,
>
> then … the man is to be treated as the father of the child."

20. So far as material for present purposes, section 37 provides that:

> "(1) The agreed fatherhood conditions referred to in section 36(b) are met in relation to a man ("M") in relation to treatment provided to W under a licence if, but only if, –
>
> (a) M has given the person responsible a notice stating that he consents to being treated as the father of any child resulting from treatment provided to W under the licence,
>
> (b) W has given the person responsible a notice stating that she consents to M being so treated,
>
> (c) neither M nor W has, since giving notice under paragraph (a) or (b), given the person responsible notice of the withdrawal of M's or W's consent to M being so treated,
>
> (d) W has not, since the giving of the notice under paragraph (b), given the person responsible –
>
> > (i) a further notice under that paragraph stating that she consents to another man being treated as the father of any resulting child, or
> >
> > (ii) a notice under section 44(1)(b) stating that she consents to a woman being treated as a parent of any resulting child, and
>
> (e) W and M are not within prohibited degrees of relationship in relation to each other.

> (2) A notice under subsection (1)(a), (b) or (c) must be in writing and must be signed by the person giving it."

21. So far as material for present purposes, section 38(1) provides that:

> "Where a person is to be treated as the father of the child by virtue of section … 36, no other person is to be treated as the father of the child."

22. Next, the scheme under section 43. So far as material for present purposes, section 43 provides that:

> "If no man is treated by virtue of section 35 as the father of the child and no woman is treated by virtue of section 42 as a parent of the child but –
>
> (a) the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person to whom a licence applies,
>
> (b) at the time when the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, the agreed female parenthood conditions (as set out in section 44) were met in relation to another woman, in relation to treatment provided to W under that licence, and
>
> (c) the other woman remained alive at that time,
>
> then … the other woman is to be treated as a parent of the child."

23. So far as material for present purposes, section 44 provides that:

> "(1) The agreed female parenthood conditions referred to in section 43(b) are met in relation to another woman ("P") in relation to treatment provided to W under a licence if, but only if, –
>
> (a) P has given the person responsible a notice stating that P consents to P being treated as a parent of any child resulting from treatment provided to W under the licence,
>
> (b) W has given the person responsible a notice stating that W agrees to P being so treated,
>
> (c) neither W nor P has, since giving notice under paragraph (a) or (b), given the person responsible notice of the withdrawal of P's or W's consent to P being so treated,
>
> (d) W has not, since the giving of the notice under paragraph (b), given the person responsible –

> (i) a further notice under that paragraph stating that W consents to a woman other than P being treated as a parent of any resulting child, or
>
> (ii) a notice under section 37(1)(b) stating that W consents to a man being treated as the father of any resulting child, and
>
> (e) W and P are not within prohibited degrees of relationship in relation to each other.
>
> (2) A notice under subsection (1)(a), (b) or (c) must be in writing and must be signed by the person giving it."

24. So far as material for present purposes, section 45(1) provides that:

> "Where a woman is treated by virtue of section … 43 as a parent of the child, no man is to be treated as the father of the child."

25. As will be seen, both the scheme under section 36 and the scheme under section 43 share these fundamental features:

    i) M or P, as the case may be, must have given a notice (sections 37(1)(a), 44(1)(a), as the case may be), stating that "he [or P, as the case may be] consents to being treated as the father [or a parent] of any child resulting from treatment provided to W."

    ii) W must have given a notice (sections 37(1)(b), 44(1)(b), as the case may be), stating that "she consents[1] to M [or P, as the case may be] being so treated."

    iii) The notices must be (sections 37(2), 44(2), as the case may be) "in writing" and "signed by the person giving it."

    iv) The notices must have been signed *before* the treatment took place: see the words "at the time when … [etc]" in sections 36(b) and 43(b).

Consent forms

26. Directions given by the HFEA from time to time in accordance with its statutory powers, have at all material times required that any consent required under sections 37(1) and 44(1) "must" be recorded in a specified form: respectively, Form WP ("your consent to your partner being the legal parent") and Form PP ("your consent to being the legal parent"). Form WP and Form PP have themselves been subject to some changes, but so far as material for present purposes their essential content has remained unchanged. For a more extended discussion of these matters, which there is no need for me to elaborate, see *AB v CD and the Z Fertility Clinic* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357, paras 54-55.

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[1] In section 44(1)(b) the word is "agrees". The difference, whatever other significance it may have, is immaterial for present purposes.

27. So far as material for present purposes, Form WP, which is headed "Your consent to your partner being the legal parent", has three critical sections. Section 1 requires completion of boxes giving W's names and date of birth. Section 2 requires completion of boxes giving the names and date of birth of W's partner. Section 3, which is headed "Your consent", reads as follows:

> "Your consent to your partner being the legal parent
>
> Please tick the box next to the statement below to confirm your consent.
>
> [Box] I consent to my partner (named in section two) being the legal parent of any child born from my treatment."

Section 4, which is headed "Declaration", reads in material part as follows:

> "Please sign and date the declaration
>
> Your declaration
>
> • I declare that I am the person named in section one of this form.
>
> • I declare that:
>
> – before I completed this form I was given information about the options set out in this form and I was given an opportunity to have counselling
>
> – the implications of giving my consent, and the consequences of withdrawing this consent, have been fully explained to me, and
>
> – I understand that I can make changes to, or withdraw, my consent at any time until the eggs, sperm, or embryos have been transferred.
>
> • I declare that the information I have given on this form is correct and complete.
>
> • I consent to the clinic (or any subsequent HFEA-licensed clinic that may become involved in my treatment, or a data controller – as defined in section one of the Data Protection Act 1998) using the information on this form in the process of providing licensed activities (in accordance with the provisions of the Human Fertilisation and Embryology Act 1990 (as amended)), or for record storage and archiving purposes."

At the foot there are two boxes, one labelled "Your signature", the other "Date".

28. So far as material for present purposes, Form PP, which is headed "Your consent to being the legal parent", has four critical sections. Section 1 requires completion of

boxes giving "your" names, date of birth and sex. Section 2 requires completion of boxes giving the names and date of birth of "your" partner. Section 3, which is headed "Your consent", reads as follows:

> "Your consent to being the legal parent
>
> Please tick the box next to the statement below to confirm your consent.
>
> [Box] I consent to being the legal parent of any child born from my partner's treatment (named in section two)."

Section 4 is not material for present purposes. Section 5, which is headed "Declaration", reads in material part as follows:

> "Please sign and date the declaration
>
> Your declaration
>
> • I declare that I am the person named in section one of this form.
>
> • I declare that:
>
> – before I completed this form I was given information about the different options set out in this form and I was given an opportunity to have counselling
>
> – the implications of giving my consent, and the consequences of withdrawing this consent, have been fully explained to me, and
>
> – I understand that I can make changes to, or withdraw, my consent at any time until the eggs, sperm, or embryos have been transferred.
>
> • I declare that the information I have given on this form is correct and complete.
>
> • I consent to the clinic (or any subsequent HFEA-licensed clinic that may become involved in my partner's treatment, or a data controller – as defined in section one of the Data Protection Act 1998) using the information on this form in the process of providing licensed activities (in accordance with the provisions of the Human Fertilisation and Embryology Act 1990 (as amended)), or for record storage and archiving purposes."

At the foot there are two boxes, one labelled "Your signature", the other "Date".

29. It is apparent that a number of clinics also use for internal purposes a consent form (which for convenience I shall refer to as Form IC) based on a form circulated by the

HFEA prior to the 2008 Act coming into effect in April 2009. The Form IC used by different clinics varies in its details, but in substance the ones I have been shown follow the same format. The first section or sections provides for W's consent to the various stages of the IVF process. The final page of the document provides for the signed consent of W's partner.

30. This latter part of the Form IC used by Barts provides, as alternatives, for "Husband's Consent" or "Male Partner's Acknowledgement". (No doubt there are thought to be sound technical reasons for this distinction between "consent" and "acknowledgement", but the impression created that a married woman still requires, well into the twenty-first century, her husband's consent to treatment is surprising, to put it no higher – as many, with every justification, undoubtedly would.) The "Husband's Consent" reads as follows:

> "I am the husband of [blank space] and I consent to the course of treatment outlined above. I understand that I will become the legal father of any resulting child."

The "Male Partner's Acknowledgement" reads as follows:

> "I am not married to [blank space] and I acknowledge that she and I are being treated together, and that I will become the legal father of any resulting child."

Just below, the following appears:

> "NB: The centre is not required to obtain a … partner's acknowledgment in order to make the treatment lawful, but where donated sperm is used it is advisable in the interests of establishing the legal parenthood of the child."

31. The corresponding part of the Form IC used by MFS provides, as alternatives, for "Husband's Consent" or "Partner's Acknowledgement". The "Husband's Consent" reads as follows:

> "I am the husband of [blank space] and I consent to the course of treatment outlined overleaf. I understand that I will become the father of any resulting child."

The "Partner's Acknowledgement" reads as follows:

> "I am not married to [blank space]. But I acknowledge that she and I are being treated together and that I intend to become legally responsible for any resulting child."

Just below, the following appears:

> "Note, the centre is not required to obtain a partner's consent prior to treatment beginning, but it is advisable in the interests of establishing the legal parenthood of the child."

The authorities

32. Before proceeding any further, it is appropriate to consider two authorities: the judgment of Cobb J in *AB v CD and the Z Fertility Clinic* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357, which includes a comprehensive and illuminating survey of the previous authorities, and the judgment of Theis J in *X v Y (St Bartholomew's Hospital Centre for Reproductive Medicine Intervening)* [2015] EWFC 13.

33. In *AB v CD and the Z Fertility Clinic* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357, Cobb J found as a fact (paras 65-66) that the Forms WP and PP were completed *after* the commencement of the treatment, and that finding, as he went on to observe (para 67), was really the end of the dispute. In that case (para 22), both partners had signed a Form IC *before* the treatment. There seems to have been no suggestion that this might satisfy the statutory requirements. On the contrary, Cobb J proceeded on the basis (paras 55(i), 57) that, in the light of the HFEA's directions to which I have referred, the statutory consent notices "must be in forms WP and PP." Moreover, he said (para 70), the Form IC "did not purport to establish the grant of legal rights".

34. Cobb J went on to consider, albeit obiter, two other issues to which I need to refer. The first was the need for *informed* consent. His finding, after a careful review of the evidence, was (para 76) that "any consent to the grant of parentage was not in the circumstances, truly 'informed' consent."

35. The second issue was whether the clinic had complied with the terms of its licence and, if it had not, what the legal consequences were. The issue arose in that case, just as on one view it arises in the present case, because of the requirement in section 43 of the 2008 Act that the relevant treatment was being provided "by a person to whom a licence applies" and, more specifically, "under that licence."

36. After a lengthy analysis of the statutory regime under the 1990 Act and of what the relevant licence required, Cobb J made the following findings (para 88):

> "In the following respects I find that the clinic did not comply with its licence conditions in providing treatment to AB and CD in that:
>
> (i) The clinic had not provided sufficient information to both parties to enable them to make informed decisions about parentage issues at the time of the treatment.
>
> (ii) The clinic did not provide the parties with an opportunity to receive proper counselling about the step proposed prior to treatment.
>
> (iii) Inadequate records have been kept of the treatment and the delivery of the WP/PP forms."

For present purposes (see below) it is the third of these findings that is relevant.

37. Cobb J continued (para 89):

> "In the circumstances, I am obliged to conclude that the 'treatment provided to W [CD]' was not offered under the strict terms of 'that licence' (s 43) and that, even if the consent forms had been delivered prior to the third cycle of treatment, I would have been obliged to conclude that they were ineffective to achieve their purpose."

38. He returned to the point when setting out his conclusions in summary (paras 96(iii), 97):

> "96 … I nonetheless am satisfied that the consent forms were completed and submitted in breach of the clinic's licence obligations in that:
>
> (a) there was no offer of counselling to the parties on this issue;
>
> (b) the 'consent' on the forms was not 'informed consent' …
>
> [97] In the circumstances, the agreement was not effectively achieved within the licensed terms of [the] clinic; that is to say, the 'treatment' was not 'provided to W under' the strict conditions of 'that licence': s 43 HFEA 2008."

It will be noticed that Cobb J here treated the relevant breaches of licence as being the absence of counselling and lack of informed consent, that is items (i) and (ii) of the three items previously listed by him (para 88). Item (iii), the inadequate record keeping, was not something he identified here as going to his ultimate conclusion.

39. I turn to the decision of Theis J in *X v Y (St Bartholomew's Hospital Centre for Reproductive Medicine Intervening)* [2015] EWFC 13. The problem in that case arose because the Form PP was not on the clinic's file. Theis J identified (para 14) the four issues which accordingly arose: (1) Did X sign the Form PP so that it complied with section 37(1) of the 2008 Act? (2) If X did, was the Form PP subsequently mislaid by the clinic? (3) Was the treatment "provided under a licence" as required by section 37(1)? (4) If the Form PP form was not signed can the court 'read down' section 37(1) to enable the court to make the declaration of parentage sought? She summarised her conclusions as follows (para 15):

> "I have concluded, on the facts of this case, that it is more likely than not that X did sign the PP form on 26 October 2012, and it has subsequently been mislaid by the clinic. I have also concluded, in the circumstances of this case, the failure by the clinic to maintain records did not amount to a breach of the licence so as to invalidate it, so that the treatment was 'provided under a licence' as required by s. 37(1)."

In the circumstances, there was no need for Theis J to address the issue of 'reading down' and she came to no decision on the point.

40. For present purposes, what is most important is Theis J's analysis and conclusion in relation to question (3), the record-keeping point. She articulated the question as being (para 50) "whether the failure by the CRM to retain the necessary records (namely X's consent in PP form) had the consequence that the treatment provided to Y 'under a licence' as required by s. 37(1) was not satisfied." She summarised (paras 51-52) the relevant statutory provisions and her finding of breach:

> "51 Section 12(1)(d) HFEA 1990 provides that one of the conditions of every licence granted is that '*proper records shall be maintained in such form as the Authority may specify in directions*'. Direction 0012 requires licensed centres to maintain for a period of 30 years certain specific records, including '*all consent forms and any specific instructions relating to the use and/or disposal of gametes and embryos*' (paragraph 1(f)). Licence condition T47 provides '*All records must be clear and readable, protected from unauthorised amendment and retained and readily retrieved in this condition throughout their specified retention period in compliance with the data protection legislation*'. At paragraph 31.2 of the guidance it provides '*A record is defined as 'information created or received, and maintained as evidence by a centre or person, in meeting legal obligations or in transacting business. Records can be in any form or medium providing they are readily accessible, legible and indelible'*.'
>
> 52 It is clear from the findings I have made about the clinic not keeping the PP form for X that the CRM is in breach of Direction 0012."

41. To understand the eventual basis upon which Theis J decided the point, it is necessary to set out at least part of her summary (paras 53-59) of the different submissions she had heard:

> "53 In its letter to the court dated 20 January the [HFEA] states as follows
>
> > ' *… failure to ensure that either a PP form is completed or that a copy of a completed PP form is retained in a patient's records is not a breach of the Act which amounts to a criminal offence. It is instead considered a failure to do something which the clinic was licensed to do to the standard or in the manner required, rather than something which could never be done lawfully in 'pursuance of' its licence.*
> >
> > *In addition, the Act gives the Authority the power to impose a very limited range of regulatory sanctions including the addition of conditions, suspension or revocation of the licences where circumstances warrant such action. If it were the case that a clinic's failure to comply with directions or*

> *licence conditions rendered its licence invalid or affected the subsistence of the licence, there would be no licence against which the Authority could impose a sanction.*'

The letter went on to express the view, although acknowledging it was a matter for the court, that the treatment in this case had been provided lawfully and within the terms of the clinic's licence as the necessary consents were in place at the time of treatment.

54 Ms Allman [advocate to the court] sought to develop an argument in her written submissions that the purpose of the licence condition as to record keeping is qualitatively different to the purpose of the licence conditions as to consent, the provision of information and counselling.

55 She submitted some of the licence conditions clearly mirror the statutory criteria, and therefore where there is breach of a licence condition, it also represents non-compliance with the statutory criteria …

57 The licence condition requiring the maintenance of records, she submits, is a more general requirement. There is no readily identifiable reason why a child should be deprived of his/her parentage where the treating clinic has simply failed to maintain proper records, provided it can be established what has taken place; this is unlikely to have been Parliament's intention.

58 Mr Wilson [counsel for the parents] … supports the position set out in the [HFEA]'s letter …

59 Mr Wilson submits the condition for record-keeping is not fundamental, because it derives from guidance in the Code and [is] therefore relevant to the [HFEA]'s functions of regulating licensed clinics and not to the subsistence of the licence, which subsists until revocation."

42. Theis J set out her conclusions as follows (paras 60-61):

"60 It is not necessary for me, in the circumstances of this case, to resolve the issue between Ms Allman and Mr Wilson as to whether a failure to provide information, the opportunity for counselling or the notice (consent) required under s. 37 prior to the treatment is a category of breach that does comply with treatment '*under a licence*' as required in s. 37. In *AB v CD* Cobb J concluded in that case (at paragraphs 88 and 89) that treatment provided to W [CD] in that case was not offered '*under the strict terms of* '*that licence*' (s. 43) …' These observations have to be viewed in the context of that case where Cobb J based his conclusion on the finding that the

required consent forms had not been completed prior to the treatment taking place, as well as the other matters set out (provision of information and counselling). Consequently his observations about the effect of treatment not being offered under the strict terms of the licence did not form the underlying rationale for his conclusion in that case.

61 I am satisfied that the breach of record keeping in the circumstances of this case does not invalidate the CRM's licence in such a way that offends against s. 37. I have reached that conclusion for a number of reasons:

(1) It is agreed that the notice required under s 37(1)(a) in PP form needs to be completed prior to treatment provided to Y.

(2) It follows that if that requirement is complied with (along with other requirements such as completion WP form, counselling etc) then at the time of the birth of the child X is treated as the legal father of the child (by operation of s. 36 HFEA 2008).

(3) If that is the case it would be wholly inconsistent with that provision, and the underlying intention to provide certainty, if that status could then be removed from the father and the child in the event of the clinic mislaying the consent in PP form, possibly many years later.

(4) The requirement to keep records concerning consent is provided by way of a direction pursuant to s. 23 whose requirements shall be complied with. I agree with the analysis in the letter from the [HFEA] that any non-compliance in these circumstances is dealt with through the regulatory powers given to [it]. As they state in that letter the CRM had co-operated with the [HFEA] about the findings identified by their audit and '*no sanctions were imposed against the clinic and the clinic's licence remains in force*'.

(5) There is no evidence in the enacting history of s. 37 to suggest any intention to create an additional test of compliance by the clinic with directives given pursuant to s. 23 and the acquisition of paternity."

43. I respectfully agree with Theis J's decision and reasoning which, it will be noted, was, on the narrow front on which she proceeded, entirely consistent with Cobb J's approach as I have summarised it in paragraph 38 above.

The issues

44. As will become apparent in due course, the cases before me raise three general issues of principle which it is convenient to address at this point.

45. The first (which arises in Cases A, B, E, F and H) is whether it is permissible to prove by parol evidence that a Form WP or Form PP which cannot be found was in fact executed in a manner complying with Part 2 of the 2008 Act and whether, if that is permissible, and the finding is made, the fact that the form cannot be found prevents it being a valid consent, as involving a breach by the clinic of its record-keeping obligations. This was the issue decided by Theis J in *X v Y (St Bartholomew's Hospital Centre for Reproductive Medicine Intervening)* [2015] EWFC 13. In the light of her decision, with which, as I have said, I respectfully agree, the only question in such a case is a question of fact: Allowing for the fact that it can no longer be found, is it established on the evidence that there was a Form WP or Form PP, as the case may be, which was properly completed and signed *before* the treatment began?

46. The second issue (which arises in Cases D and F) is the extent to which errors in a completed Form WP or Form PP can be 'corrected', either as a matter of construction or by way of rectification. A similar point (which arises in Cases E and F) is the extent to which errors in a completed Form IC can be 'corrected' This is a novel point in this context which, in my judgment, falls to be decided in accordance with long-established and well-recognised principles.

47. I start with rectification. As a matter of general principle, I can see no reason at all why a Form WP or Form PP should be said to be, of its nature, a document which cannot be rectified. The fact that it is a document required by statute to be in a particular form (that is, "in writing" and "signed by the person giving it") is, in my judgment, neither here nor there: compare the many cases where rectification has been decreed of conveyancing or trust documents similarly required by various provisions of the Law of Property Act 1925 to be in a particular form. Nor does it matter, in my judgment, that a Form WP or Form PP is used as part of, and, indeed, in order to comply with the requirements of, a statutory scheme. There is, for example, nothing in the language of any of the relevant provisions of Part 2 of the 2008 Act to suggest that rectification is impermissible. Contrast, for example, the well established rule that the Articles of Association of a company will not be rectified because rectification would be inconsistent with the provisions of the Companies Acts: see *Scott v Frank F Scott (London) Ltd* [1940] Ch 794. So, in my judgment, if the criteria for rectification are otherwise established, a Form WP or a Form PP can be rectified.

48. Quite apart from the equitable doctrine of rectification, the court can, as a matter of construction, 'correct' a mistake if (I put the matter generally, without any detailed exegesis) the mistake is obvious on the face of the document and it is plain what was meant. The reported examples of this are legion and stretch back over the centuries. They include cases of clear misnomer. Again, there is, in my judgment, no possible objection to the court taking this course in relation to a Form WP or a Form PP.

49. The third issue (which arises in Cases A, C, D, E, F and H) is whether a properly completed Form IC is capable of operating as consent for the purposes of sections 37 and 44 of the 2008 Act. This question falls into two parts.

50. The first question is whether, as a matter of its content and construction, a Form IC is apt to operate (a) as a Form WP and/or (b) as a Form PP. This involves a comparison between the structure and language of the Form IC and the structure and language of

the Form WP and the Form PP, assessed in the light of the requirements of sections 37 and 44.

51. I start with the comparison between the Form IC and the Form PP. So far as concerns sections 37 and 44 and the content of the Form PP, there is, in my judgment, no difficulty. What sections 37(1)(a) and 44(1)(a) require is a "notice in writing" by, as the case may be, M or P "stating that [M or P] consents to being treated as ["the father" or "a parent" as the case may be]." That statutory language is tracked in the Form PP formula, "I consent to being the legal parent." The Barts Form IC uses the words "I acknowledge that … I will become the legal father of any resulting child." This has to be read in conjunction with the "NB" reference to "the legal parenthood of the child." The MFS Form IC uses the words "I acknowledge that … I intend to become legally responsible for any resulting child". This has to be read in conjunction with the "Note" reference to "consent … in the interest of establishing the legal parenthood of the child."

52. I am conscious of the view which Cobb J expressed in *AB v CD*, para 70. But for my part I have no difficulty. Both the Barts Form IC and the MFS Form IC make clear that what is in issue is "establishing … legal parenthood" by W's partner and that this is why the Form IC is being signed by W's partner. In the MFS Form IC the word "consent" is used. Indeed, the phrase "partner's consent" appears immediately below the space where the partner has to sign. True it is that the word "consent" does not appear in the corresponding place in the Barts Form IC, but what the partner is signing is an acknowledgement – "I acknowledge" – that he or she "will become" a "legal" parent and acquire "legal parenthood." It is said that Casement was hanged on a comma, but I cannot accept that everything here turns on the use of the word "acknowledge" rather than "consent" when the purpose and effect of the words used in the Form IC is obvious. Why, after all, is W's partner being asked to sign the Form IC at all, if not to make sure that he or she becomes a parent? By signing the Form IC, W's partner is acknowledging in terms that he or she will become a parent and, by necessary implication, that this is something he or she wants. Taking the Form IC in context and having regard to its content and language, even a black-letter lawyer in Lincoln's Inn would struggle to deny that what is being signed is a consent. In my judgment, this Part of the Form IC – both the Barts Form IC and the MFS Form IC – is, as a matter of content and construction, apt to operate as a Form PP and complies with the requirements of sections 37(1)(a) and 44(1)(a).

53. I turn to the comparison between the Form IC and the Form WP. This is less clear cut. What sections 37(1)(b) and 44(1)(b) require is a "notice in writing" by W, "stating that she consents to [M or P as the case may be] being … treated [as "the father" or "a parent", as the case may be]." That statutory language is tracked in the Form WP formula, "I consent to my partner … being the legal parent." These words do not appear anywhere in either the Barts Form IC or the MFS Form IC. But this, in my judgment, is not fatal. The Form IC is, as we have seen, a single composite document which has accordingly to be read and construed as a whole, the first section or sections providing for W's consent to the various stages of the IVF process and the final page providing for the signed consent of W's partner. If W is consenting to the treatment and, in the same document, W's partner is consenting to becoming the parent of the child resulting from that treatment, it seems to me to follow by necessary implication, even if not by express words, that W is consenting to her partner being

the other parent. What otherwise, looking at the matter from W's point of view, is the point of her partner signing the document, along with W, what is the point in W signing a document which is also to be signed by her partner, if not to record their joint acknowledgement that W's partner is to be a parent? In my judgment, the Form IC – both the Barts Form IC and the MFS Form IC – is, as a matter of content and construction, apt to operate both as a Form PP and a Form WP and complies with the requirements of both sections 37(1)(a) and 44(1)(a) and sections 37(1)(b) and 44(1)(b).

54. The second question is whether a properly completed Form IC which, as a matter of content and construction, is apt to operate both as a Form PP and a Form WP and which complies with the requirements of both sections 37(1)(a) and 44(1)(a) and sections 37(1)(b) and 44(1)(b), is precluded from operating as consent for the purposes of sections 37 and 44 of the 2008 Act either because of the words "treatment provided … under the licence" in sections 37(1)(a) and 44(1)(a) (and the corresponding words "being so treated" in sections 37(1)(b) and 44(1)(b)) or because of the HFEA's requirement in directions that any consent required under sections 37(1) and 44(1) "must" be recorded in a specified form, that is Form PP or Form WP as the case may be. This, it will be appreciated, is a matter considered by Cobb J in *AB v CD*.

55. At this point I need to go back to the statutory scheme set out in the 1990 Act and the 2008 Act. The relevant provisions are immensely long and detailed. Even to summarise them would extend this judgment to a quite inappropriate length. It suffices to identify what are for present purposes the key features of the statutory scheme:

i) The 1990 Act identifies various activities which cannot be performed "except in pursuance of a licence" granted by the HFEA and various other activities which a licence "cannot authorise." These prohibitions are reinforced by various provisions making their breach a criminal offence. There is no suggestion that anything done or omitted to be done in any of the cases I am concerned with has involved the commission of a criminal offence.

ii) The 1990 Act identifies various matters that "shall be conditions of every licence granted under this Act." One, specified in section 12(1)(d) of the 1990 Act, is that "proper records shall be maintained in such form as the [HFEA] may specify in directions."

iii) Section 18 of the 1990 Act empowers the HFEA to revoke a licence in certain circumstances, including if (section 18(2)(c)) it is satisfied that the person responsible "has failed to comply with directions given in connection with any licence."

iv) The HFEA is given power to issue directions on various matters. Section 23(2) of the 1990 Act provides that a person to whom any requirement contained in directions is applicable "shall comply" with the requirement. Section 23(3) provides that anything done in pursuance of directions is to be treated "as done in pursuance of a licence." Although there are provisions making non-compliance with particular types of direction a criminal offence (see, for

example, section 41(2)(d) of the 1990 Act), it is to be noticed that failure to comply with the terms of a licence or with the requirements of a direction is not, of itself, a criminal offence.

v) The HFEA is required to maintain and publish a code of practice. Section 25(6) of the 1990 Act provides that failure by a person to observe any provision of the code "shall not of itself render the person liable to any proceedings" but may be taken into account by the HFEA in considering whether or not to vary or revoke a licence.

vi) Apart from those provisions which create specific criminal offences, the only sanction specified in the legislation, whether for non-compliance with the terms of a licence or non-compliance with the requirements of a direction, is the possibility that the licence may be varied or revoked.

56. It is against this background that I return to the question I posed above.

57. Given the statutory framework, what it provides and, equally significant, what it does not provide, I do not see how a mere failure to comply with the HFEA's direction that Form WP and Form PP "must" be used can, of itself, invalidate what would otherwise be a consent valid for the purposes of section 37 or section 44. These sections do not prescribe a specific form. What is required is a "notice" and that is not defined, although I would agree with Miss Broadfoot that, given the context, what is required is a document of some formality. The argument must be that it is the combined operation of section 12(1)(d) of the 1990 Act, which in effect elevates this requirement into a condition of the licence, coupled with the words "treatment provided … under the licence" in sections 37(1)(a) and 44(1)(a) (and the corresponding words "being so treated" in sections 37(1)(b) and 44(1)(b)), that invalidates what would otherwise be a consent valid for the purposes of section 37 or section 44.

58. Recognising that in this respect I am differing from the views expressed, albeit *obiter*, by Cobb J in *AB v CD*, I do not think that the key phrase "under the licence" can sustain the weight of the argument. It is noticeable that the statute does not, for example, use the words "in accordance with the licence", or "in compliance with the licence" or even, to pick up the language of section 23(3) of the 1990 Act, "in pursuance of the licence." The word "under" is much less specific. It serves the important purpose of making sure that parenthood is conferred by virtue of sections 36 and 43 only where the child results from "treatment under the licence" of a licensed clinic, rather than treatment by an unlicensed clinic, or treatment outside the scope of the clinic's licence, for example, treatment of a kind which the 1990 Act absolutely prohibits as being outside the permitted scope of any licence. There is also a quite separate matter which, in my judgment, points in the same direction. So long as the licence remains in force and has not been revoked it makes perfectly good sense to describe the provision of treatment of a kind within the scope of that licence as being treatment provided "under" the licence.

59. There is one final consideration. What is meant by a direction saying that a clinic "must" use the Form WP and the Form PP? Suppose that what are completed are copies of Form WP and Form PP which, in their operative parts, follow to the last dot

and comma the text of the required forms, but which omit all the explanatory text which is included in those required forms. Can Parliament really have intended that to be fatal? Surely not. So, surely, what one is looking for is compliance with the substance, not slavish adherence to a form. Is parenthood to be denied by the triumph of form over substance? In my judgment, not.

60. Parliament has very carefully defined in sections 37 and 44 the conditions that have to be satisfied if the consequences identified in sections 36 and 43 are to follow. If Parliament had intended that those consequences were not to follow, even though the consents specified in sections 37 and 44 had been given, merely because there had been a non-criminal breach of some term of the licence or a non-criminal breach of a requirement imposed by a HFEA direction, then surely it would have spelt that out. But that sanction is not to be found set out in sections 37 and 44 nor, as I have already pointed out, elsewhere in the legislation.

61. In my judgment, failure to use a Form WP or a Form PP does not invalidate a consent which would otherwise comply with sections 37 and 44. I add only that this approach accords with the general thrust, if not with the specific detail, of Theis J's analysis in *X v Y*.

62. I think I should also record what Miss Broadfoot said in her skeleton argument:

> "Specifically, it is the Secretary of State's position that the failure to use the WP / PP form does not prevent the court from making a declaration of parentage if the statutory requirements were met."

She went on:

> "Failure to comply with a direction is undoubtedly a serious matter and may lead to variation or revocation of a licence … However, … failure to comply with these directions as to the use of the WP / PP forms does **not** of itself mean that the treatment … was not "treatment provided to W under the licence."

I agree.

63. I conclude, therefore, that, in principle:

i) The court can act on parol evidence to establish that a Form WP or a Form PP which cannot be found was in fact properly completed and signed *before* the treatment began;

ii) The court can 'correct' mistakes in a Form WP or a Form PP either by rectification, where the requirements for that remedy are satisfied, or, where the mistake is obvious on the face of the document, by a process of construction without the need for rectification.

iii) A Form IC, if it is in the form of the Barts Form IC or the MFS Form IC as I have described them above, will, if properly completed and signed *before* the

treatment began, meet the statutory requirements without the need for a Form WP or a Form PP.[2]

iv) It follows from this that the court has the same powers to 'correct' a Form IC as it would have to 'correct' a Form WP or a Form PP.

The evidence

64. I turn at last to consider the evidence in Cases A, B, C, D, E, F and H. As I have already mentioned, Cases A, B, C, E and H relate to a man and a woman, Cases D and F relate to two women. Cases A, F and H arise out of treatment at Barts, Cases C, D and E from treatment at MFS, and Case B from treatment at BH.

65. In two cases (Cases B and D) the parties have separated *since* the birth of the child. Everyone is correctly agreed that this is legally irrelevant to anything I have to decide, for in each case (as in all the other cases) the legal status of all the parties finally and irrevocably crystallised at the moment when the embryo or the sperm and eggs were placed in the mother, or the mother was artificially inseminated, and this treatment resulted in the birth of the child.

66. In each case I have read the written evidence and heard the oral evidence of both the woman (W) and her partner. I do not propose to go through this evidence in detail or case by case. There is, as we shall see, no need for me to do so. More important, much of this evidence related, in the nature of things, to intensely private and intimate matters which none of the witnesses had ever imagined would need to be exposed in a court of law, even a court sitting in private and, as it happens, without the attendance of the media, and in some cases revealing matters which, for understandable reasons, they had not shared, and did not wish to share, even with their closest relatives and friends. These are unusual cases where anonymisation alone may not suffice – some small and seemingly insignificant but nonetheless telling detail may suffice to enable a close relative or friend to pierce even a heavily anonymised account. I am not prepared to run that risk. For the judicial branch of the State to visit that on people who have already suffered so heavily at the hands of clinics operating in this highly State regulated area would simply be to add insult to injury.

67. In contrast I can see no reason at all why the clinics should not be identified. So far as concerns IVF Hammersmith Limited, readers of this judgment will appreciate that the case has not yet been heard and that there are as yet no findings. Barts, MFS and BH, on the other hand, each stands exposed as guilty of serious shortcomings, indeed, at least in the case of Barts and MFS, repeated and systemic failings. Why, in the circumstances, should their shortcomings be shielded from public scrutiny or, indeed, public criticism? I can think of no compelling reason. On the contrary, if public condemnation serves to minimise the risk that any future parent is exposed to what these parents have had to suffer, then it is a price well worth paying. I have not identified any of their staff, nor any of the treating clinicians. There is no need, and it would be unfair, to do so, for the failings are systemic and, ultimately, the responsibility of senior management and the HFEA.

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[2] I express no views in relation to similar forms used by these or other clinics. I also make clear that nothing I have said should be treated as any encouragement to anyone not to use Form WP and Form PP.

68. Before coming to what, for cold legal purposes, has to be the core of the evidence, I think I should make some general comments.

69. The evidence I listened to in these cases was some of the most powerful, the most moving and the most emotionally challenging I have ever heard as a judge. It told of the enormous joy, both for the woman and her partner, to discover, in some cases after a hitherto unsuccessful journey lasting years, that she was pregnant, having taken a pregnancy test that they had scarcely dared to hope might be positive; the immense joy of living through the pregnancy of what both thought of from the outset as "their" child; the intense joy when "their" child was born. In contrast, it told of the devastating emotions – the worry, the confusion, the anger, the misery, the uncertainty, the anguish, sometimes the utter despair – they felt when told that something was wrong about the parental consent forms, that, after all they had been through, all the joy and happiness, W's partner might not legally be the parent. In one case, where the journey to a successful birth had taken the parents *twelve years* of what was described as grief and pain, it is hardly surprising to learn that they were "devastated and heartbroken" when told by the clinic that the mother's partner was not the child's parent. In another case, the comment was, "it is simply not fair." The words may be understated, but the raw emotion is apparent. Another called the situation "terrible." Another spoke of being "extremely distressed", unable to sleep and "constantly worrying about the future."

70. It is testament to the enormous dignity they displayed, even while the case was going on and they did not know what the outcome was going to be, that these parents, despite their justified criticism of how they felt let down by professional people they had trusted and who they had thought, wrongly as it turned out, they could rely upon, did not give voice to greater anger and more strident criticism. It was, if they will permit me to say so, a humbling experience to watch them and hear them give evidence.

71. A number of common themes emerge from the evidence. In each case, having regard to the evidence before me, both written and oral, I find as a fact that:

    i) The treatment which led to the birth of the child was embarked upon and carried through jointly and with full knowledge by both the woman (W) and her partner.

    ii) From the outset of that treatment, it was the intention of both W and her partner that her partner would be a legal parent of the child. Each was aware that this was a matter which, legally, required the signing by each of them of consent forms. Each of them believed that they had signed the relevant forms as legally required and, more generally, had done whatever was needed to ensure that they would *both* be parents.

    iii) From the moment when the pregnancy was confirmed, both W and her partner believed that her partner was the other parent of the child. That remained their belief when the child was born.

    iv) W and her partner, believing that they were entitled to, and acting in complete good faith, registered the birth of their child, as they believed the child to be,

showing both of them on the birth certificate as the child's parents, as they believed themselves to be.

v) The first they knew that anything was or might be 'wrong' was when they were subsequently written to by the clinic.

vi) The application to the court is wholeheartedly supported by the applicant's partner or, as the case may be, ex-partner.

vii) They do not see adoption as being a remotely acceptable remedy. The reasons for this will be obvious to anyone familiar with a number of recent authorities which there is no need for me to refer to. As it was put in the witness box by more than one of these parents, as they thought of themselves, why should I be expected to adopt my own child?

72. There are two other matters which emerged clearly in the evidence. There is no suggestion that any consent given was not fully informed consent. Nor is there any suggestion of any failure or omission by any of the clinics in relation to the provision of information or counselling. So the facts here in each case, as I find them to be, differ markedly from the facts as found by Cobb J in *AB v CD*.

Specific findings in each case

73. In the light of the general findings as I have set them out, I turn finally to consider the specific issues arising in each case. I can in fact deal with them quite shortly,

Specific findings: Case B

74. I start with Case B.

75. The relevant facts are stark and simple. The mother signed, at the appropriate time, a Form WP in proper form. There is no signed Form PP in the BH records. The evidence of both the mother and her partner is that he signed the Form PP at the appropriate time and in the proper form. That evidence has not been challenged. There is no reason to doubt it. I accept it. The Form PP, I find, has been lost or mislaid.

76. It follows that the applicant in Case B is entitled to the declaration sought.

Specific findings: Case D

77. I turn to Case D.

78. The mother signed, at the appropriate time, a Form WP in proper form. Her partner signed a Form PP, at the appropriate time and in the proper form, except that she dated sections 4 and 5 with her date of birth rather than the date on which she signed it. That this was a mistake is obvious, as is the 'correction' required to remedy the mistake, for the correct date, established by the evidence, is that on which both the Form WP and the Form IC were signed. (I note in passing that the precise date is not material; what is vital is that the form was signed, as I am satisfied it was, *before* the treatment.)

79. It follows that the applicant in Case D is entitled to the declaration sought.

80. Moreover, both parties signed, at the relevant time and in proper form, a MFS Form IC. On that ground also, were it necessary to rely upon it, the applicant would be entitled to the declaration sought.

Specific findings: Case H

81. I turn next to Case H.

82. The mother signed, at the appropriate time, a Form WP in proper form. There is no signed Form PP in the Barts records. However, the Barts *Treatment Checklist* contains the following entry: "[In print] Male Consent to Treatment [added in manuscript] ✓ [date] [initials of nurse]." The date, I note, is the same as that for the Form IC (see below). In all the circumstances, and having regard to all the evidence I have heard, I am entitled to conclude, and I find as a fact, that this sufficiently evidences a Form PP, signed by the mother's partner at the appropriate time and in proper form. The Form PP, I find, has been lost or mislaid.

83. It follows that the applicant in Case H is entitled to the declaration sought.

84. Moreover, both parties signed, at the relevant time and in proper form, a Barts Form IC. On that ground also, were it necessary to rely upon it, the applicant would be entitled to the declaration sought.

Specific findings: Case A

85. I turn next to Case A.

86. The applicant signed, at the appropriate time, a Form PP in proper form. There is no Form WP signed by the mother in the Barts records. However, the Barts *Treatment Checklist* contains the following entry: "[In print] Female HFEA consent [added in manuscript] Signature reqd ✓ [date] [initials of nurse]." In all the circumstances, and having regard to all the evidence I have heard, I am entitled to conclude, and I find as a fact, that this sufficiently evidences a Form WP, signed by the mother at the appropriate time and in proper form. The Form WP, I find, has been lost or mislaid.

87. It follows that the applicant in Case A would, but for the matters set out below, be entitled on this basis to the declaration sought.

88. Moreover, both parties signed, at the relevant time and in proper form, a Barts Form IC. On that ground also, were it necessary to rely upon it, the applicant would be entitled to the declaration sought.

89. However, there is a further point in this case. It turns out the parties were, at the relevant time, married, having been married according to customary law in their country of origin. They do not seek a declaration as to marital status in accordance with section 55 of the Family Law Act 1986. There is no reason why they should and this does not prevent me proceeding in accordance with section 35 of the 2008 Act. All that is needed is for me to be satisfied that, at the time relevant for the purposes of section 35, they were the parties to "a marriage" and that it is *not* "shown that he did

not consent." In the circumstances I propose to say nothing more than this. Given the parties' evidence, which I accept, in the light of the very clear and compelling evidence of an expert well-qualified in the customary law of the relevant country, and applying the relevant principles of private international law, I am satisfied (a) that the parties were lawfully married as they assert, (b) that the marriage is entitled to be recognised in English law and (c) that the marriage continues to subsist and was therefore subsisting at all times relevant for the purposes of section 35. I add only, what is manifest, that there is no evidence that the husband did not consent. Quite the contrary.

90. Accordingly, the applicant is entitled to the declaration sought. If I am wrong about that, he would be entitled to the declaration for the reasons I have already set out.

Specific findings: Case C

91. I turn to Case C.

92. There is neither a Form WP nor a Form PP in the MFS records. What there is, however, is a MFS Form IC, signed by both the mother and her partner at the appropriate time and in the proper form.

93. It follows that the applicant in Case C is entitled to the declaration sought.

Specific findings: Case E

94. I turn to Case E.

95. The Form WP and the Form PP were signed *after* the treatment had taken place, and seemingly after MFS had discovered its mistake. They are therefore ineffective. There is evidence however, that the mother and her partner had signed both a Form WP and a Form PP previously and at the relevant time. Their evidence was that they had been presented with a "pack of forms", like a "conveyor belt". They recalled that their response when asked to sign the ineffective Form WP and Form PP was "I've signed those already" (the mother) and "I knew I'd signed them before" (her partner).

96. In all the circumstances, and having regard to all the evidence I have heard, I am entitled to conclude, and I find as a fact, though I have to say only after much reflection and with some hesitation, that this sufficiently evidences the signature by the mother and her partner, at the appropriate time and in proper form, of both a Form WP and a Form PP. The Form WP and the Form PP, I find, have both been lost or mislaid.

97. It follows that the applicant in Case E is entitled to the declaration sought.

98. However, both the mother and her partner signed a MFS Form IC, at the appropriate time, that is, *before* the treatment, and, subject only to one point in the correct form. The one defect is that in the 'Partner's Acknowledgment', the mother's partner has wrongly inserted his own name rather than the mother's name in the space following the words "I am the partner of." That this was a mistake is obvious, as is also the 'correction' required to remedy the mistake, for immediately above the heading

'Partner's Acknowledgement' the clinic's sticker with the mother's name has been attached. Her name also appears, twice, on the previous page of the Form IC.

99. On this ground also, were it necessary to rely upon it, the applicant would be entitled to the declaration sought.

Specific findings: Case F

100. I finish with Case F.

101. For reasons which are still largely unexplained, the mother signed a Form WP which is manifestly defective: section 2 was not completed and the consent box in section 3 was not ticked. Moreover, at that time the mother was being treated as a single woman. In my judgment, the Form WP was, and is, wholly ineffective. It cannot be cured by any acceptable process of rectification.

102. Subsequently, and at a time when the mother was being treated together with her partner, the partner signed a Form PP which was both in proper form and signed *before* the treatment began. There is no Form WP signed by the mother in the Barts records. However, the Barts *Treatment Checklist* contains the following entries against the date on which the Form PP was signed:

> "[In print] Attended [added in manuscript] ✓ [In print] Partner attended [added in manuscript] ✓ [In print] Consent to VEC/IVF [added in manuscript] ✓ [In print] Female HFEA consent [added in manuscript] ✓ [In print] Male HFEA consent [amended in manuscript to read Female HFEA consent] [added in manuscript] PP HFEA."

103. In all the circumstances, and having regard to all the evidence I have heard, I am entitled to conclude, and I find as a fact, that this sufficiently evidences a Form WP, signed by the mother at the appropriate time and in proper form. The Form WP, I find, has been lost or mislaid.

104. It follows that the applicant in Case F is entitled to the declaration sought.

105. Moreover, both parties signed, at the relevant time and in proper form, a Barts Form IC. On that ground also, were it necessary to rely upon it, the applicant would be entitled to the declaration sought. It will be recalled that, in contrast to the MFS Form IC, the Barts Form IC refers to the "Male Partner's Acknowledgment." Here, and appropriately, the word "Male" has been crossed out and the word "Female" substituted in manuscript. Even if that had not been done, the mistake would have been obvious, as also the 'correction' required to remedy it, so this would not have been an obstacle to the declaration sought.

Conclusion

106. Accordingly, the applicant in each of Cases A, B, C, D, E, F and H is entitled to the declaration sought.

107. I add, lest it be feared that I have overlooked the point, that, having found the facts as I have, I am required in each case to make the declaration “unless to do so would manifestly be contrary to public policy”: see section 58(1) of the Family Law Act 1986. The declarations I propose to make do no violence to the 1990 Act or the 2008 Act and involve no ‘reading down’ of any of the statutory provisions (there is accordingly no need for me to consider, nor do I, the very interesting submissions I have heard on that topic). I have proceeded in accordance with the strict letter of the legislation, applying long established principles of construction in cases of obvious mistake. There is no conceivable basis in public policy for refusing to make the declarations.

An afterword

108. It is not for me to provide guidance as to how these serious and systemic failings could better be prevented. That, after all, is the function of the HFEA and, within each clinic, the responsibility of the individual who is the “person responsible” within the meaning of section 17(1) of the 1990 Act. There are, however, three observations which I am driven to make in the light of the very detailed forensic examination to which these matters have been subjected during the hearing.

109. The first relates to the material published from time to time by the HFEA in the aftermath of Cobb J’s judgment in *AB v CD*. I have in mind letters sent out by the Chief Executive of the HFEA dated 10 February 2014 and 1 September 2014, a letter sent out by the Chair of the HFEA dated 3 February 2015 and the April 2015 version of the HFEA’s *Consent forms: a guide for clinic staff*. While a careful reader who studies these documents with a critical and attentive mind ought not to be left in much doubt about the need to make sure that both Form WP and Form PP are completed properly, and at the right time, I cannot help thinking that it might be better if this ***FUNDAMENTALLY IMPORTANT*** requirement, and the potentially ***DIRE LEGAL CONSEQUENCES*** of non-compliance, were expressed in more emphatic, indeed stark, language and, in addition, highlighted by appropriate typography. By appropriate typography I mean the use of **bold** or *italic* type, CAPITAL letters, or a ***COMBINATION*** of all three; the use, for example, of red ink; and the flagging up of key points by the use of ‘warning’ or ‘alert’ symbols. To be fair, some effort has been made to highlight particular points, but I suggest that the process could go further.

110. The second relates to the imperative need for *all* clinics to comply, *meticulously and all times*, with the HFEA’s guidance and directions, including, in particular, in relation to the use of Form WP and Form PP.

111. The final observation relates to practice within clinics. A completed Form WP and a completed Form PP surely needs to be *checked* by one person (probably a member of the clinical team) and then *re-checked* by another person, entirely separate from the clinical team, whose sole function is to go through the document in minute detail and to draw attention to even the slightest non-compliance with the requirements – all this, of course, *before* the treatment starts. I trust that the parties will not be offended by the comparison, but the approach to checking that the Form WP and the Form PP have been fully and properly completed is surely just as important, and demands just as much care, attention and rigour, as would be demanded in the case of a legal

document such as a contract for the sale of land, a conveyance or a will – indeed, in the context of parenthood, even more important.