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Case No: FD19P00246

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London
WC2A 2LL

Friday, 12th March 2021

Before:

THE PRESIDENT
Remotely via Microsoft Teams

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Re Al M

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LORD DAVID PANNICK QC, MR. ANDREW GREEN QC, MR. RICHARD SPEARMAN QC, MR. NIGEL DYER QC, MR. DANIEL BENTHAM and MR. STEPHEN JARMAIN (instructed by **Harbottle & Lewis LLP**) for the **Father**

MR. CHARLES GEEKIE QC, TIM OTTY QC, MR. NICHOLAS CUSWORTH QC, MS. SHARON SEGAL, MR. DANIEL BURGESS and MR. NICHOLAS WILKINSON (instructed by **Payne Hicks Beach**) for the **Mother**

MS. DEIRDRE FOTTRELL QC and MR. TOM WILSON (instructed by **CAFCASS Legal**) for the **Children**

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APPROVED JUDGMENT
IN PRIVATE

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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THE PRESIDENT:

1. I deal first with paragraph 9. I am plain that there needs to be an experts' meeting. That would be the normal course. This is highly complicated material and the more that any distinction and dispute that there may be between the two experts can be flushed out, acknowledged, explained and then committed to paper or video before the hearing the better. It will enable us all to engage with it more effectively at the hearing.

2. The alternative is for there to be no experts' meeting, for Dr. Marczak to give his evidence and for us then separately to hear what Professor Beresford may have to say about what he has said. The development of the whole concept of expert meetings arose because of the unsatisfactory nature of that process.

3. The main objection is that, on the father's case, Dr. Marczak is seen as entirely partisan, he does not come to the court, on their submission, as a free-standing independent expert who has been instructed for the proceedings. The basis of those submissions are well-understood and they will no doubt feed in to submissions about how reliable his evidence is for me to consider at the final hearing. I will look forward to hearing those submissions at the time and they are to be given full weight. However, that is for then.

4. I do not think that those matters cut across the expert meeting process being valuable in itself. Dr. Marczak comes to that process, certainly with my eyes wide open as to where he comes from in terms of his origins into the proceedings. But, provided the experts' meeting can be recorded in full in the way that we have now canvassed, I am comfortable with it taking place and with there being no opportunity for there to be any surreptitious subversion or whatever the father is concerned about of one expert of another, and certainly with all of us being able to see what goes on and for it to be the subject of comment questioning and submissions in due course.

5. The experts' meeting is, therefore, to take place. It is to be recorded on video. I do not share the lack of confidence in the ability for that to be done. If it really cannot be done, it cannot be, but I would expect it to be recorded on video, and as has been discussed, almost immediately after the hearing, as soon as possible (so that is within 24 hours) a transcript of the experts' meeting is to be disclosed to the father with any redactions for any confidential references during the meeting taken out of the written transcript. As soon as possible thereafter, an adequately redacted copy of the video recording is also to be made available to the father. Hopefully, that deals with the experts' meeting.

6. I now refer to paragraph 12. So far as the father's application for disclosure of the material upon which Dr. Marczak and now Professor Beresford will have given their reports, I refuse the father's application. I am prepared to give a more detailed judgment if required in writing, but in essence, the position I take is one of high principle. It was a wholly exceptional course for the court to take to permit the father to disclose the written material in the case to a shadow expert and, in particular, for that expert to be based outside the jurisdiction of this court. I did so for good reasons, as I saw them to be, and I maintain the view that that was the right and fair decision to take.

7. Because of the complicated nature of material in this case, the father and his legal team are entitled to have someone who is technically and scientifically sighted in respect of that material to help them understand what is said in the report and to inform the shape of their further enquiries and any challenges they wish to make within the court process, but it goes no further.

8. It was never the court's intention that that instructed agency, Signia, as it has turned out to be, would develop into a separate expert who would have access to the underlying material and conduct their own assessment of it. It has always been open to the father to make an application under Part 25 of the Family Procedure Rules for leave to instruct his own free-standing expert and for that then to be conducted in the ordinary way with everything the expert has and everything the expert says open and transparent within the process. That has not happened. That is not the role of Signia, and it is not right now for Signia to be brought forward to undertake that role, particularly as there is no indication that Signia's report on the underlying material would be disclosed into the court proceedings, in any event.

9. What I have given permission for, acknowledging the difficulties in the case and acknowledging the need for a fair process, is the instruction of a single joint expert and the court and the parties have been tasked with the difficult operation of (a) finding an expert and now (b) finding a second one. We have persevered with that, precisely to try to meet the fair trial needs of the process, and to do so in an open way where all involved in the court process can see what is going on and can see how that expert opinion is first given and then developed by the staged process that I put in place as that expert has exposure to Dr. Marczak's report.

10. I have now sanctioned a further stage in that transparent and, as I see it, fair process in approving the arrangements for the experts' meeting that I have done, but the disclosure of the raw material to Signia is way beyond any line that is required for fairness and is wholly without principle in terms of the way that the courts in this jurisdiction, certainly in the family jurisdiction, approach the instruction of experts. I would be able to give more detail in relation to that judgment if that is required, but I stand on high principle and simply say ‘no’ and I therefore refuse that application.

11. Moving on, I think 14 and 15 are to do with Mr. X and so is 16. Again, this is a matter that has been raised a number of times. There are clear sensitivities here and a balance has to be struck, but I am fully satisfied that it would not be proportionate to require Mr. X's name to be disclosed. Mr. X, his contribution, as it were, sits within Dr. Marczak's overall analysis. Mr. X is part of that analysis, but he is not the only factor relied upon. The fact that his identity has not been disclosed to the father may affect the degree of weight that is to be put upon that element of Dr. Marczak's analysis. That is a matter that will have to be visited during any fact-finding process, but I am persuaded that the detriment to Mr. X in disclosing his identity to the father, particularly if that is done in a way that is not going to allow him to know that that is happening, and where the father refuses to permit Mr. X to be told the identities of the parties in these

proceedings before he is invited to give consent to the disclosure of his name, in my view is not justified and is not fair to Mr. X.

12. Equally, the father's knowledge of who Mr. X is, in my view, of only marginal importance in the case. The overall case will stand or fall, to a very large extent, upon Dr. Marczak's approach, his methodology, the basic evidence upon which he relies, of which Mr. X is a part, but is not the whole. The mother is not going to prove her case solely because Mr. X is a feature of it, equally, it may not fail because of what is said about Mr. X. He is a satellite element within the whole, rather than at the core of the case and it is therefore disproportionate, in my view, to require the disclosure of his identity now.

13. The proposed course of action is for the independent counsel who has been instructed to be given information so that she can conduct some basic screening check of the material. That seems to me a proportionate step to take and we see what the response is from that.

14. This is an issue that can be revisited as we move forward, but at the moment, I am very clear that I am not persuaded that Mr. X's identity is to be disclosed, other than to independent counsel, for her to undertake that step.

15. Moving on to the difficult question of whether a request is made to the litigants in the pending litigation in Israel, for them to send a copy of what is referred to as a contract that is at the centre of that litigation. The mother's team wish that to happen in circumstances where there is an inability to access directly material from the UAE with respect to the use or otherwise of the Pegasus software. This other information is referred to in the public domain and may indicate that Dubai and/or another State in the UAE is a customer of the Pegasus software. If so, this is potentially relevant and has substantial potential importance in the case. I clearly understand that and I am sympathetic to the request.

16. The father's case is not that the request is unmerited as a matter of principle, his prime concern is for the children and that this request will lead to the dots being joined, as Lord Pannick described in his oral submissions, very quickly, with certainly the international Press, if not the Press here, being able to publish something that indicates the nature of the dispute which currently is being litigated before this court in confidential proceedings. The mischief that the father seeks to avoid is for the children then to learn that there are phone-hacking allegations by that media disclosure and be upset by it and hear about it in an uncontrolled way.

17. Again, obviously I understand that and the father's submission, through Lord Pannick, is that what is to be gained forensically by the disclosure of any contract is not so important and weighty in the case as to justify the risk of harm to the children's welfare by the potential for disclosure which I have described. That is a long-winded way of saying it is disproportionate, therefore, to sanction the request being made.

18. A further difficulty has been identified, rightly and helpfully, by Ms. Fottrell, in submissions, which is that the agency who makes the request from this court,

Cafcass, the court itself, or Payne Hicks Beach, is likely to give a heavy hint as to what the case involves, and the widely reported accounts in the Press of there being a dispute between these parents about these children will readily lead to an understanding in Israel of why the contract is being sought, and again I understand that.

19. The position I am left in is that I do consider that the request for the disclosure of the document from Israel is justified and that it is proportionate. I think, provided the requesting agency from this court is sufficiently neutral, the risk of it leading to Press reports asserting that there is a phone-hacking allegation between these parents, which is being litigated in this court, is relatively remote, and the risk of the children hearing about it in an uncontrolled and unexpected way in the media is relatively small. It cannot be ignored, but relatively small. It is nowhere near as high as the father, through Lord Pannick, was describing, provided the agency that makes the request is not one that, of itself, identifies the nature of the dispute.

20. Of the various options, I think the most likely to be seen as neutral and not give any hint as to the underlying litigation is for the independent counsel to be used as a post-box, as Mr. Geekie submitted, for counsel and her chambers, if she is willing to do this, simply to be the source of the request, the point of contact, and for the letter sent by counsel to be drafted by Cafcass, no doubt approved by the other parties.

21. That is, as it were, where I am on that tricky point at the moment. If independent counsel cannot undertake this function, it will have to be reconsidered. I do think that of the other options, using the Clerk to Peter Jackson LJ is probably the least likely to indicate the underlying nature, but there may be, when we have had time for thought, other options which are similarly neutral and non-identifying. I give leave for the request to be made and, subject to those observations, I sanction the use of independent counsel to undertake the task.

22. I think all of the rest of the order relates to the timetable. I am just going to switch to ----

MR. GEEKIE: I believe it does, but in relation to the letter to Israel, there is the draft, if whether by now or Monday you can say whether that is approved or not ----

THE PRESIDENT: I need to read that. I will deal with that.

MR. GEEKIE: Thank you.

THE PRESIDENT:

23. The timetable, as we all recognise, is concertinaed, now, as I think we all realised it would be, to achieve the necessary steps which still have to be undertaken as quickly as possible, but in the a way which gives the parties sufficient time before the hearing starts on Tuesday, 13th April, to put their cases before the court. I think there is now agreement as to the dates on which Professor Beresford will file his report, which is expected to be 21st March,

realistically and if Dr. Marczak needs until Tuesday, the 30th, then one day is not going to alter matters there. The key thing is the experts' meeting, and it is agreed that that should take place on 6th July. The question is when the father is to file a statement of his case? That is not a statement from the father, but it is a statement from his team setting out what his case is. It is accepted that that will not be his case or his final case on the technical matters, which will still be churning through the report and expert meeting process which still has time to run. But it is acknowledged that the father is likely to be putting forward a secondary case, his primary case being simply to say to the mother, "prove it" and his case being that she will be unable to prove it both as to the issue of the phones being hacked -- and Lord Pannick rightly points to the fact that currently the two single joint experts who have been instructed have not found any evidence of hacking on the raw material that they have examined of itself -- and secondly, even if hacking is proved, the link between the hacking and the father will not be established, so the case simply is to prove it.

24. Within that process, the father is likely to assert a number of matters, no doubt, the principal theme of which will be that even if there has been hacking, it does not follow as night follows day that it must be on the father's instruction that other agencies, particularly those from other States in the Middle East, who may have a negative mindset towards Dubai, the United Arab Emirates or politically against the father, could undertake hacking and make it look like the father if the Pegasus software is used.

25. As I have indicated during submissions, it is not enough simply for that to be raised in argument, the ground has to be laid and that is accepted. So the question is what date the father has to put in the statement of his "secondary case", as I called it during submissions, the non-technical part of his case and any underlying material. The mother submits that should be by next Friday, 19th March. The father seeks for that to be the following Friday, the 26th, but is prepared for the court to say, for example, it should be two or three days earlier, on the Wednesday, and indeed it slipped -- no, it did not slip, it was the Wednesday.

26. I firmly take the view that the father has known that this fact-finding process has been underway, he has a legal team of very substantial proportions acting for him. They were entitled to raise the issue of Act of State, and that has rightly gone up through the appeal process in this jurisdiction, but has now ended with the Supreme Court refusing permission to appeal. But that has always been one strand in the father's case, and the need, should that fail, to put forward any other case, must have been understood by those acting for the father, right back that the autumn, if not August when this all started, but at least by October, six months or so ago. Indeed, the nature of the submission that I have just described in relation to other States has been raised by Lord Pannick on a number of occasions. It was, therefore, well open to the father to prepare his case on this long before this week and I find it very hard to contemplate that that has not been done.

27. I, therefore, direct that the father files the statement setting out his secondary case by Friday, 19th March, a week from today, in the confidence that that can

be done despite the hard work that it may involve some undertaking in the ensuing seven days.

28. The mother is entitled, and the court is entitled, and the Guardian is entitled, to know what the father is to say. It is very unusual litigation in relation to any fact-finding process for the party who is contesting the allegation not to have been required to put their case before the court a long time before now. I have, for good reason, not required the father to take that step pending the playing out of the necessary consideration of the foreign Act of State element of his case, but that moment has now passed and the time therefore is long overdue for the father's case to be put before the court.

29. In terms of filing of skeleton arguments, I think that is the only other matter that has been left. This is where the rock and the hard place of the timetable do collide with each other and the need for the court to have the father's skeleton argument, but to allow time for him to take on board the outcome of the experts' meeting on 6th April could not be more tightly constrained.

30. I am grateful for, and accept, Lord Pannick's offer for the filing to take place on Sunday, 11th April, and I direct that the father's skeleton argument for the fact-finding hearing, which will, obviously, encompass his case on the technical matters, is to be filed by 4.00 p.m. on Sunday, 11th April.

(For continuation of proceedings: please see separate transcript)

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