[2024] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL COA2022CV00121

IN THE MATTER of the *parens patriae* inherent jurisdiction of the Supreme Court

AND

IN THE MATTER of the Children (Guardianship and Custody) Act

AND

IN THE MATTER of an application for Guardianship, Custody, Care and Control of a minor child, PS

BETWEEN	**SL**	**APPELLANT**
AND	**KS**	**RESPONDENT**

Written submissions filed by Nunes Scholefield DeLeon & Co for the appellant

Written submissions filed by Samuda & Johnson Attorneys-at-Law for the respondent

19 January 2024

PROCEDURAL APPEAL (Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

Civil Procedure – application to file and rely on affidavit evidence after order prohibiting the filing of any further affidavits - whether judge hearing the application erred in refusing to permit reliance on late affidavit evidence -

whether evidence relevant to substantive matter – proper approach a court ought to take in such an application - Civil Procedure Rules, rule 1, rule 25.1(m), Part 26, rule 26.1 (2)(c) and Part 29

Civil Procedure - expert evidence - whether judge erred in refusing to certify expert - whether judge erred in refusing to allow reliance on an expert report – whether report beneficial to what the court has to decide - Civil Procedure Rules, Part 32, rules 32.2 and 32.6

Family Law - application for guardianship, custody, care and control of child – child in the care of maternal aunt- aunt seeking guardianship of child – father of child seeking custody – father having adverse character traces after investigation by Office of the Children's Advocate – whether proposed late evidence relevant to proceedings – whether it is in the best interests of the child to admit affidavit evidence - welfare of the child of first and paramount consideration - Children (Guardianship & Custody) Act, s 18

EDWARDS JA

Introduction

[1] This appeal has its genesis in a custody and guardianship dispute between the father of a minor child ('the respondent') and the aunt of that child ('the appellant'). The appeal seeks to challenge the interlocutory orders of a judge of the Supreme Court ('the learned judge') made on 3 November 2022. By her order, the learned judge refused the appellant's application for permission to file further affidavits in her claim for custody, for the further affidavits filed to stand as properly filed, and for the court to appoint an expert witness and rely on that expert's report. This application was made after the deadline for the filing of affidavits, which was set in orders made at the case management conference ('CMC'), by K Anderson J, had passed, and after his later order that no further affidavits were to be filed in this matter, was made. Although the appellant had filed several affidavits in support of her claim for custody within the time specified in the CMC orders, the additional affidavits related to matters which, the appellant alleged, were relevant to the issues to be decided in the proceedings, and which only came to light after the deadline for the filing of affidavits had passed and after the order was made that no further affidavits were to be filed in the matter.

[2] The appellant sought leave to appeal the order of the learned judge, by way of a notice of application for court orders filed 4 November 2022. This application was heard by O Smith J (Ag), who, on 14 November 2022, granted leave to the appellant to appeal the learned judge's decision refusing permission to rely on the affidavits of KL and SL (filed 30 May 2022 and 6 July 2022, respectively), as well as her refusal to appoint an expert witness and to permit reliance on the expert's report dated 26 October 2022. O Smith J (Ag) also stayed the proceedings pending the outcome of the appeal and transferred the matter to the Family Division of the Supreme Court, as had been requested in the application (see decision of O Smith J (Ag) reported at [2022] JMSC Civ 219).

Background

[3] As indicated, this custody dispute is between the appellant and the respondent over the child ('PS'), whose paternity is not in dispute and who is, at the time of writing, almost four years old. The mother of PS died from complications shortly after giving birth at hospital. After the death of her mother, PS was released from the hospital into the care of the appellant, who was her maternal aunt. PS remained in the sole care of the appellant and her other maternal relatives for several months.

[4] However, soon thereafter, acrimony and discord grew between the appellant and the respondent over the future custody and care of PS. The respondent brought an action in the Family Court to gain custody and control of PS. That matter did not get off the ground due to jurisdictional issues, and on 7 October 2020, the appellant filed a fixed date claim form in the Supreme Court, pursuant to the Children (Guardianship and Custody) Act, seeking guardianship and custody, care, and control of PS, with liberal access to the respondent. The claim was supported by an affidavit in support, sworn to by the appellant, as well as by an affidavit filed the same day, sworn to by the godmother

of the deceased. The appellant also filed a supplemental affidavit in support of the fixed date claim form, on 14 October 2020.

[5] In her affidavit, filed 7 October 2020, in support of her claim, the appellant deponed, among other things, that she had been caring for PS since she was seven days old, that the respondent had provided no financial assistance or otherwise, before and after PS was born, that the respondent had failed to be involved with important matters concerning PS since her birth, and that the respondent was not financially able to take care of PS, in addition to his other children.

[6] The respondent filed an affidavit in response, sworn to by him, on 20 November 2020, denying most of the assertions made by the appellant and asserting that he was desirous, willing, suitable and able to take care of his child, financially and otherwise. He also filed an affidavit in response to that of PS' godmother.

[7] The first hearing of the fixed date claim form came before K Anderson J, on 30 November 2020, and he made several orders intended to manage the progress of the case. These orders were in regard to matters inclusive of the timetable for the filing of affidavit evidence and list of documents, as well as orders relating to the pre-trial review and trial dates. It is necessary to set out his orders in full. He ordered as follows:

> 1. "The trial of this claim shall take place before a judge in Chambers on May 17, 18 and 19, 2021 commencing at 10:00 a.m. on each day.
>
> 2. Parties shall file and serve a List of Documents and shall do so by or before January 29, 2021.
>
> 3. The Applicant…, **shall be at liberty to file Affidavit evidence in response to the Affidavit evidence of the Respondent**, provided that all such further Affidavit evidence being relied on by her shall be limited to matters of response only and shall be matters of response with reference to the four (4) Affidavits deponed to by the respondent, which were filed on November 20, 2020 and **provided that any such further Affidavit evidence is filed and served by no later than December 18, 2020**.

4. **If the Respondent wishes to rely on any further Affidavit evidence, same shall be filed and served by or before January 29, 2021**.

5. **The Applicant shall be at liberty to rely on further Affidavit evidence separate and apart from that which has already been provided for at Order number 3 above**, provided that same shall be **limited to matters of response only** and shall be limited to responses to averments made in an Affidavit [sic] evidence, that may be filed on the Respondent's behalf, in accordance with Order number 4 above and provided that such further Affidavit evidence is filed and served, **by or before February 26, 2021**.

6. **It is required**, notwithstanding any other stipulation of this Order, **that each party file and serve an Affidavit as to means** and same shall be done, **by or before January 29, 2021 and any Affidavit evidence intended to be relied on by either party, limited to response(s) to same**, shall be filed and served, **by no later than February 26, 2021**.

7. **A pre-trial review shall be held with respect to this claim and same shall be held before a Judge in Chambers on March 24, 2021 commencing at 2:00 p.m. for 60 minutes.**

8. **At that pre-trial review hearing, the Judge presiding over same shall consider whether any further Affidavit evidence should be allowed to be relied on by either party and if so, subject to what conditions and also, shall consider whether to schedule new trial dates.**

9. Upon the trial of this claim, all Affiants are required to be present and shall be subject to cross-examination **and in respect of any Affiant who is not present either in person or via any of the appropriate legally permissible means, that Affiants' Affidavit evidence shall be given no consideration whatsoever by the Court.**

10. Upon the trial of this claim, it shall be open to the trial Judge to permit further evidence to be given by any Affiant in keeping with requisite Rules of Court regarding the amplification of evidence at trial and in addition, the Affidavit

evidence of the Affiant shall stand as their evidence in chief, subject to the legal prerequisites regarding admission of evidence.

11. The Applicant shall file a core bundle for trial and a bundle of Affidavit evidence and shall do so and in addition, shall file and serve an index to core bundle by or before May 5, 2021.

12. By or before April 20, 2021 the Respondent shall notify the Applicant as to which documents are agreed and shall do so by means of a document which shall be filed and served by or before said date.

13. The Applicant shall file a bundle of agreed documents and a bundle of those documents that are not agreed and shall file and serve indices for those bundles and shall do so, by or before May 5, 2021.

14. …

15. …" (Emphasis added)

[8] By virtue of these detailed orders, the lists of documents ought to have been filed by 29 January 2021, and, inclusive of affidavits in response, all affidavits were to have been filed by 26 February 2021. The pre-trial review was set for 24 March 2021, and the trial was set for three days from 17 to 19 May 2021. The orders also contemplated that further affidavits might have been necessary, and consideration was to be given to that at the pre-trial review hearing.

[9] The parties filed their affidavits in time. However, both parties were late in filing their list of documents. The appellant filed her list of documents on 10 March 2021, and the respondent filed his list of documents on 24 March 2021.

[10] Additional orders were made by K Anderson J, on 24 March 2021 to further manage the case, including orders setting a new trial date of 1 February 2022 and granting weekly visitations to the respondent. (Although there is no formal order or minute of order before this court in relation thereto, K Anderson J's subsequent order of 1 February 2022 makes reference to his previous orders made 24 March 2021).

[11] The Office of the Children's Advocate ('OCA'), as intervenor, and by virtue of its mandate under section 4(1) of the Child Care and Protection Act ('the Act'), and whose representative had been present at the CMC, filed affidavits sworn to by its Director of Investigations, Inspection and Compliance, on 24 March 2021 and 26 April 2021. The first of these affidavits exhibited an investigation report that was based on the interviews conducted by that office into the matter and gave findings and recommendations. The report was, by and large, based on routine interviews conducted with the appellant and the respondent as well as information received from other individuals which required further investigations. The OCA had information touching and concerning serious allegations of past misconduct of the respondent dating as far back as 2005 and as recent as 2018, both in his personal and professional life.

[12] The second affidavit filed by the OCA was done at the request of K Anderson J in his order, made on 24 March 2021, that the OCA conduct an investigation into the suitability of the living arrangements provided by the respondent for PS, pursuant to his order for residential access to be granted to the respondent. The order was that the report was to be attached to an affidavit and filed by 26 April 2021. This order regarding residential access was made after the OCA's report regarding allegations of personal and professional misconduct by the respondent was received by the court.

[13] On 1 February 2022, K Anderson J ordered the OCA to file and serve supplemental submissions before 31 March 2022, in which it was to specifically make recommendations as to whether any of the parties were suitable to have access to PS and why, as well as who should be granted custody and why.

[14] At that time, the OCA requested permission to adduce further affidavit evidence as investigations were still ongoing, but K Anderson J refused and instead ordered that no further affidavits must be filed by the OCA or any of the parties in the matter. By this time, K Anderson J would have been aware that serious allegations about the conduct of the respondent had been made in the first report to the court from the OCA, into which further investigation was being conducted. It was also on 1 February 2022 that K

Anderson J heard an application by the appellant's then attorney to remove his name from the record, and heard from her new attorneys, who subsequently filed a document the following day to place their name on record. On that day, too, he adjourned the trial to 7 November 2022, and made orders relating to the filing of bundles in respect of submissions and core documents.

[15] The OCA complied with the orders of K Anderson J, filing its submissions as well as a list of documents (but did not include the documents themselves). In those submissions, the OCA disclosed further information and allegations of misconduct against the respondent, which had come to light as a result of its further investigations. The OCA did not make a definitive recommendation as to custody or access, stating that the "evidence must be adduced and tested" at which time it said, it would be in a "stronger and more justifiable position to more definitively pronounce on the matter in a fair and balanced way".

[16] It was in these submissions that the OCA revealed the information that precipitated the appellant's quest to admit the affidavits in question. Included in the information which galvanized the appellant to act was the fact that continued investigations by the OCA had unearthed that the respondent had been convicted (having pleaded guilty) of carnal abuse in 2009, when he was 30 years-old, the complainant being a 15-year-old student at the material time. From this encounter, the 15-year-old complainant had become pregnant and had subsequently given birth to a child.

[17] Up until the point at which this information came to light, the respondent had maintained that he had four children, who he identified by name, all of whom he took care of financially and otherwise and who lived a privileged life. This information, therefore, meant that, in addition to having a conviction that he had not disclosed, the respondent had at least one other child, which he had not disclosed. I say at least, because in the appellant's affidavit of 6 July 2022, a sixth child was alleged to have been fathered by the respondent.

[18] It was further revealed by the OCA, in its submissions, that:

a. two of the respondent's children, inclusive of the child born to the complainant in the matter for which he was convicted, were born to 15-year-old minors;

b. all the appellant's children, except PS and the alleged sixth child, were given birth to by teenage mothers;

c. two of the mothers of his children were alleged to have been students at the school at which he was teaching at the time he impregnated them;

d. he was charged for rape in 2015, and that charge was dismissed in the court in 2018 when the prosecution offered no further evidence due to the complainant's refusal to attend court;

e. that latter charge was made public by a report of the dismissal in the Gleaner newspaper dated 27 September 2018;

f. the respondent was interdicted from his workplace as a result of the charge but was reinstated after the charge was dropped;

g. he was also charged for professional misconduct at his workplace, involving sexual harassment and two other charges of a non-sexual nature; and

h. a further report had been made to the police in 2020 alleging rape which took place in 2005, but the complainant refused to pursue the matter.

[19] It was the view of the OCA, taken in these submissions, that the respondent's antecedents raised obvious questions as regards his fitness to have custody of PS.

[20] The information in the OCA's submissions was corroborated by documentation in its possession and was set out in its list of documents, but the information was not in evidence, as, although the OCA outlined the source of the information and evidentiary documents which it had in its possession, it was restrained by the earlier order of K Anderson J from filing an affidavit with respect to this information. Submissions, as we know, are not evidence; therefore, up to this point, what would appear to any reasonable person to be relevant evidence in a custody matter was not properly brought before the court. As a result, the appellant proceeded to do that which was necessary in order to properly have the issues raised in the OCA's submissions, adduced as evidence before the court, as well as to have an expert appointed and an expert report adduced, relevant to the welfare of the child.

[21] The full order that K Anderson J made prohibiting the filing of any further affidavit was in the following form:

> "**No further affidavit evidence shall be filed or relied on by either party or by the Office of the Children's Advocate as Intervener but at the Trial**, it shall be open to the trial judge to permit amplification of affidavit evidence in accordance with the principles set out in Rule 29.9 of the Civil Procedure Rules as regards amplification of witness statements at trial." (Emphasis added)

The OCA is a Commission of Parliament whose role includes the protection of the nation's children and the intervention, as *amicus curiae*, into court proceedings involving the rights and interests of children, where it is deemed necessary (see section 4 and para. 14 of the First Schedule to the Child Care and Protection Act). It is unclear from the record how the OCA became involved in this case. What is clear, however, is that two judges of the Supreme Court (K Anderson J and the learned judge) ignored the warnings of the OCA that affidavit evidence of the misconduct of one party in a family matter involving the

welfare of a child, which is of paramount importance, ought to be adduced and tested. The issue here is whether that approach, in the exercise of a discretion, was correct.

The application in the court below

[22] On 30 May 2022, an affidavit of the complainant in the carnal abuse case in which the respondent was convicted and who was the mother of his fifth child, was filed by the appellant in support of the fixed date claim form. Because the substantive matter has not yet been heard, I will refrain from going into the details of that affidavit. Suffice it to say she provided background evidence of the circumstances in which she had met the respondent, and asserted that a DNA test had confirmed that the respondent could not be excluded as the father of her child. She also spoke to the lack of financial support for the child from the respondent and the absence of any relationship between the respondent and the child.

[23] No reasonable person could assert that this affidavit was not relevant in a custody case in which the father described in that affidavit was involved.

[24] On 6 July 2022, the appellant filed a notice of application for court orders seeking permission to file and serve further affidavits in the claim and that the affidavits filed after 1 February 2022 be allowed to stand. The appellant also sought permission to amend the fixed date claim form for PS to be examined by a clinical psychologist, and for a report of that examination to be provided to the court. The appellant also asked for the order granting weekly visitation to the respondent, made by K Anderson J on 24 March 2021, to be varied to supervised non-residential access.

[25] That application was supported by an affidavit also filed on 6 July 2022, sworn to by the appellant, which was also said to be in support of the fixed date claim form. In it, among other things, she spoke to the new information unearthed by the OCA in its supplemental submissions and exhibited supporting documents. These documents included a certified copy of the indictment charging the respondent with carnal abuse; the statement of the respondent in the matter; the DNA Report – Paternity Analysis; four

witness statements in the matter, including that of the complainant, KL; the OCA's investigative report and the report of the Jamaica Constabulary Force Rape Investigation Unit. Also exhibited was a letter from the Supreme Court's Criminal Registry in Westmoreland confirming that the respondent had pleaded guilty to carnal abuse in 2009 and had been sentenced to three years' imprisonment, suspended for three years.

[26] In so far as it affects the issue of relevancy to the proceedings, the affidavit made mention of the following:

(i) the fact that the respondent fathered two sons born to two separate 15-year-old girls, one of whom was the child of the carnal abuse complainant. The first child was born in 2001 and the second in 2008. The birth certificates were exhibited;

(ii) That the respondent had fathered another child, apart from the child of the complainant KL, whom he had not disclosed. That child's birth certificate was also exhibited;

(iii) that two of the mothers of the respondent's children had been students at schools at which he was teaching at the time he impregnated them;

(iv) that the respondent had obtained a teaching job two months after his conviction but had failed to disclose the conviction to that school, as well as many of the schools at which he had worked prior, as a teacher. His resume', job letter, and social enquiry report were exhibited;

(v) that the respondent was the holder of a firearm licence, which he had obtained after his conviction, and that his licence was suspended after the respondent had made threats on Twitter

(now X), by way of video, in which he showed his gun on a chair and stated that that is what does the talking for him; and,

(vi) that the respondent had been placed on interdiction by his employer, as a result of the gun incident.

[27] In relation to the respondent's weekend access to PS, that had commenced a year prior, the appellant outlined her concern as to the visible distress of the child (crying and running away) upon visits with the respondent, which caused the appellant to seek the assistance of the clinical psychologist. The initial report of the doctor was exhibited. The appellant also asserted that, on many occasions, PS was returned sick from her visits with the respondent and outlined some instances that required her taking PS to the doctor. The appellant asserted that the respondent did not help with these costs. She also asserted that she bore the bulk of the financial responsibility for the expenses of PS and outlined those expenses, including day-care expenses.

[28] The appellant's affidavit also spoke of various other things, including updates on the accommodation and development of PS, as well as other accusations against the respondent, which it is not necessary to go into detail here. Suffice it to say, the appellant asserted that, based on the information revealed by the OCA, the non-disclosures by the respondent, and his character, there was an "unacceptable risk of harm" to PS' physical and psychological safety.

[29] On 27 October 2022, the appellant filed an amended notice of application for court orders, supported by a further affidavit sworn to by her filed on the same date. The amended notice, on which the learned judge made the impugned orders, therefore, sought as follows:

1. "The Applicant be permitted to file and serve further Affidavits in the Claim herein and that the Affidavits filed herein by the Claimant after the 1st of February 2022 be allowed to stand namely Affidavit of [KL] In Support of Fixed Date Claim Form filed May 30, 2020, Affidavit of [SH] in Support of Fixed Date

Claim Form filed June 3, 2022 and Affidavit of [the appellant] in Support of Fixed Date Claim Form filed July 6, 2022.

2. The Affiants, [KL] and [SH] be permitted to attend Court proceedings by video link and give their evidence.

3. That the Fixed Date Claim Form filed herein on the 7th of October 2020 be amended in terms of the draft Amended Fixed Date Claim Form.

4. The order granting weekly visitation to [the respondent] made by the Honourable Mr. Justice Kirk Anderson on the 24th of March 2021 be varied to permit access to [the respondent] on alternate weekends.

5. That the child, [PS] be examined by [the] Clinical Psychologist, and a report provided to the Court on or before the 30th of August 2022.

6. That [the] Registered Clinical Psychologist, be appointed an expert witness and the Claimant be given permission to rely on the report of [the Clinical Psychologist] dated the 26th of October 2022 at the trial herein without calling the maker thereof.

7. That the Office of the Children's advocate be requested to conduct further investigations… in respect of [the respondent's] interdiction…" (Emphasis as in original)

[30] These orders were sought based on various grounds, including that liberty to apply was implied in all orders of the court given in proceedings involving a minor; that the OCA had disclosed the new information in its further submissions filed 31 March 2022; that this new information was relevant to the issues the court had to determine; that the respondent had failed to disclose the information; that the duty of disclosure was a continuing one; and that the court ought to be informed of relevant developments concerning the care of the child.

[31] The respondent opposed the application in an affidavit, sworn to by him, filed 31 October 2022, largely based on K Anderson J's order that no further affidavit evidence was to be filed. He also asserted his belief, on the advice of his attorneys, that the affidavit

of the appellant contained hearsay and information that was scandalous, inflammatory and irrelevant and was, therefore, irregular and inadmissible. Further, he contended that the subject of his conviction had already been raised to the court by the OCA, and as such, the appellant's further evidence on the matter was irrelevant and that the application only sought to diminish his character. Otherwise, he admitted his interdiction from his place of employment, but stated that this was the first time he had ever faced disciplinary proceedings in respect of his conduct. He did not deny that he had fathered two children in addition to the four he had disclosed.

[32] Having considered the application, the evidence, and the submissions of counsel, the learned judge, on 3 November 2022, granted only the orders sought in respect of the amendments to the fixed date claim form. I have not seen any written reasons for her decision.

[33] It is to be noted that, in accordance with the order of the learned judge, the claim was amended on 4 November 2022, with the appellant seeking legal guardianship, custody, care and control of PS; that PS continue to reside with her; and that the respondent be granted supervised non-residential access to PS, as well as liberal access by telephone and electronic means. In the alternative, the amended claim sought legal guardianship under the same conditions.

[34] The amended claim further sought to include that the application was being made pursuant to the "*parens patriae* inherent jurisdiction of the court", the Children (Guardianship and Custody) Act, including sections 3(2), 8 and 20 and the Judicature Supreme Court Act (particularly section 27); that the orders being sought were being sought in the best interest of the welfare of the child; and that the appellant could better provide for the overall welfare of PS.

The appeal

[35] On 25 November 2022, the appellant filed notice and grounds of appeal. The grounds of appeal were as follows:

a. "The learned judge erred in law and in fact in not permitting the [appellant] to put forward crucial evidence that was necessary to assist the Court in determining what was in the best interest of the minor, [PS] born on the 24th of April 2020.

b. The learned judge erred in law and in fact in failing to consider or adequately consider that the matters contained in the Affidavit of [KL] and [the appellant] are relevant to the issues in dispute before the court namely the character, credibility and means of the [respondent] to support his children.

c. The learned judge erred in law and in fact in failing to consider or adequately consider that the [appellant] could not have provided the Affidavit of [KL] before due to the deliberate non-disclosure by the [respondent] that he fathered a child by the name of [MS], and his blatant dishonesty in respect of the number of children he fathered in his Affidavit evidence before the Court and to the investigators from the Office of the Children's Advocate who interviewed him pursuant to the order of the Court.

d. The learned judge erred in law and in fact [in failing] to consider or adequately consider that there was no deliberate disregard of the case management conference orders by the [appellant] and the [appellant] sought permission or leave of the Court to allow the Affidavits to be filed well in advance of trial.

e. The learned judge erred in law and in fact [in failing] to consider or adequately consider the provision of Rule 25.1(m) of the Civil Procedure Rules and the fact that to not allow the Affidavit of [KL] and [the appellant] to stand would in effect allow the [respondent] to take unfair advantage of his own non-disclosure and dishonesty.

f. The learned judge erred in law and in fact [in failing] to consider or adequately consider that Rule 29.9 of the Civil Procedure Rules did not allow the [appellant] to call a new witness who came to her knowledge after the time for compliance with the orders for filing Affidavits had passed and the order of Justice Kirk Anderson of February 1, 2022 was made.

g. The learned judge erred in law and in fact [in failing] to consider or adequately consider the provisions of section 18

of the Children Guardianship and Custody Act which states that in matters concerning the custody, care and upbringing of children, the welfare of the child is the paramount consideration. In the circumstances of this case this principle ought to have overridden any consideration of a failure to comply with case management orders on the part of the [appellant] in particular where the failure was not deliberate or due to wilful non-compliance on her part but occasioned by the [respondent's] non-disclosure and dishonesty.

h. The learned judge erred in law and in fact [in failing] to consider that in matters involving the care and upbringing of a minor in particular one of very tender age the Court was exercising a protective, parens patraie jurisdiction accordingly all matters relevant to the welfare of the child should be properly placed before the Court before it made a determination.

i. The learned judge erred in law and in fact [in failing] to consider or adequately consider the relevance and admissibility of previous convictions involving carnal abuse of a minor in matters concerning the care, custody and welfare of a minor of tender years.

j. The learned judge erred in law and in fact in failing to consider or adequately consider that the Affidavits of [the appellant] and [KL] were filed well in advance of the trial date and served on the [respondent] and contained matters which were within his personal knowledge. There would therefore be no prejudice occasioned to the [respondent] if the documents were allowed to stand.

k. The learned judge erred in law and in fact in not finding that the expert evidence of [the Clinical Psychologist] was critical evidence that was necessary to assist the Court in determining the issue of the impact of the weekly weekend visits on the child, [PS] and ultimately the impact on the child of removing her from her current home environment with the [appellant].

l. The learned judge erred in law and in fact in not finding that there is presently no court appointed expert notwithstanding the observations/recommendations of the Office of the Children's Advocate in its Investigation Report which was exhibited to the Affidavit of Keisha Rodrigues-Mills filed on the 26th of April 2022 that '*a child psychologist would be the*

expert to speak on what if any impact the weekend visits will have on [PS].'

m. The learned judge erred in law and in fact in not finding that the overriding objective and the overriding interests of justice were aimed at determining a matter based on its merits and all relevant evidence and accordingly permitting the [appellant] to rely on an expert report in respect of a crucial issue before the court which was not addressed by any expert was in furtherance of these objectives.

n. The learned judge erred in law and in fact in not finding that the report of [the Clinical Psychologist] demonstrated objectivity and was unbiased. The [appellant] was at liberty to put questions to the expert or attend on her personally to be examined in keeping with the recommendations of the expert.

o. The learned judge erred in law and in fact in finding that strict compliance with case management orders and a desire to avoid any delays or adjournments of the trial of the claim outweighed the need to allow the Affidavits of [the Appellant], KL and expert evidence which would assist the court in its overriding objective of a just determination of the matter and in the exercise of its parens patriae/protective jurisdiction over a minor and prevent the need for further litigation in the future.

p. The learned judge erred in law and in fact in not finding that the [Appellant] will be prejudiced at the trial of the Claim if she is unable to rely on the Affidavit of [SL] filed on the 6th of July 2022, [KL] filed on the 30th of May 2022 as they contain information relevant to the credibility, character and means of the [Respondent] which are all relevant to the welfare of the child and are in dispute.

q. The learned judge erred in law and in fact [in failing] to consider or adequately consider that it is in the best interest of the child that the Court has all the relevant information before it at the time of the trial and prior to making a final determination concerning the welfare of a minor especially one of tender years who has already lost her biological mother."

[36] The appellant has asked this court to set aside the order of the learned judge refusing to grant permission for her affidavit and that of KL to stand as properly filed, as well as her refusal to appoint the Clinical Psychologist as an expert, and to substitute, therefor, its own orders granting such permission and appointing the doctor as an expert. The appellant also asked for an order allowing her to rely on the expert's report in her claim in the court below and for costs in this court as well as in the court below.

The issues raised in this appeal

[37] The grounds of appeal raise two broad issues, which are:

(1) Whether the learned judge erred in the exercise of her discretion in refusing permission for the appellant to rely on the affidavits filed after the order prohibiting the filing of any further affidavits.

(2) Whether the learned judge erred in the exercise of her discretion in refusing to appoint the expert witness and allowing the appellant to rely on the expert's report.

The role of this court

[38] It is noted that this matter involves an appeal of the exercise of the discretion of the learned judge in an interlocutory ruling, with which this court will not lightly interfere. It is well accepted that, in such a case, this court will only disturb such a decision on the ground that it was based on a misunderstanding by the judge "of the law or of the evidence before him, or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence … can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it". In the absence of reasons, the judge's decision may be "so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it" (see **Hadmor Productions v Hamilton** [1982] 1 All ER 1042 at 1046 per

Lord Diplock and applied in **Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, para. [20]).

[39] This court is, therefore, only entitled to exercise a discretion of its own and set aside the judge's orders, if it has concluded that the learned judge wrongly exercised her discretion based on any of the aforementioned reasons (**Hadmor Productions v Hamilton**).

[40] In the absence of the reasoning of the learned judge, it is open to this court to assess whether the "decision, without reasons, demonstrates a proper exercise of the learned judge's discretion" (see **Ray Dawkins v Damion Silvera** [2018] JMCA Civ 25, at para. [47]).

[41] The appellant and the respondent have joined issue as to whether the learned judge gave oral reasons for her decision. The appellant has asserted that the learned judge gave no reasons for her orders, other than to preface it with the oral statement that "the Court's case management timetable ought to be followed". The appellant contends that the learned judge only considered that factor to the exclusion of other crucial factors and as such, wrongly exercised her discretion.

[42] The respondent, however, has staunchly disagreed, asserting that the learned judge did, in fact, give oral reasons for her decision, which, he says, demonstrate that the learned judge fully and properly considered the matter and all the relevant factors and, therefore, exercised her discretion correctly. These reasons were outlined in an affidavit that was placed before O Smith J (Ag), in response to the application for leave to appeal, which was sworn to by Monique James, attorney-at-law from the law firm of Samuda and Johnson. In that affidavit, Ms James deponed that she was present at the hearing when the orders were made, and at para. 10, she outlined five reasons she said the learned judge gave for her decision. These are set out in full further in this judgment.

[43] The affidavit of Ms James was not countered in the court below, with any evidence from counsel representing the appellant, but rather, evidence from the appellant herself,

which was alleged to be hearsay. O Smith J (Ag), in dealing with the application for leave to appeal, approached the issue of the reasons of the learned judge by focusing on the one reason the parties had agreed the learned judge had said – that is, that CMC orders ought to be followed.

[44] In this appeal, in light of the above, I will consider whether the learned judge's decision can be supported generally, as well as whether the decision can be supported by the reasons outlined in Ms James' affidavit. Having assessed the matter, I am of the view that either way, the outcome of the appeal will be the same.

Issue 1 - Whether the learned judge erred in the exercise of her discretion in refusing permission for the appellant to rely on the affidavits filed after the order prohibiting the filing of any further affidavits

The submissions

[45] The grounds of appeal and submissions made by the appellant raise five main contentions as to why the learned judge wrongly exercised her discretion to exclude the affidavits. These are that: (1) the late filing of the affidavits was not deliberate but due to the respondent's own conduct; (2) the affidavits were relevant to the proceedings; (3) the learned judge failed to consider the welfare of the child as paramount, pursuant to section 18 of the Children (Guardianship and Custody) Act; (4) the respondent would gain an unfair advantage from his own dishonesty and non-disclosure, contrary to rule 25.1(m) of the Civil Procedure Rules ('the CPR'); (5) the learned judge misunderstood rule 29.9 of the CPR; and (6) that a consideration of prejudice and the overriding objective required that the appellant be allowed to rely on the affidavits.

[46] The respondent argued that the proper application for the appellant to have made was an application for relief from sanctions, pursuant to rule 26.8 of the CPR, since the appellant was in breach of K Anderson J's order that no further affidavits be filed beyond the prescribed date. For this reason alone, it was argued, it was right that the application failed.

Discussion

What is the proper approach?

[47] Before discussing the substantive issue as to whether the learned judge exercised her discretion incorrectly, I think it is necessary to determine what the proper approach to the application ought to have been. The application in the court below sought permission to file and serve further affidavits in the claim, and for the affidavits filed after the deadline of 1 February 2022 to be allowed to stand. In deciding on what the proper approach of the learned judge, faced with this application, ought to have been, it is necessary to consider the circumstances which made it necessary for these affidavits to be filed. In that regard, I will say immediately that I do not agree with the respondent that rule 26.8 of the CPR (applications for relief from sanctions) was triggered. The appellant was not in breach of any court order to which a sanction was attached. An application under that rule is appropriate where the rule, direction or order with which a party has failed to comply specifies a sanction as a consequence of the failure to comply. K Anderson J's order of 1 February 2022, though prohibitive, contained no sanction, and the CPR does not impose a sanction for the failure to file affidavit evidence in time. There was, therefore, no reason for the appellant to apply for relief from sanctions (see **Rose Marie Walsh v Clive Morgan (Administrator of Estate of Yvonne Iona Robinson, deceased)** [2023] JMCA Civ 27 ('**Rose Marie Walsh v Clive Morgan**')). Furthermore, the failure to apply for relief from sanctions did not form part of the alleged reasons given by the learned judge, and I agree with counsel for the appellant that no counter-notice of appeal was filed to ask this court to affirm the decision on that ground.

[48] In **Rose Marie Walsh v Clive Morgan**, at para. [29], this court, in refusing an appeal against a judge's decision to extend time for the filing of an affidavit which was filed out of the time and for that affidavit to stand as properly filed and served, took the view that the applicable rule in such a case is rule 26.1(c) of the CPR. That rule empowers the court to extend the time for compliance with any rule, practice direction, order or direction of the court, even if the application is made after the time for compliance has passed.

[49] In that case, however, the respondent had missed the specified deadline for the filing of any further affidavits and requested that the further affidavit filed after the specified date be allowed to stand, as if properly filed. That is not the case here. The appellant, in this case, has filed, on time, all the affidavits she had intended to rely on. However, two things occurred subsequent to that: K Anderson J barred the filing of any further affidavits, and there was a change in circumstances in that pertinent information came to light. Therefore, the appellant's application in the court below was, at the very least, an application to extend time to file further affidavits beyond the date specified and, at most, an application for the variation of the court order barring any further affidavits being filed, in order to regularize the affidavits that had been filed in May and July 2022. To my mind, since the order barring any further affidavits from being filed was the last in time, that would necessarily be the order that needs to be addressed.

[50] However, if I am wrong in that view, the matter can be easily assessed from both approaches. There is no guidance provided in the CPR as to how a judge should exercise his or her discretion, using either approach. Applying the extension of time approach, the learned judge would have been required to apply the principles generally applied to matters dealing with permission to file documents out of time, as laid down in the case of **Strachan (Leymon) v The Gleaner Co Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999 ('**Leymon Strachan**'). Applying a variation of the order approach, the learned judge would simply have had to consider whether there was a change in circumstances and the relevance of the evidence sought to be adduced, as a result of those changes which have occurred since the order was made.

[51] **Leymon Strachan** was considered in the context of an application for an extension of time for leave to appeal before this court, but the approach taken by this court in that case has been consistently applied in our jurisdiction to applications for an extension of time to do various things, including an application to extend time to file a defence in **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ

4, and an application to extend time to file affidavit evidence in **Rose Marie Walsh v Clive Morgan**. The court in **Leymon Strachan** spoke generally to its "wide discretion in considering applications for extension of time for complying with procedural requirements" (see page 14), and this court in **Rose Marie Walsh v Clive Morgan** accepted that the considerations in **Leymon Strachan** were of general application to applications for extension of time, including those relating to the filing of affidavits. Further, in **Leymon Strachan**, the court relied on the case of **Finnegan v Parkside Health Authority** [1998] 1 All ER 595, in which it was noted that the considerations it adopted from the case of **Mortgage Corp Ltd v Sandoes** [1996] TLR 751, were of general application.

[52] The case of **Leymon Strachan**, therefore, established that on an application for extension of time for compliance, consideration should be given to the length of the delay in complying, the reason for the failure to comply in time, whether there is an arguable case, and the degree of prejudice that may be caused to the other parties if time is extended. At page 20 of that decision, this court determined that:

> "(1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a time-table, the Court has a discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider –
>
> (i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) whether there is an arguable case for an appeal and;
>
> (iv) the degree of prejudice to the other parties if time is extended.
>
> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done."

[53] It must also not be forgotten that that case related to the failure to comply with a timetable set by the rules and not in a court order made by a judge. The time-table in a rule cannot be varied, but it may be extended. A timetable made by a judge can be varied or even set aside altogether. Ultimately, in an application of this type, a rigid formula should not be imposed, and the court is required to look at all the particular circumstances of the case in order to give effect to the overriding objective and to ensure that justice is done (see **Commissioner of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others** (2000) Times 7 March; [2000] Lexis Citation 2473, **Finnegan v Parkside Health Authority**, and **Rose Marie Walsh v Clive Morgan**).

[54] The approach in **Leymon Strachan** was applied by this court in the recent decision of **Rose Marie Walsh v Clive Morgan**. This court dismissed the appeal, having assessed the factors laid out in **Leymon Strachan** in favour of the respondent, and on the basis that the evidence was relevant to the proceedings.

[55] In considering the proper approach to this issue, I also take into account the discretion of the court in controlling the evidence to be given at trial pursuant to the CPR (specifically rule 29.1(1)). This discretion, of course, must be exercised judiciously, in accordance with specific rules and obligations of the CPR (rule 1.2) and in light of the overriding objective (rule 1.1), the court's duty to further the overriding objective by actively managing cases (rule 25.1), and the court's general powers of case management (rule 26.1).

[56] Rule 29.1(1) of the CPR provides as follows:

> "29.1 (1) The court may control the evidence to be given at any trial or hearing by giving appropriate directions as to –
>
> (a) the issues on which it requires evidence;
>
> (b) the nature of the evidence which it requires to decide those issues; and

(c) the way in which the evidence is to be placed before the court, at a case management conference or by other means.

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.

(3) The court may limit cross-examination."

[57] I further bear in mind the approach adopted by Phillips JA in **Joan Allen and Louise Johnson v Rowan Mullings** [2013] JMCA App 22, in respect of late applications. At para. [48] of that decision, relying on **Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties Ltd and another** [2011] EWHC 1918(Ch), she opined that, in exercising the discretion to admit late evidence, the fact that evidence is late ought not to be the sole consideration.

[58] Of course, to my mind, in the circumstance of this case, the better approach would, perhaps, be to treat the issue as merely an application to vary the orders of K Anderson J where he ordered, simpliciter, that no further affidavits are to be filed. That order was prohibitive and, therefore, required a variation if the new affidavits were to be allowed in. The appellant had already complied with the order for affidavits she intended to rely on to be filed within a certain time, and in my view, there was no requirement for an extension of that order. What was required was a variation of the order that no further affidavits be filed. On such an application, the court would only have to consider whether there was a change in circumstances since the order was made and whether the affidavits sought to be introduced, as a result of that change, were relevant. If they were not, that would be the end of the matter. If they were, the court would then go on to consider whether, although they were relevant, were they so prejudicial to the respondent that they should not be admitted. Furthermore, in a case of this nature, the court would have to consider that even if they were prejudicial to the respondent, whether it was in the best interest of the child for them to be admitted, the best interest of the child being paramount.

[59] Both approaches would have required a weighing of all the factors in the case, the overarching consideration being what is in the best interest of the child, her welfare being paramount in a case such as this.

(1) *The Leymon Strachan approach (should an extension of time have been granted?)*

[60] I will, therefore, first discuss the matter as if the approach in **Leymon Strachan** is the correct approach.

[61] The first two factors to be considered, as outlined in that case, are the length and reason for the delay. In this case, the length of the delay would have to be calculated from the date when K Anderson J's prohibitive order took effect. That order took effect immediately it was made on 1 February 2022. Amongst his orders made on 30 November 2020, order number eight was that the judge at the pre-trial review was to consider whether any further affidavit evidence should be allowed to be relied on. The pre-trial review was held on 24 March 2021, but there is no order evidencing that any such consideration was made. The previous order was that all affidavits were to be filed by 26 February 2021. It is on 1 February 2022 that we see K Anderson J closing the door on any further affidavits being filed.

[62] The delay also, I suppose, could be measured from the time at which the information contained in the affidavits sought to be admitted came to light. From which date, then, should the issue of delay be calculated, if the approach in **Leymon Strachan** is the correct approach to take in this case? I will consider that matter below.

(a) The length of the delay and the reason for the delay - grounds c and d

[63] In respect of the delay, the appellant asserted that the late filing of the application was not deliberate, and was due to no fault of her own, as she had complied with all the CMC orders. She submitted that the information sought to be adduced in the affidavits of KL, filed on 30 May 2022, and her affidavit, filed on 6 July 2022, was information not previously known to her and was, therefore, not available for her to include in the

affidavits filed in support of her case and in accordance with the CMC. The respondent, she said, deliberately failed to disclose the information and dishonestly withheld it from the OCA. The appellant argued that the respondent had lied in his affidavits and to the OCA investigators about the number of children he had, stating that he had four children. He did not at any time disclose that he had additional children and, more specifically, a child by the name of MS, nor that he had a conviction for a sexual offence. The appellant only became aware of the relevant information when it was revealed in the supplemental submissions of the OCA filed 31 March 2022. *A fortiori*, the appellant asserted, she could not have known about the existence of KL, before. The appellant pointed out that the OCA did not attach the substantiating documents to its submissions, or its list of documents filed, nor did it file affidavit evidence in relation thereto. Immediately after the information had been revealed, it was submitted, the appellant, through her attorneys, sought to verify the information and obtain the supporting documentation. The information, therefore, could not have been filed at a much earlier time by the appellant.

[64] The appellant contended that the learned judge misunderstood these pertinent facts and misdirected herself by failing to consider that the late disclosure by the OCA was due to the deliberate failure of the respondent to make full and honest disclosure of relevant facts.

[65] The respondent, on the other hand, submitted that the application was not made promptly by the appellant following the disclosure by the OCA in March 2022, since, he contended, the application was effectively filed in October 2022 (the date the amended application was filed), seven months later and at the "eleventh hour". He relied on the case of **Warner v Sampson and Another** [1958] 1 QB 297 in that regard. He submitted, therefore, that the learned judge was correct to find that the appellant had breached the case management order.

[66] The relevant affidavits the appellant sought to adduce were filed on 30 May 2022 and 6 July 2022, and the relevant application, on 6 July 2022. The application was amended on 27 October 2022. The respondent contends that there was a delay of seven

months from the time the information came to light to the time when the amended application was filed. Of course, the respondent's calculation does not take into consideration the fact that the application was first filed on 6 July 2022. That would have been the operative date. Calculating from the 31 March 2022 to 6 July 2022, the delay would have been approximately three months and six days. If the delay were to be considered to be from the 1 February 2022, the date of the prohibition on the filing of affidavits, to 6 July 2022, it would mean that the length of delay would have been approximately five months. The application would have also been filed approximately four months prior to the date slated for trial (albeit it was not heard until the day before that date).

[67] However, the length of delay cannot be divorced from the reason for the delay, and, by extension, whether it was possible or reasonable for the appellant to have applied earlier.

[68] From the evidence, it is plain that the information contained in both affidavits in relation to the respondent's conduct and conviction was not known to the appellant until it was disclosed by the OCA in submissions and, therefore, could not have been included in any of the appellant's affidavits filed prior to the initial deadline. The appellant was also not aware that the respondent had two other children whose existence he had not disclosed. This was information that was particularly within the knowledge of the respondent, which he failed to mention in his evidence to the court, as well as to the OCA investigators. This information was not information that would have necessarily come to the attention of the appellant by way of ordinary investigation and preparation for trial. I also accept that the information was not properly before the court as evidence, as no affidavit evidence had been filed in this regard.

[69] The appellant took immediate steps, once the information contained in the submissions of the OCA became known, to confirm its veracity and acquire documentary evidence in support thereof. In that regard, the time between the disclosure of the information by the OCA on 31 March 2022, and the filing of the application for permission

to rely on further affidavits on 6 July 2022, was approximately three months and six days, and it cannot, therefore, be said to have been inordinate, or that the appellant had no good reason for filing these affidavits after K Anderson J's order. Indeed, in respect of the aforementioned matters, I entirely agree that it was the respondent's own non-disclosure that hindered the appellant from seeking to rely on the information sooner.

[70] In relation to the information in the affidavits pertaining to the change in circumstances of the living arrangements of PS, and the concerns about her health and safety, this information would also not have been available prior to the prohibition imposed by K Anderson J on 1 February 2022. The appellant moved in March 2022, and the health and safety concerns arose subsequent to the visitation order imposed by K Anderson J on 24 March 2021, with regard to the respondent's weekend residential access to the child from 9 May 2021, to the date of the application. Curiously, K Anderson J ordered the OCA on 31 March 2022 to make specific recommendations as to suitability for access and custody, as well as the reasons for those recommendations whilst at the same time barring the OCA from filing any affidavits to support those recommendations. Just as curious is the fact that residential access was granted to the respondent in May 2021, but there was no report or affidavit to inform the court of how this was progressing and the impact, if any, it was having on PS and her welfare.

[71] The evidence regarding the respondent's interdiction from his place of employment, the behaviour occasioning same, and the suspension of his firearm licence, also occurred well after the deadline for the filing of all affidavits and the order that no further affidavits be filed.

[72] There is, therefore, merit in the grounds of appeal as set out in grounds c and d.

(b) whether the evidence sought to be adduced is relevant (whether there was an arguable case) - grounds a, b, g, h, i, o, and q

[73] The appellant contended that the information contained in the rejected affidavits is relevant to the main issues to be decided in the case since in matters of this nature,

based on section 18 of the Act, as well as the *parens patriae* jurisdiction of the court, the welfare of the child is to be the paramount consideration. It was submitted that, in discharging its duty to treat with the paramountcy of the welfare of the child in the matter, it is imperative that the court be seized of all matters concerning the welfare of the child. In that regard, the appellant asserted how a parent treats his other known biological children, financially and emotionally, would be relevant to the court's assessment of what is in the best interest of the welfare of the child. It was submitted that the evidence of KL in respect of the lack of financial and emotional support to the child MS is very relevant to the court's assessment of the welfare of PS and that without this evidence, "a trial judge would be left without critical evidence which affects the credibility, means and character of the Respondent as a father".

[74] The appellant further submitted that her affidavit is also very relevant to the court's assessment of the welfare of PS, as this affidavit included evidence of the respondent's previous conviction for carnal abuse, evidence of his fathering a child with another minor other than KL, as well as concerns in respect of the weekly weekend access to PS, and her being returned ill after those visits.

[75] The appellant relied on the case of **Dennis Forsythe v Idealin Jones** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 49/1999, judgment delivered 6 April 2001, for the proposition that the moral character of persons seeking custody, care and control of a child must be considered when assessing the welfare and best interests of that child. The appellant also relied on the cases of **Child, Youth and Family Services v EB FC Ashburton** Fam-2004-003-000261 [2005] NZFC 35 (27 October 2005), **Harris & Cavanaugh (No 2)** [2018] FAM CA 1147 (15 June 2018) (Australia), and **Re: R (A child)** [2015] EWFC B140 (11 February 2015) in this regard.

[76] Since the respondent placed his character in issue by speaking of his good character and moral integrity in his affidavits, the appellant argued that these factors are relevant for the court to consider in assessing the best interest of the welfare of PS. Also

relevant, the appellant contended, is the evidence of the respondent's conviction and lack of financial and emotional support to the child MS. It was submitted that the learned judge erred in not treating these factors as relevant and allowing the affidavit evidence in respect of them to stand. The relevance of this information, it was argued, should have overridden any other factor having to do with failure to comply with the CMC orders, especially where that failure was not deliberate and was occasioned by the respondent's non-disclosure and dishonesty. The appellant also submitted that the learned judge erred when she failed to realize that the welfare of the child, being paramount, outweighed any consideration of the strict compliance with CMC orders and concerns regarding delays and adjournments. Additionally, the argument continued, the court, acting as *parens patraie*, should have all relevant materials properly placed before it before making a determination as to what is in the best interest of the child.

[77] The respondent, for his part, contended that the evidence that the appellant sought to place before the court did not "touch and concern the factors which a Court must consider in determining what is in the best interest of the child", and is, therefore, not relevant. He also maintained that his conviction is not directly relevant to the proceedings and, therefore, he was not under any duty to disclose it pursuant to the order for standard disclosure. He argued that although his conviction was an established fact, the appellant, in her statement of claim, had raised no issue of sexual misconduct or other criminal conduct on the part of the respondent towards any of his children or that he had physically harmed the children in any way, nor does any such issue arise on the appellant's case. The respondent contended that the main issue in the case is "whether [he] is able to provide a stable home, educational, spiritual, moral and healthy environment for the minor child". This information, he said, was already disclosed to the appellant and addressed in his various affidavits. The respondent submitted that the appellant's contention that the conviction is relevant is illogical, as he was not convicted of a sexual offence against one of his own children, nor does a criminal conviction by itself render a person "unfit, unsafe, immoral or unstable". To that extent, he said, even if the affidavits were allowed, paras. 8-20 of the appellant's affidavit ought to be struck

out on the basis of irrelevance. Furthermore, he said, the allegations were already in the OCA's submissions, and the court was in a position to consider its relevance at the trial, therefore, there was no need for it to be duplicated in the affidavits filed by the appellant.

[78] The respondent also relied on several cases dealing with irregular affidavits and on the cases of **J and another v C and others** [1969] 1 All ER 788 as cited in **F v B** (unreported), Supreme Court, Jamaica, Claim No 2010HCV2702, judgment delivered 16 September 2011, and **GE Capital Corporate Finance Group Ltd v Bankers Trust Co and Others** [1995] 1 WLR 172, in relation to how the court should determine what is relevant to a case. The words of the learned author Stuart Sime in A Practical Approach to Civil Procedure, 13th Ed, at para. 29.12, was also relied on in this regard, as well as Zuckerman on Civil Procedure, Principles of Practice, 4th Ed, at page 1116.

[79] I will immediately say that I do not attach much credence to the respondent's claim that the affidavits are irregular and, therefore, not admissible. The learned judge, based on the alleged reasons, made no such finding. KL, in her affidavit, spoke to matters in her own personal knowledge, and the appellant, to the extent that the matters were not in her personal knowledge, pointed to the source of her information and belief, and attached the supporting documentation. The cases cited by the respondent in support of this submission are, therefore, irrelevant.

[80] In **Leymon Strachan**, the court considered the merits of the case in order to determine whether "it would serve any useful purpose to permit the case to proceed further" (see page 7). As stated above, that criterion was considered in that case in the context of an application for an extension of time for leave to appeal. That is not the context in which matters are being considered in this case. In this case, there is no question surrounding the merits of the case and whether it should proceed further.

[81] In **Rose Marie Walsh v Clive Morgan**, in dealing with this criterion, this court, having noted that there had been no assertion that there was no arguable case, took the

view that what was important, in the circumstances of that case, was the relevance of the information in the affidavit that the respondent sought to have admitted.

[82] I agree with that approach and find it can also be applied in this case since there is no issue joined between the parties regarding whether the appellant has an arguable case. The only issue, therefore, is whether the information contained in the affidavits is relevant to what the court has to decide at trial.

[83] The learned author Peter Murphy of Murphy on Evidence (Ninth Ed) defines 'relevant evidence' as "evidence which has probative value in assisting the court or jury to determine the facts in issue" (see para. 2.6, page 28). In that regard, he explains that:

> "Relevance is not a legal concept, but a logical one, which describes the relationship between a piece of evidence and a fact in issue to the proof of which the evidence is directed. **If the evidence contributes in a logical sense, to any extent, either to the proof or the disproof of the fact in issue, then the evidence is relevant to the fact in issue**. If not, it is irrelevant. It is a fundamental rule of law of evidence that, if not actually material, evidence must be relevant in order to be admissible. The converse, however, is not true, because much relevant evidence is inadmissible under the specific rules of evidence affecting admissibility." (Emphasis added)

[84] Murphy relies, among other sources, on the case of **DPP v Kilbourne** [1973] AC 729, in which Lord Simon of Glaisdale said the following at page 756:

> "**Evidence is relevant if it is logically probative or disprobative of some matter which requires proof**. It is sufficient to say, even at the risk of etymological tautology, that **relevant** (i.e., logically probative or disprobative) **evidence is evidence which makes the matter which requires proof more or less probable**." (Emphasis added)

[85] The learned authors of Zuckerman on Civil Procedure: Principles of Practice (4th ed), on which the respondent relied, opines that the test of admissibility is partly a question of law and partly a question of fact. Relevance, they say, is a matter of fact only,

and only relevant facts are admissible. Such facts must also be probative. The test of relevance is there described, at page 1116, as follows:

> "To be relevant **the evidence must be such that if believed it could affect the court's conclusion regarding a fact in issue**. It must also have some prospect of being believed otherwise there is no point in admitting it. The test of relevance applies not only at the trial, but whenever the court is asked to make a decision about evidence." (Emphasis added)

[86] The test of relevance can arise at the disclosure stage as, it is said and agreed that, irrelevant evidence need not be disclosed (see the headnotes of **GE Capital Corporate Finance Group** and Zuckerman on Civil Procedure, para. 22.94). These are the statements on which the respondent relies for his submission that his conviction is not relevant and, therefore, need not have been disclosed in standard disclosure. Of course, in this case, the issue of disclosure did not only involve the previous conviction and did not only affect standard disclosure. The respondent was interviewed by the OCA during which he made no mention of his conviction or his two additional children. In his affidavits filed in the court, he also failed to mention his conviction and two additional children.

[87] This court, therefore, has to determine whether the information contained in the affidavits is capable of proving or disproving the facts in issue in the substantive matter and whether it is probative. The issue of the respondent's failure to disclose has already been dealt with in the reasons for the delay in the filing of the appellant's additional affidavits.

[88] It is well accepted in our jurisdiction that, in matters involving an application for guardianship, custody, care and control of a minor child, both at common law and by virtue of statute, the paramount focus of the court should be on the welfare of the child (see **Dennis Forsythe v Idealin Jones**, at page 7). Section 18 of the Children (Guardianship and Custody) Act requires that in any proceeding involving a question of the custody or upbringing of a child, in deciding that question, the court "shall regard the

welfare of the child as the first and paramount consideration". It is also accepted that in considering the welfare of the child, the court must consider every aspect of the child's well-being and everything that affects the well-being of the child, including the conduct of the parties. In **Dennis Forsythe v Idealin Jones**, in considering the requisite approach to the principle, this court, at page 7, relied on the case of **In re McGrath (Infants)** [1893] 1 Ch 143, in which Lindley LJ said the following, at page 148:

> "The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only nor by physical comfort only. **The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being**. Nor can the ties of affection be disregarded." (Emphasis added)

[89] At page 8 of **Dennis Forsythe v Idealin Jones**, the court went on to say:

> "A court which is considering the custody of the child, mindful that its welfare is of paramount importance **must consider the child's happiness its moral and religious upbringing, the social and educational influences, its psychological and physical well-being and its physical and material surroundings**, all of which go towards its true welfare. These considerations, although the primary ones, **must also be considered along with the conduct of the parents, as influencing factors in the life of the child, and its welfare**." (Emphasis added)

[90] The court, therefore, has to take into consideration every factor and probative bit of evidence relating to any state of affairs that has the potential to affect the overall welfare of the child, whether positively or negatively. The court must also consider the conduct of any party who seeks to have guardianship or custody, care and control of the child, which has the potential to affect the welfare of the child in a significant way.

[91] The case of **Re W-A (children: foreign conviction)** [2022] EWCA Civ 1118 provides useful guidance. That case involved the question of whether the appellant's previous convictions for sexual offences against a child (for which he was registered as a sex offender) were admissible in care proceedings brought by the local authority, in

respect of the two minor female children of his wife (with whom he lived). There had been no allegation of sexual abuse or misconduct against the particular children involved. The appellant appealed the first instance judge's ruling that his conviction was admissible in the care proceedings. The Court of Appeal, per Peter Jackson LJ, noted the following, at para 8:

> "The modern touchstone for the admissibility of evidence is relevance…When considering whether evidence is relevant, the starting point must be the nature of the proceedings in which the question arises. The purpose of family proceedings is the protection of children and the promotion of their welfare and it is a fundamental principle that the court will take account of all the circumstances of the case, as stated by Hollings J *in Re H (a minor) (adoption: non-*patrial) [1982] 3 All ER 84 at 93, [1982] Fam 121 at 132:
>
> > 'When welfare considerations apply, where the welfare of the minor is paramount…the very welfare of the minor dictates that regard must be had to every matter which bears on a possible risk or benefit to the child…'"

[92] In respect of the appellant's conviction, the court, in that case, found that the lower court judge was correct to find that the conviction of the appellant was plainly relevant and not subject to any exclusionary rules, such as the rule in **Hollington v F Hewthorn & Co Ltd** [1943] 2 All ER 35, estoppel or *res inter alios acta*, that might have made it inadmissible. These exclusionary rules, it found, did not serve the interests of children and their families or the interests of justice in family proceedings, which were, substantively, welfare-based.

[93] The court also found that it was settled law that, in family proceedings, the findings of previous tribunals were admissible, and that it was open to the court to give it whatever weight it thought fit based on the circumstances of the case, whilst "remaining alert to the need for fairness to all parties in the procedure it adopts" (see para. 18). The court reasoned that any other approach "would severely conflict with the court's overriding duty to get at the truth in the interests of the child and would in many cases lead to absurdity". The court further stated that, "[for] the family court to refuse to admit the

conviction lying at the root of all this into evidence would be to blind itself to reality" (see para. 19).

[94] Then, at paras. 50 to 53, Peter Jackson LJ concluded:

> "50. The rule in *Hollington v Hewthorn* does not apply in family proceedings as I have defined them because such a rule is incompatible with the welfare-based and protective character of the proceedings.
>
> 51. In family proceedings all relevant evidence is admissible. Where previous judicial findings or convictions, whether domestic or foreign, are relevant to a person's suitability to care for children or some other issue in the case, the court may admit them in evidence.'
>
> 52. The effect of the admission of a previous finding or conviction is that it will stand as presumptive proof of the underlying facts, but it will not be conclusive and it will be open to a party to establish on a balance of probability that it should not be relied upon. The court will have regard to all the evidence when reaching its conclusion on the issues before it."

[95] In my view, these statements accord with good conscience and firm common-sense. It is clear, therefore, that evidence of the respondent's previous conviction, general conduct and character is relevant to any issue concerning the welfare of PS and to any determination that the court will make regarding custody and access.

[96] The respondent has submitted that a "criminal conviction does not *ipso facto* render someone unfit, unsafe, immoral or unstable". Whilst this may, generally speaking, be so, the fact of the conviction and the circumstances involved, along with the other circumstances of the case, are relevant factors in considering where the custody of a child should lie. The conviction is but one factor that the court ought to have at its disposal in assessing all the circumstances of the case.

[97] As was noted by Bean LJ in **Re W-A (children: foreign conviction)**, it could not be right that the court, in deciding issues relating to the welfare of children, and in considering the character of the appellant, should ignore the appellant's previous

conviction as though he is of entirely good character and as though the offence had never occurred (see para. 61). I, therefore, agree with the appellant that the information contained in both affidavits in relation to the conviction of the respondent is relevant and crucial evidence that ought to be considered in the determination of the substantive matter in this case.

[98] As for the relevance of the other information in the affidavits of the appellant and KL (outlined above), it is quite plain that the fact that the appellant has two other children that he failed to disclose, and who it is alleged he does not financially maintain, is relevant as it gives insight into his character and his *modus operandi* as a parent. Whether the appellant provides for these children financially or not is critical to the question of his willingness, means and ability to take care of PS financially. Also, whether he is present and involved in their lives, and cares for them physically and emotionally, is also clearly relevant. The fact that the existence of these children was not disclosed by the respondent, although he had the opportunity to do so, and the fact that he has not brought custody proceedings in regard to any of them (although two are said to reside with him), is also a relevant consideration for any court considering the welfare of any child in a custody hearing.

[99] I agree with the respondent that the question of whether he is able to "provide a stable home, educational, spiritual, moral and healthy environment for the minor child" is germane, and certainly, the evidence that two of his children's mothers were underage and that two others were teenagers when they gave birth, is relevant to any assessment of the answer to that question. Also relevant to this custody and guardianship proceedings and to any assessment of the respondent's morals, character and fitness to parent PS, is the fact that after fathering a child with a 15-year-old in 2001 and after his conviction for carnal abuse in 2009 and fathering a child with another 15-year-old, he was again the subject of allegations of sexual misconduct in 2015 and 2020. The information that, as a teacher, he impregnated two different students at two different schools where he taught, is also relevant to that assessment.

[100] In relation to the assertions in SL's affidavit regarding the respondent being the holder of a firearm licence and a firearm, those facts by themselves are undoubtedly relevant. The trial court would certainly be obliged to consider, at the very least, the risk to the physical safety of PS when she is in the care of her father and if she were to be placed in his custody on a permanent basis. Additionally, that the respondent's firearm licence has been suspended for alleged inappropriate and possibly illegal use of the firearm, such inappropriate conduct having been broadcasted on a social media platform must be relevant to the nature, temperament and character of the respondent. The respondent's interdiction from his employment (which he did not deny), on the basis of this alleged misconduct as well as the reduction in his salary, are also relevant factors in any consideration as to where custody and access should lie with regard to a child.

[101] The affidavits are also relevant to the respondent's credibility and honesty, in that not only did he fail to mention the child born as a result of the carnal abuse of the 15-year-old, but documents attached to the affidavit of the appellant, (which may have to be authenticated and substantiated at the trial), show that in applying to work at other schools, he failed to list the two schools at which he had been working when he entered into sexual relations with a student at each school.

[102] There are certain aspects of the affidavits that may be considered to amount to hearsay, but these could have been dealt with by the appropriate application by the respondent and orders made by the learned judge, such as to strike out those offending portions, if so justified.

[103] As to the information relating to the illnesses suffered by PS, her overall development, and the changes in her living arrangements, these are clearly relevant.

[104] It is clear, therefore, that the affidavits sought to be tendered by the appellant are relevant, as they are potentially probative, and there would have been no basis for the learned judge to have excluded them on the basis that they were irrelevant.

[105] There is merit in these grounds.

(c) Whether the respondent would gain an unfair advantage in breach of rule 25.1(m) and whether rule 29.9 was applicable (prejudice and the overriding objective) - grounds e, f, j and p

[106] The appellant submitted that the learned judge failed to consider rule 25.1(m) of the CPR. It was argued that the effect of the learned judge's refusal to allow the evidence to stand, was that the respondent would gain an unfair advantage by virtue of his own failure to disclose facts that were relevant to the case, in breach of rule 25.1(m). As such, it was contended, the learned judge failed in her duty to manage the case to ensure compliance with rule 25.1(m). It was also argued that the learned judge's refusal was inimical to the interests of justice.

[107] It was further submitted that the appellant would suffer grave prejudice to her case if the affidavits were not allowed, as rule 29.9 of the CPR does not allow her to call a new witness. In that regard, it was submitted, the learned judge erred in her interpretation of rule 29.9, since the appellant would be precluded by the rules of evidence from commenting on or giving evidence through amplification on the matters deponed to by KL, specifically the respondent's failure to financially and emotionally support his son MS. This information, it was said, would be hearsay, as it is not within the appellant's own personal knowledge. Further, the appellant submitted, there is no other affidavit evidence before the court that speaks to the existence of the child MS.

[108] The appellant contended that the learned judge failed to consider or adequately consider that the respondent had not and would not suffer any prejudice, as the matters contained within the affidavits are fully within his own personal knowledge. Further, courtesy copies of the affidavits were provided to the respondent's counsel by email on 30 September 2022, and they were officially served with the affidavits on 11 October 2022, well in advance of the hearing date of 3 November 2022. It was also submitted that the respondent would have been able to amplify his evidence by commenting on the new affidavits.

[109] The appellant further argued that the CMC orders should be viewed in light of the fact that, when they were made, K Anderson J would not have been aware that the respondent had failed to disclose the relevant information, and would have made the orders in relation to no further affidavits being allowed to be filed, and with regard to amplification, in the context that it was expected that all relevant information would by then, have already been disclosed.

[110] It was submitted that the court has an overriding duty "to ensure that every party has the fullest opportunity to fairly and fully present their case provided that can be done without any prejudice to the other party", which is even more significant in cases involving the care and upbringing of children of tender years. *Dicta* of Smith J in **Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties Ltd and another**, at para. 32, which was applied in the case of **Joan Allen and Louise Johnson v Rowan Mullings**, was relied on in this regard.

[111] On the other hand, the respondent has submitted that the admission of the late evidence would be prejudicial to him because he has already had to suffer through protracted litigation, with its associated costs, since two trial dates have already been vacated (the latter date at the instance of the appellant in relation to the relevant application). He submitted that, if the evidence is permitted, this would cause even further delay, as he would be entitled to the opportunity to probe the information and respond by way of affidavit.

[112] The respondent further argued that a quick resolution of the case would be in the best interest of the child, as it would bring normalcy and stability to her life. It was also submitted that the long delay in the resolution of the case has interfered with his ability to bond with his child.

[113] In respect of whether the appellant would be prejudiced, the respondent submitted that the evidence of his conviction could be explored at the trial without the admission of a new witness or further affidavits. In that regard, he noted K Anderson J's order of 1

February 2022, which permitted the parties to amplify their evidence at trial pursuant to rule 29.9 of the CPR regarding new matters. The respondent submitted that, in accordance with that rule, it was open to the OCA to amplify its evidence concerning his conviction, and that the appellant could cross-examine the respondent on the material disclosed by the OCA.

[114] The respondent argued that the purpose of the rules is to ensure fairness and reasonableness throughout the proceedings and that to allow the appellant to file further affidavit evidence "would go against the grain of the overriding objectives", since the appellant had already filed the 11 affidavits that K Anderson J had restricted her to, and had already challenged, through these affidavits, "the issue of the Respondent's character, means, credibility and general suitability as a parent".

[115] Rule 25.1 of the CPR outlines the court's general duties to actively manage cases in order to further the overriding objective. These are set out from rule 25.1(a) to (m). At rule 25.1(m) it shows that those duties include "ensuring that no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application". Would the respondent gain an unfair advantage from the non-disclosure of the facts contained in the impugned affidavits? The obvious answer would be yes. Why is that so? Firstly, the failure to disclose the two additional children would affect the court's consideration of his ability to give the remaining four children the privileged life he claims he has afforded the children. That assessment would be in danger of being made on a false premise. In custody matters, disclosure must involve not only the existence of other children belonging to either of the parties but also the relevant circumstances surrounding their existence.

[116] Disclosure is also to include adverse documents, which are to be judged against the statements of case (see Sime paras. 29.12 to 29.13). In this case, it is a custody and guardianship action, so anything that would impact the child's welfare and the question as to who would be the best carer for the child, ought to be disclosed. The prohibition and the refusal to vary it to allow the affidavits to stand, ran the risk of the court making

an assessment of the respondent as a fit and proper carer for PS, on an incomplete premise. On the respondent's own submissions, his morals would be relevant to an assessment of his capacity to properly provide moral guidance to PS. His failure to disclose his conviction, the child he fathered with KL when she was 15 years' old and the fact that he had fathered another child with another 15-year-old in 2001, would give him an unfair advantage in having his morals assessed by a court blinded as to those facts.

[117] Therefore, the respondent's contention that he is being made to battle "for custody of his own daughter where the appellant has no testamentary document" is irrelevant to these proceedings, where the welfare of PS is paramount, and the question is what is in her best interest.

[118] The argument that the conviction can be ventilated at the trial through cross-examination, submission and amplification is unacceptable. Firstly, rule 29.9 of the CPR deals with witness statements. The fact that affidavits are dealt with separately in rule 30, where no mention of amplification is made anywhere in those rules, throws doubt on whether rule 29.9 is applicable. However, I need not decide the point in this case. The respondent's submission that the OCA could tender the documents as hearsay documents is untenable, as rule 30.5(1) requires that documents which are intended to be used in conjunction with an affidavit must be attached as exhibits. Of course, the documents could have been put to him in cross-examination, without mentioning what they were, with the hope that the respondent would admit to them, and thus putting them into evidence against him. This approach, however, would be rife with risk. In a case such as this, that would be a totally unnecessary course to force the appellant to take and would not be in the best interest of the child.

[119] I find, therefore, that there is merit in the arguments. It follows, therefore, that applying the **Leymon Strachan** approach, grounds a, b, c, d, e, f, g, h, i, j, o and p would succeed.

(2) *The variation of orders approach*

[120] Rule 26.1(7) of the CPR provides that the power to make orders under these rules also includes the power to vary or revoke those orders.

[121] Taking the variation of order approach, which is my preferred approach in this case, the learned judge ought to have considered (a) whether there was any change in circumstances since the order was made, which could have impacted how the court would proceed in its determination of the case; (b) whether the information contained in the affidavits was relevant to the case; (c) what was the likely prejudice to the respondent if the affidavits were allowed and if that prejudice could have been alleviated, for example by an adjournment; and (d) whether, despite any perceived prejudice to the respondent, it was in the best interest of the child that the affidavits be allowed.

[122] Unfortunately, the learned judge took neither of these approaches but appears to have been blinded by the finality of the nature of the order of K Anderson J and held herself bound by it. She, thereby, fell into error.

[123] The respondent sought to indicate the learned judge's reasons in the affidavit of Ms James. At para. 10 of Ms James' affidavit, she stated that the learned judge gave her reasons orally as follows:

> "(a) That the court heard both arguments and finds that case management orders are to be followed strictly and that they are put in place for a reason; to manage the case and to ensure that there is management of evidence;
>
> (b) That the court was of the view that the application should be refused because the affidavits were filed out of time and are of the view that issues of fact can be challenged at trial;
>
> (c) That the conviction is brought before the court by the Office of the Children's Advocate and can be treated with at the trial through amplification;
>
> (d) The prejudicial effect of the Affidavit of [Ms. H] outweighs the probative value.

(e) That it is unfair to have the expert report entered at this stage and that the child is 2 years old."

[124] The learned judge, if these reasons are a correct reflection of what was expressed, would have stated what the general rule was without going on to consider what, if anything, took this case outside of the general rule, so that exceptional considerations ought to be given to it. A blanket refusal of the application because the affidavits were filed out of time is also the wrong approach, especially in a case involving the welfare of a child.

[125] In any event, I am uncertain of the basis upon which issues of fact can be challenged at trial where there is no evidence on which to successfully challenge them, and neither am I clear on how the submissions of the OCA would be amplified as evidence.

[126] I am further of the view that what is set out in Ms James' affidavit as the learned judge's reasons for her decision, given orally, shows no proper basis for the refusal of the appellant's application.

[127] It is clear that the application was refused simply on the basis that the affidavits were filed after the order of prohibition made by K Anderson J. It is also clear that the learned judge was influenced by his further orders regarding amplification. However, both K Anderson J and the learned judge were wrong in their belief that the issues raised in the affidavits could be properly dealt with by cross-examination or amplification. Since these matters were not in any previous affidavits, it begs the question of what there would be in those earlier affidavits that could be amplified in a manner which would bring out these entirely new bits of evidence. The fact of the conviction and the surrounding circumstances were not previously in evidence before the court and it is trite that suggestions and submissions do not amount to evidence.

[128] The appellant is also correct in her assertion that she would not be able to give evidence in court in relation to a new witness (KL), as without affidavit evidence from KL,

any evidence in relation to her and her child (outside of the public record documents) would simply be inadmissible hearsay.

[129] There was clearly a change in the circumstances since K Anderson J made his order of 1 February 2022. New matters had come to light following the investigations by the OCA, and those matters could clearly impact a court's decision on custody and guardianship of a child. The delay in filing the application to have the affidavits considered by the court was not inordinate, and the reason for them coming so late in the day is obvious and speaks for itself. The appellant could not have deponed, any earlier, to facts she knew nothing about.

[130] The evidence revealed in the affidavits is, without a doubt, relevant to what the court has to determine. There is no prejudice to the respondent, as the information is within his own knowledge, and any explanation he wishes to give with regards to it can either be given in an affidavit in response, or under oath in the witness box. The prejudice to be caused by the refusal to permit the evidence, in my view, would be far greater than any prejudice to be caused to the respondent. That prejudice would not only be caused to the appellant in being prevented from being able to put forward her case fully, but more importantly, may also be caused to PS, as a result of the court not having before it all the pertinent facts that may possibly affect her welfare, which is a paramount consideration.

[131] As already stated, all the matters sought to be adduced in the affidavits are new matters which arose or came to light after the deadline for the filing of affidavits had passed. In respect of the respondent's conviction and the fact of the existence of his other two children, which were within his particular knowledge, had he disclosed this information sooner, the delay in that respect would not have occurred. In relation to the respondent's interdiction from his place of employment and the alleged misconduct that occasioned it, these too, came to light after the CMC orders and were also within the respondent's own knowledge. I agree that the respondent should not be allowed to benefit from his own default in this regard, contrary to rule 25.1(m) of the CPR. Further,

the respondent having already been well aware of this information, there could have been no real prejudice to him as it relates to the preparation of his case.

[132] Even if the respondent was found to be in danger of suffering some prejudice, the court is bound to consider the welfare of the child as the first and most important factor, and as long as the information sought to be adduced was relevant and probative, the welfare of the child would require that the evidence be considered. In **Re H (a minor) (adoption: non-patrial)** [1982] 3 All ER 84, the court there was considering the adoption of a child nearing majority under the English Children's Act of 1975. That Act required the court to regard the need to safeguard and promote the welfare of the child as a first consideration. The court, in that case, recognised, at page 93, the difference between the welfare being of first consideration in adoption proceedings and it being paramount as in guardianship or wardship cases.

[133] The court went on to refer, at page 94, to the case of **Re D (an infant) (parents' consent)** [1977] 1 ALL ER 145, where Lord Simon distinguished proceedings in which the welfare of the child was a paramount consideration from those in which it was only the first consideration, and explained what that meant. He explained that of "paramount consideration" meant that the welfare of the child outweighed all other considerations.

[134] In the premise, then, the welfare of the child being paramount, in any balancing act undertaken by the court, that factor must outweigh any consideration of prejudice to the respondent or the appellant, subject to the question of proportionality. The overriding objective to deal with cases justly and in saving expenses time and convenience must, in family proceedings, have regard to the welfare of the child as paramount.

[135] In my view, if the learned judge had followed any of the two suggested approaches to the case, she would not have fallen into error.

[136] That being the case, I am unable to see any valid basis upon which the learned judge properly exercised her discretion to refuse to permit the appellant to rely on the affidavits. Taking into account the role of this court in reviewing the exercise of a judge's

discretion, I am firmly of the view that no judge regardful of his or her duty, having regard to all the circumstances of this case, would have exercised their discretion in the way the learned judge did.

[137] The alleged reasons for decision contained in the affidavit of Ms James suggest that the learned judge was not mindful of her duty to consider the welfare of the child as paramount. The learned judge ought to have considered the welfare of the child as paramount and that that paramountcy "dictates that every matter which bears on a possible risk or benefit to the child" is probative. Serious matters were being raised by the OCA, which has responsibility for the welfare of the nation's children, and the learned judge was duty bound to consider the probative value of the information. She was also duty bound to consider that the probative value of the information would not only far outweigh any prejudice that may have been caused to the respondent but would also trump any issue which would have arisen as a result of a change in the timetable.

[138] Applying the variation of the order approach, it can be seen that the learned judge was clearly wrong to refuse the application as she did, therefore, those grounds of appeal would still succeed.

Conclusion on issue 1

[139] Having considered all the circumstances of the case, I am of the view that the learned judge was plainly wrong in the exercise of her discretion to refuse the appellant's application to file and serve further affidavits, to permit the affidavits filed to stand as properly filed and rely on those affidavits at the trial. The learned judge failed to consider that there was a change in circumstances, that there was a very valid reason for the affidavits being filed after the prohibitive order of K Anderson J, and that the delay in filing the order after the information came to light was not inordinate. She also failed to consider that the information in the affidavits was directly relevant to what the court had to decide in the matter, which was a claim for custody and guardianship. She failed to consider that in such a claim, the welfare of the child is paramount and that any information which touches and concerns the welfare of the relevant child is of relevance

to the proceedings. Furthermore, there was no prejudice to the respondent caused by the late filing, as all that is contained in the affidavits are matters within his own knowledge. In the final analysis, the overriding objective, the justice of the case, and the paramount consideration of the welfare of PS, clearly lies in favour of permitting the affidavit evidence to be filed, served and relied on in the trial.

[140] It is here apt to return to the approach of Phillips JA in the case of **Joan Allen and Louise Johnson v Rowan Mullings**, at para. [48], where she outlined the requisite approach a judge ought to take in considering whether to admit late evidence. She said this:

> "[48] It must be stated, however, and it is important to this case, that the fact that that evidence is late ought not to be the sole consideration in the exercise of the judge's discretion. In **Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties Ltd** and Another which concerned an application for the admission of further evidence by the claimant when the matter had already run the 10 days allotted to it, Peter Smith J granted the application. In doing so he was following the judgment of the Court of Appeal in **Cobbold v London** Borough of Greenwich. His decision was recorded as a Practice Note. A summary of the decision is taken from the headnote:
>
> > '**The decision whether to allow late evidence to be adduced is a matter of discretion to be exercised by the trial judge in accordance with the principles sent [sic] out in CPR Pts 1 and 3, with the overriding backcloth of the duty of the courts to ensure that every party has the fullest opportunity fairly and fully to present their case, ensuring that a decision in favour of one party does not unfairly impact on other parties. If during the trial late evidence emerges which is important it is essential that that evidence is heard, provided that it will not cause a fatal prejudice to the other party.** Where such late evidence cannot be properly dealt with by the other side, it is almost inevitable that the application to adduce the evidence will be refused, but where it can be so dealt with, even on terms as to adjournment in costs, the evidence should ordinarily be allowed. **A decision to exclude**

> **evidence should not be made merely because the evidence is late**. **A trial judge should consider all factors, including lateness and prejudice, when exercising his discretion but should not give lateness a greater significance**. A party seeking to introduce the evidence does not have a heavy onus to justify it merely because it is late.'

At paragraph 33, the learned judge said this:

> 'It might be said that this is a relaxed attitude to non compliance [sic] with the rules. I am not sure what the word relaxed means in that context but the whole thrust of the CPR is that parties are not to be punished fatally for mistakes or non-compliance with the rules if those mistakes and non-compliance matters can be addressed without causing an injustice to the other party.'" (Emphasis added)

[141] In applying these principles to the case before her in **Joan Allen and Louise Johnson v Rowan Mullings**, Phillips JA found that, even though the application was late and unjustifiably so, the learned judge in the court below had been wrong to view the lateness of the application as the main consideration as to whether the expert evidence should have been permitted. Balancing that factor against the other factors, which the judge ought to have considered, which included the importance of the evidence in resolving a main issue in dispute between the parties, that there was no evidence the expert would have been unwilling to testify, and that there was no evidence the respondent would suffer any prejudice in the circumstances, the court found that the judge had wrongly exercised his discretion to exclude the expert evidence in that case.

[142] Those sentiments were expressed in an ordinary case. What more so a case where the welfare of the child is paramount above all else? I similarly find that the evidence sought to be adduced in this case ought to be admitted in the best interests and welfare of the child involved. Without the evidence, the case would proceed on a partially inaccurate basis, and the court would potentially abdicate its responsibility towards the child. Furthermore, there was a change in circumstances since the order of K Anderson J was made as the application became necessary due largely, if not entirely, to the conduct

of the respondent in not disclosing the information, and the trial date in the matter was already vacated, so there will be a delay, in any event. I conclude, therefore, that the appeal ought to succeed on these grounds.

Issue 2 - Whether the learned judge erred in exercising her discretion in refusing to appoint the Clinical Psychologist as an expert witness, and for the relevant report to be relied on (grounds k, l, m, n)

Submissions

[143] In relation to this issue, the appellant again asserted the relevance of the expert evidence as the main reason the learned judge was wrong to exercise her discretion as she did. The appellant submitted that it is in the best interest of the child that all information that is relevant to the case is before the court at the time of trial and prior to the making of a decision as to the welfare of the child. In that regard, the appellant asserted that it is relevant and necessary that the court has before it expert evidence to assess the impact of the weekly weekend visits on PS, if any, as well as the impact on PS, if any, of removing her from her current home where she is in the care of the appellant. This was submitted, particularly in light of the evidence of the appellant of PS' distraught behaviour when the respondent or his sister would come to collect her for weekend visits (constantly crying and refusing to go willingly), that she was often returned sick, and that she had already experienced trauma at birth having lost her biological mother.

[144] It was argued that the learned judge failed to consider that there was no court-appointed expert before the court, despite the fact that the OCA, in its report, had stated that a child psychologist would be the expert to speak on the impact, if any, the weekend visits might have on PS. It was also noted that this had been recommended even before the new information had been known. The appellant highlighted the potential risks raised by Dr Morgan in her report of 26 October 2022 and her "grave concern" that PS was so heavily resisting her father and was so visibly distressed by the sight of him.

[145] The appellant further argued that the report was in the format required by the CPR, and was balanced and unbiased even though the Clinical Psychologist did not speak to the respondent. It was pointed out that Dr Morgan noted that she had tried to contact the respondent but was unsuccessful, and that it was difficult to make conclusive recommendations as a result. The Clinical Psychologist recommended that the respondent participate in the psychological evaluation. These things, it was said, showed that the Clinical Psychologist was unbiased.

[146] The appellant relied on the case of **Joan Allen and Louise Johnson v Rowan Mullings** as to how the court should treat "late" applications to appoint an expert, particularly highlighting paras. [48] and [49]. Based on the principles in that case, it was submitted that the learned judge erred in failing to consider that "the justice of the case in appointing [the Clinical Psychologist] as an expert to assist the court with critical issues which were pertinent to the welfare of the child" was a factor that outweighed strict compliance with CMC orders and trial dates. There would have been no prejudice to the respondent, as the respondent would have been able to put questions to the doctor pursuant to the CPR and because the trial had not yet started.

[147] In relation to the lateness of the application, the appellant noted that the application was not made late deliberately, as it was made on 6 July 2022, but no date was given for its hearing until 3 November 2022.

[148] Finally, the appellant contended that "there has been a change of circumstances" since the learned judge made her order that would justify the variation of the order by this court in keeping with the dicta of Lord Diplock in **Hadmor Productions v Hamilton**.

[149] Whilst the respondent took no issue in respect of whether an expert report should be done in the matter or that one was done, issue was taken with the content of the particular report that the appellant is seeking to adduce. The respondent asserted that the report failed to comply with rules 32.3(1), 32.4(2) and 34.4(3) of the CPR, in that, the report in its current form is biased and does not reflect an objective finding. This

assertion was made on the basis that the Clinical Psychologist had indicated, in her report, that she had only interviewed the appellant and the maternal grandmother of the child, whilst the child was observed. The respondent also asserted that the report does not give any conclusive finding that can assist the court. The respondent argued that, given these deficiencies and in light of the late stage at which the appellant was seeking to adduce the evidence, the learned judge was not wrong to refuse to permit the evidence.

Discussion

[150] Part 32 of the CPR prescribes the way in which expert evidence should be adduced before the court, the expert's duty to the court, and how the court's discretion to admit or restrict expert evidence should be exercised. A party must receive the permission of the court to rely on expert evidence, and the general rule is that permission is to be given at a CMC (see rule 32.6). However, it is clear, from rule 32.6, as well as the authority of **Joan Allen and Louise Johnson v Rowan Mullings** (as discussed above), that simply because an application is late does not mean it should not be permitted.

[151] This aspect of the case has given me some pause. I disagree with the respondent's assertion that the Clinical Psychologist was biased in her report, as she clearly noted the limitations with her report caused by not having been able to interview the respondent (albeit not for want of trying). I, however, agree with the respondent that her report, for that reason, did not present as useful a conclusion as it otherwise could have. Rule 32.2 of the CPR requires that expert evidence be "restricted to that which is reasonably required to resolve the proceedings justly". The report, as it stands, may not totally provide the necessary assistance that the court needs.

[152] The report, nonetheless, does have some utility. It answers questions dealing with the psychological effect of the sudden introduction of a small child to a new environment and makes recommendations as to the best course, in such a case. It speaks to the risk of developmental trauma and the effect of stress on the health of PS and raises

psychological concerns as to the possible effects of restrictions on visits by the father. What is absent and what has been recommended is an assessment of PS' emotional state when with her father, her level of attachment to him and her behaviour when around him. For this, the respondent has to be cooperative either voluntarily so or by court order. What is clear is that the court ought not to deny itself the necessary expert assistance simply because one party has not made himself or herself available.

[153] It is clear that an expert report is required in this case. The reason for refusing to appoint the expert, given by the learned judge, as alleged in Ms James' affidavit, that the child was only two years old, is not a valid reason. The requirement for an assessment was long ago indicated by the OCA. The learned judge seemingly failed to recognise the benefit that would accrue to the court of having such a report, and I see no proper reason why the court should be denied that benefit. This was an error on her part. It is for that reason that I find that the learned judge erred in refusing to certify the expert.

[154] As for the report itself, to the extent that it is found lacking, the learned judge had the power to make the necessary orders to have the report done in a fashion which would be more helpful to the court. The expert owes a duty to the court and, to that end, is subject to the direction of the court.

[155] There is merit in these grounds of appeal.

Conclusion on issue 2

[156] In my view the learned judge's refusal to certify the Clinical Psychologist as an expert and to permit the expert report to be relied on by the appellant, was an incorrect exercise of her discretion. The need for an expert report was indicated, and to the extent that the one which was sought to be admitted was found wanting, the learned judge had the power to order it be rectified in a manner fair to the parties and most helpful to the court in the just resolution of the issues before it. The appellant ought to succeed on grounds k, l, m and n.

Disposal of the appeal

[157] I would, therefore, allow the appeal and set aside the orders of the learned judge made on 3 November 2022. I would order that the affidavits of KL, filed 30 May 2022, and SL, filed July 2022, be permitted to stand as properly filed and that the appellant be allowed to rely on them at trial, subject to any application which may be made to strike out any paragraph for being scandalous or irrelevant. I would also order that the Clinical Psychologist be certified as an expert and that the matter be remitted to the Supreme Court (to be heard by a different judge) for an early CMC and for directions to be given regarding the expert report and the mode of participation of the respondent either by questions to the expert or direct interview(s).

SIMMONS JA

[158] I have read, in draft the judgment of Edwards JA, I agree and have nothing further to add.

V HARRIS JA

[159] I too have read the draft judgment of Edwards JA and I agree with her reasoning and conclusions. I wish to add nothing further.

EDWARDS JA

ORDER

1. The appeal is allowed.

2. The decision of the learned judge, made on 3 November 2022, refusing the appellant's application to rely on the affidavit of SL filed on 6 July 2022, and the affidavit of KL filed on 30 May 2022, is set aside.

3. The decision of the learned judge, made on 3 November 2022, refusing the appellant's application to appoint the Clinical Psychologist as an expert and to rely on her expert report, is set aside.

4. The affidavit of KL filed 30 May 2022 and the affidavit of SL filed 6 July 2022, are permitted to stand as if properly filed and the appellant is allowed to rely on them at trial.

5. The Clinical Psychologist Dr K M is certified as an expert and, subject to any further directions from the court with regard to it, the appellant is permitted to rely on the expert report.

6. The matter is remitted to the Supreme Court before a judge, other than K Anderson J or the Learned Judge, for a case management conference to be held and for directions to be given with regard to the expert report.

7. Costs to the appellant, here and in the court below, to be agreed or taxed.