IN THE COURT OF APPEAL **CASE 2023/000462**

ON APPEAL FROM THE HIGH COURT OF JUSTICE FAMILY DIVISION (PRINCIPAL REGISTRY) **CASE ZC17P00039**

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF CHARLIE DANGER ALCOTT (BORN 10-10-13)(MINOR)
AND IN THE MATTER OF AN APPLICATION FOR LEAVE TO INTERVENE

B E T W E E N:-

NADINE TAYLOR	1st Appellant/Proposed Intervenor
AND	
MATTHEW O'CONNOR	2nd Appellant/Proposed Intervenor
AND	
FATHERS FOR JUSTICE LTD [Co.Regn 05954235]	3rd Appellant/Proposed Intervenor
AND	
BEN JONAS ALCOTT	1st Respondent/Applicant
AND	
KATY ELIZABETH ASHWORTH	2nd Respondent/1st Respondent
AND	
CHARLIE DANGER ALCOTT [Through his Guardian Eileen Carr]	3rd Respondent/2nd Respondent

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APPELLANTS' LEAVE TO APPEAL SKELETON (14/3/2023)

INTRODUCTION **0.** This Appellants' Leave to Appeal Skeleton supplements the Grounds of Appeal filed 9 March 2023 in the Appellants' Notice with further reasons why the decisions under appeal are wrong, or unjust for serious procedural or other irregularity. For brevity Paragraph **n** of the Grounds of Appeal document will simply be referred to as Ground **n.** The Skeleton follows the scheme of the Grounds of Appeal by addressing in sequence the Clauses under appeal of the Order of 21 February 2023.

1. Clause 2 of the Order Clause 2 is:

> **2.** The Intervenors' application for their application that the Proceedings on their substantive Applications be heard in Open Court be itself heard in Open Court, is refused.

Grounds **5–15** dealt with this. As to Grounds **5–9** it was made clear by Dr P that in making the 2nd OJ application he would only need to refer to various legal issues but not go into the merits of them which would be a matter for the substantive Intervenors' Application 18/11/2022. On the 2nd OJ application he would describe the nature of the legal issues and of the various disputes arising from the Order of 27 June 2022 (not a Child Arrangements Order) and of the findings in issue, the latter being to do with libel and malicious falsehood and not the child's welfare or upbringing, but examining in detail the actual findings involved would be a matter of

merits which one would only reach after commencement of the Intervenors' substantive case. So there was no reason to depart from normal Open Justice and *Scott v. Scott* [1913] AC 417 principles on the hearing of the 2nd OJ application and thus no basis for refusing the 1st OJ application.

2. In contrast there might be a basis for refusing the 2nd OJ application because Dr P would need to convince the Court that in making the Intervenors' main Application going into the relevant legal issues and findings would not lead into child welfare matters of substance which needed to be retained in private. The Judge conflated the two and failed to understand the difference made clear, for example, in *X v. Dempster* [1999] 1FLR 894 FD Headnote p.894 at (1) & (4) in the summary distinguishing between description of the nature of the dispute in the proceedings – not a contempt to publish – and dealing directly with the substance of the matters [cross-applications for *Children Act 1989* residence orders] which the court was to consider in private – a contempt of court to publish in that case.

3. Since the relevant findings were about articles and documents placed on the Internet by F4J and thus in the public domain, and lawfully so, there being no Reporting Restriction Order or pending application for one, and no contempt proceedings in relation to this publication, and in fact if you examine them no contempt or breach of any court order, then this strongly supported the submission that the 2nd OJ application would not need to go into child welfare and upbringing matters which needed to be kept private.

4. We emphasise again the necessity of obtaining the Transcript of Hearing for 20 February 2023 to prove what was actually said in course of the 2nd OJ application and thus determine whether or not it needed to be heard in private — Ground **10**.

5. If an innocuous and interesting Open Justice case as made on the 2nd OJ application cannot be heard in Open Court then the President's Transparency Programme has failed. It is time to end the mindless judicial mantra that, *"it's within Children Act proceedings so it has to be in private"* and time for the Family law judiciary to come out of the cosy secrecy and lack of public scrutiny in chambers and take notice of what the Court of Appeal said in *Pelling v. Bruce-Williams, Sec.State Constitutional Affairs Interested Party* [2004] EWCA Civ.845, [2004] 3AER 875, [2004] 3WLR 1178 CA at Para.55:-

> 55. ... in reality although the Family Proceedings Rules confer on the judge in any case the discretion to lift the veil of privacy, there is such a strong inherited convention of privacy that the judicial mind is almost never directed to the discretion and in rare cases where an application is made a fair exercise may be prejudiced by the tradition or an unconscious preference for the atmosphere created by a hearing in chambers. Judges need to be aware of this and to be prepared to consider another course where appropriate.

6. *A fortiori* this all applies to Grounds **16 & 17** which constituted an interesting general argument for all *Children Act 1989* cases that FPR 2010 Rule 27.10 was *ultra vires* the Common law and the *Courts Act 2003* and to which neither counsel nor the Judge were able to provide any cogent refutation.

7. **Clause 3 of the Order** Clause 3 is:-

> **3.** The Intervenors' application for the Proceedings on their substantive Applications to be heard in Open Court, is refused.

The detailed Grounds **19–34** here serve as their own Skeleton save that we wish to add argument to the general legal points of Grounds **19-20** & **30–34**. The argument that the Open Court safeguards in ss.XI, XXVII of the *Master in Chancery Abolition Act 1852 ["Masters Abolition Act 1852"],* 15 & 16 Vict. c.80, for proceedings in chambers persisted beyond the repeal of that Act in 1925 is as follows but it is convenient first to reproduce here those Sections (our bolding):-

> XI. From and after the First Day of Michaelmas Term 1852 it shall be lawful for the Master of the Rolls and the Vice Chancellors for the Time being and they are hereby required to sit at Chambers for the Despatch of such Part of the Business of the said Court [of Chancery] as can, **without Detriment to the Public Advantage arising from the Discussion of Questions in open Court**, be heard in Chambers, according to the Directions herein-after in that Behalf specified or referred to.
>
> XXVII. It shall be lawful for the Master of the Rolls and every of the Vice Chancellors respectively when sitting in open Court to adjourn for Consideration in Chambers any Matter which, in the Opinion of such Judge, may be more conveniently disposed of in Chambers, or, **when sitting in Chambers, to direct any Matter to be heard in open Court which he may think ought to be so heard.**

Given this primary legislation authorising certain types of proceedings in chambers but subject to the said safeguards, Rules of Court as to the practice and procedure of the High Court could lawfully be made including hearing in chambers of those types of proceedings. Note also:-

> XXVI. The Business to be disposed of by the Master of the Rolls & Vice Chancellors respectively while sitting at Chambers shall consist of such of the following Matters as the Judge shall from Time to Time think may be more conveniently disposed of in Chambers than in open Court; *videlicet*, ... **Applications as to the Guardianship and Maintenance of Infants**; ... and such other Matters as each Judge may from Time to Time see fit, or as may from Time to Time be directed by any General Order of the Lord Chancellor.
>
> XXVIII. The Mode of proceeding before the Master of the Rolls and Vice Chancellors respectively at Chambers shall be by Summons, and as near as may be according to the Form now adopted by the Judges of the Superior Courts of Common Law when sitting at Chambers.

8. The first Rules of the Supreme Court ["RSC"] made by the modern procedure of some authorised body constructing them to be then laid before both Houses of Parliament were the RSC 1883 — so enabled to be made by Her Majesty in Council on the recommendation of specified Judges or by the Supreme Court itself by ss.16,17 *Supreme Court of Judicature Act (1873) Amendment Act 1875*, 38 & 39 Vict.c.77.

These Rules regulated the practice and procedure of the High Court and Court of Appeal. Summons was the prescribed form to apply at Chambers under RSC 1883 O.54 r.1 — *"Every application at Chambers not made* ex parte *shall be made by summons"*. Conversely application by summons, including originating summons, essentially presupposed Chambers, at least to commence with since there was always the possibility of adjournment into Open Court. RSC 1883 O.55 *CHAMBERS IN THE CHANCERY DIVISION* stated:-

> r.1 The business in Chambers of the Judges of the Chancery Division shall be carried on in conjunction with their Court business.
>
> r.2 The business to be disposed of in Chambers by Judges of the Chancery Division shall consist of the following matters, in addition to the matters which under any other Rule or by statute may be disposed of in Chambers: ...
>
> (12) Applications as to the guardianship and maintenance or advancement of infants;

and for *Guardianship of Infants Act 1886* cases there were introduced the Special Rules 1887 which stated:-

> RULES OF THE SUPREME COURT, GUARDIANSHIP OF INFANTS, 17 DECEMBER 1887
>
> 1. These Rules may be cited as "the Rules of the Supreme Court, Guardianship of Infants", and shall apply to proceedings in the High Court of Justice, including appeals, under the Guardianship of Infants Act 1886, herein-after called the Act.
>
> 2. Any application under the Act may be made as follows:
>
> (a) Where there is pending any action or other proceeding by reason whereof the infant is a ward of Court, then by a summons in such action or proceeding, and in the matter of the infant.
>
> (b) Where there is not pending any such action or other proceeding as aforesaid then by an originating summons in the matter of the infant.

These Rules say nothing directly about the hearing of High Court applications under the 1886 Act being in Open Court or in Chambers, but since the prescribed procedure was by summons or originating summons this meant Chambers unless thereafter adjourned into Court. This shift into chambers under Rules of Court was only possible via the overarching *Masters Abolition Act 1852* which permitted hearings and trials not in Open Court. But the Rules could not be applied regardless of the primary legislation which so enabled this and they had always to be read as subject to the provisos of ss.11,27 of the 1852 Act. Secondary legislation, if not to be *ultra vires*, can never go beyond what is authorised by its enabling primary legislation.

9. For completeness we add that for the earlier statutes 2 & 3 Vict.c.54 (1839) — Serjeant Talfourd's Act — and the *Custody of Infants Act 1873*, 36 Vict.c.12 (1873), which repealed and replaced Talfourd's Act and was in turn repealed by the 1886 Act, proceedings under those statutes were begun by petition, which meant that they had to begin in Open Court. Prior to 1852 they were entirely in Open Court but after the *Masters Abolition Act 1852*, although they had to begin in Open Court adjournment

into Chambers was regarded as possible and probably practised by virtue of the 1852 Act, ss.XXVI,XXVII *supra*. See for example *In Re Moate's Trust [1883] 22 Ch.D 635* where Chitty J ruled that a certain matter begun by petition could be adjourned for hearing into Chambers, relying on ss.26,27 of the 1852 Act, and stated at p.639, *"I may add that it is the constant practice of the Court to adjourn petitions into Chambers. One common and everyday case is that of a petition under the Infants' Settlement Act [sic] [1855] for the sanction of the Court to a settlement by an infant. When a petition is presented for that purpose it is a matter of course to adjourn it into Chambers"*. But we do not know if it was a matter of course in regard to petitions under the first "children acts" of 1839 and 1873 concerning custody and access.

10. The *Master in Chancery Abolition Act 1852* was not amended or repealed until 1925 when the whole Act went. The *Supreme Court of Judicature (Consolidation) Act 1925,* 15 & 16 Geo.V c.49 ["SCJ(C)A 1925"], repealed and consolidated the earlier legislation governing the Supreme Court. **All the previous rule-making powers were preserved** by s.99 *SCJ(C)A 1925* dealing with Rules of Court. Thus:

> 99(1). Rules of court may be made under this Act for the following purposes:- ...
>
> (f) For regulating and prescribing the procedure and practice to be followed in the Court of Appeal or the High Court in cases in which the procedure or practice is regulated by enactments in force immediately before the commencement of this Act or by any provisions of this Act re-enacting any such enactments...:
>
> (j) For regulating or making provision with respect to any other matters which were regulated or with respect to which provision was made by the rules of the Supreme Court in force on 30th September 1925, or by any rules or regulations so in force with respect to practice and procedure in matrimonial causes and matters or with respect to applications and proceedings relating to legitimacy declarations.

In relation to infants, RSC 1883 O.55 as quoted above continued unchanged until the RSC 1883 were revoked and replaced by the RSC 1965. The Special Rules 1887 were revoked on the enactment of the SCJ(C)A 1925 and the new *Guardianship of Infants Act 1925*, and replaced by a new Order 55A:-

> ORDER 55A *GUARDIANSHIP OF INFANTS ACTS, 1886 AND 1925*
>
> r.2 Any application under either the Act of 1886 or the Act of 1925 may be disposed of in Chambers by a Judge of the Chancery Division and may be made as follows:-
>
> (a) where there is pending any action or other proceeding by reason whereof the infant is a ward of Court, then by summons in such action or proceeding, and in the matter of the infant;
>
> (b) where there is not pending any such action or other proceeding as aforesaid, then by an originating summons in the matter of the infant.

and these quoted provisions continued unchanged, save for a renumbering to O.115 in 1962, until the RSC 1965. Note that O.55A r.2 while preserving the summons

procedure expressly stated that applications under the *Guardianship of Infants Acts 1886 & 1925* ***may be disposed of in Chambers***.

11. The importance of all this is that notwithstanding the repeal in 1925 of the *Masters Abolition Act 1852*, Rules of Court could validly continue or be made authorising trials in Chambers in applications as to the guardianship and maintenance, access to and custody, of infants. Since the County Courts Acts prior to and after 1925 authorised rules of court to be made which in similar cases might be made for the High Court one ended with a situation where rules of court could be made for both High Court and County Courts (but not Magistrates' Courts) authorising hearing of *Guardianship of Infants Acts 1886 & 1925* cases in Chambers. Subsequent legislation, culminating in the *Supreme Court Act 1981* (c.54) and *County Courts Act 1984* (c.28), was always careful to preserve any previous rule-making powers so that the dead hand of the 1852 Act lived on in the rule-making powers of Section 84 *Supreme Court Act 1981* and Section 75 County Courts Act 1984 and in the specialisation of those powers to Family Proceedings Rules authorised by Section 40 *Matrimonial & Family Proceedings Act 1984* (c.42). **That is why FPR 1991 r.4.16(7) was not *ultra vires* the Common Law or s.40 *MFPA 1984***. For reasons of space we omit to trace in entirety the sequence of Rules through RSC 1965 and CCR 1889, 1903, 1936, & 1981, but the rule making change wrought by s.40(1) *MFPA 1984* is important in the analysis of the final change wrought by the *Courts Act 2003*.

12. It is worth noting first that in the County Courts all proceedings under the *Guardianship of Infants Acts 1886 & 1925* were in Open Court like any other County Court action or matter between 1886 and 1960: there was no provision for hearing in chambers until a fundamental change occurred when the *County Court (Amendment) Rules 1960*, SI 1960/1275, inserted a new O.46 r.1(1) so that O.46 r.1 commenced:-

CCR 1936 ORDER 46 RULE 1 *Guardianship of Infants Acts 1886 and 1925*

> r.1(1). All proceedings under the Guardianship of Infants Acts 1886 and 1925 shall be heard and determined in Chambers unless the Court otherwise directs.

The analogous later provision in the CCR 1981 was:-

CCR 1981 ORDER 47 RULE 6 **Guardianship of Minors Acts 1971 and 1973**

> r.6(3). All proceedings under the said Acts of 1971 and 1973 shall be dealt with in chambers unless the court otherwise directs.

The latter continued until revoked by the coming into force of the *Children Act 1989* with repeal of the *Guardianship of Minors Act 1971 & 1973*, and the making by a different Rule Committee pursuant to s.40(1) *Matrimonial Proceedings Act 1984* of the FPR 1991 (SI 1991/1247) which applied both in the High Court and County Courts but

which by FPR 1991 r.1.3(2) were effectively treated as provisions of the CCR or RSC respectively and with, r.1.3(1), the CCR/RSC only applying subject to the FPR 1991.

13. In the High Court the RSC 1965, SI 1965/1776, replaced the RSC 1883 and the new Order 91 replaced the former Order 55A [O.115], which later in 1971 due to the reconstitution of the High Court and establishment of the Family Division was replaced by a new Order 90:-

> ORDER 90 [1971] MISCELLANEOUS PROCEEDINGS IN THE FAMILY DIVISION
>
> r.5 [Application under the Guardianship of Minors Act 1971 to be by summons in wardship, otherwise by originating summons issued out of the PRFD or District Registry of the Family Division.]
>
> r.7 Applications under the Act of 1971 may be disposed of in Chambers.

The former *GIA 1886 & 1925* had been repealed in 1971 and replaced by the new *Guardianship of Minors Act 1971.* The Order 90 provisions were soon amended with the enactment of the *Guardianship Act 1973* to cover applications under the *Guardianship of Minors Acts 1971 & 1973* with the same r.7 provision for hearings. Thus again the procedure was by Summons/Originating Summons which ***may be disposed of in Chambers.***

14. The *SCJ(C)A 1925* was repealed by the *Supreme Court Act 1981* (c.54) but again all previous rule-making powers were preserved. Thus from Section 84:-

> **84 Power to make rules of court**
>
> (1) Rules of court may be made for the purpose of regulating and prescribing the practice and procedure to be followed in the Supreme Court.
>
> (2) Without prejudice to the generality of subsection (1), the matters about which rules of court may be made under this section include all matters of practice and procedure in the Supreme Court which were regulated or prescribed by rules of court immediately before the commencement of this Act.
>
> (4) Rules made under this section shall have effect subject to any special rules for the time being in force in relation to proceedings in the Supreme Court of any particular kind.
>
> (5) Special rules may, to any extent and with or without modifications, apply any rules made under this section to proceedings to which the special rules apply; and rules under this section may, to any extent and with or without modifications, apply any special rules to proceedings in the Supreme Court to which those special rules would not otherwise apply.
>
> (6) Special rules which apply any rules made under this section may apply them as amended from time to time; and rules under this section which apply any special rules may apply them as amended from time to time.
>
> (9) In this section "special rules" means rules applying to proceedings of any particular kind in the Supreme Court, being rules made by an authority other than the Supreme Court Rule Committee or the Crown Court Rule Committee under any provision of this or any other Act which (in whatever words) confers on that authority power to make rules in relation to proceedings of that kind in the Supreme Court.

Family Proceedings Rules made by the separate Rule Committee defined in s.40 *MFPA 1984* are "Special Rules" under s.84 *SCA 1981* but note that *"the power to make rules*

of court" [s.40(1)] is not created by s.40 but derives from s.84(1) *SCA 1981*: s.40(1) allows that power to be exercised by the Rule Committee defined in s.40(1). S.40:-

> **40 Family proceedings rules**
>
> (1) Subject to subsection (2) below, the power to make rules of court for the purposes of family proceedings in the High Court or county courts shall be exercisable by the Lord Chancellor together with any four or more of the following persons, namely—
>
> (a) the President of the Family Division,
>
> (b) one puisne judge attached to that Division,
>
> (c) one registrar of the principal registry of that Division,
>
> (d) two Circuit Judges,
>
> (e) one registrar appointed under the [1984 c. 28.] County Courts Act 1984,
>
> (f) two practising barristers, and
>
> (g) two practising solicitors, of whom one shall be a member of the Council of the Law Society and the other a member of the Law Society and also of a local law society.
>
> (4) Rules made under this section may, in relation to county court rules, do anything which, as special rules, they are authorised by section 84 of the Supreme Court Act 1981 to do in relation to Supreme Court Rules and may—
>
> (a) modify or exclude the application of any provision of the County Courts Act 1984;

Thus it can be seen that FPR 1991 r.4.16(7) was not *ultra vires* because the necessary statutory power to depart from the Common law requirement of trials being in Open Court can be traced back through the chain **FPR 1991 r.4.16(7)** – s.40(1) *MFPA 1984* – s.84(1)(2)(9) *SCA 1981*– RSC 1965 – RSC 1883 – s.99(1)(f)(j) *SCJ(C)A 1925* – RSC 1883 – **15 & 16 Vict.c.80** culminating in the necessary initial primary enabling legislation of the *Master in Chancery Abolition Act 1852*.

15. The necessity for analysis of this kind is exemplified by the *Children Act 1989* itself, on noting the sections in that Act which deal with Rules of Court. As originally enacted there were s.97(1) and s.93:-

> **97 Privacy for children involved in certain proceedings**
>
> (1) Rules made under section 144 of the [1980 c. 43.] Magistrates' Courts Act 1980 may make provision for a magistrates' court to sit in private in proceedings in which any powers under this Act may be exercised by the court with respect to any child.
>
> **93 Rules of court**
>
> (1) An authority having power to make rules of court may make such provision for giving effect to—
>
> (a) this Act;
>
> (b) the provisions of any statutory instrument made under this Act; or
>
> (c) any amendment made by this Act in any other enactment,
>
> as appears to that authority to be necessary or expedient.
>
> (2) The rules may, in particular, make provision—
>
> (a) with respect to the procedure to be followed in any relevant proceedings (including the manner in which any application is to be made or other proceedings commenced);

— which part of s.93 is still in force unchanged today. Notwithstanding the wide generality of s.93 it did *not* give power to the authority which could make rules of court under s.144 *Mags' Court Act 1980* to allow proceedings in private in the Magistrates Courts: this needed s.97(1) for so enabling. This is an example of the Principle of Legality at work: s.93 could not override the Common law principle of Open Justice. So if it was needed for the Magistrates Courts then where was it for the High Court and County Courts? Not directly in the similar general words of s.40 *MFPA 1984* and s.84 *SCA 1981* but only in the chain of such general words leading back finally to the initial primary enabling legislation of **15 & 16 Vict.c.80** which the general words in the way they were formulated successfully carried forward to 1991.

16. It is submitted however that while the various Rules of Court from 1925 onwards to the FPR 1991 r.4.16(7) authorising child proceedings to be heard in chambers were lawfully made, by preservation of previous rule-making powers going back to the 1852 Act, then by the Principle of Legality those Rules could not further enlarge the original inroad into the Common law principle of Open Justice made by the 1852 Act. Hence the judges historically always had complete freedom to procede in chambers or Open Court — Mr Justice Holman was right in his approach there of no presumption in favour of chambers — but could not derogate from the principle that they must act "**without Detriment to the Public Advantage arising from the Discussion of Questions in open Court".** Which is certainly what Mrs Justice Arbuthnot did in refusing the 1st and 2nd OJ applications.

17. *The Family Procedure Rules 2010* The new *Family Procedure Rules 2010,* SI 2010/2955, in force 6 April 2011, which were made under the power granted in the enabling primary legislation of ss.75,76 *Courts Act 2003* (c.39), broke with previous precedent because this enabling legislation neither expressly authorised proceedings in private nor preserved previous rule-making powers which had lawfully authorised proceedings under the *Children Act 1989* and predecessor Acts such as the *Guardianship of Minors Acts 1971 & 1973* and the *Guardianship of Infants Acts 1886 & 1925* to be heard in chambers in the High Court and County Court. However, there are clauses in s.76 which, for example, allow the application by Family Procedure Rules of other rules of court (e.g. Civil Procedure Rules), so it is necessary to examine the powers in s.76 with some care.

18. Until the coming into being of the new Family Court on 22 April 2014, s.75(1) *Courts Act 2003* stated:-

> **75 Family Procedure Rules**
>
> (1) There are to be rules of court (to be called "Family Procedure Rules") governing the practice and procedure to be followed in family proceedings in—

(a) the High Court,

(b) county courts, and

(c) magistrates' courts.

and since s.97(1) *Children Act 1989* was amended by the *Courts Act 2003* with effect from 6/4/2011 to read:

97 Privacy for children involved in certain proceedings.

(1) Family Procedure Rules may make provision for a magistrates' court to sit in private in proceedings in which any powers under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to any child.

— it is not possible to impugn Rule 27.10 as applying to Magistrates' Courts in the period 6/4/11 to 22/4/2014 when the Family Court came into being [and s.97(1) was also repealed altogether with effect from 22 April 2014 by the *Crime & Courts Act 2013* (c.22) which was the legislation creating the Family Court].

19. In regard to High Court and County Courts the *Civil Procedure Act 1997* (c.12) had repealed the rule-making powers of s.84 *Supreme Court Act 1981* and s.75 *County Courts Act 1984* with effect from the coming into force of the CPR 1998, SI 1998/3132, on 26 April 1999. The CPR 1998 superseded the former RSC 1965 and CCR 1981. The scope of the new CPR 1998 expressly in CPR r.2.1(2) excluded application of the CPR to Family proceedings for which rules of court could be made under s.40 *MFPA 1984* (unless some other enactment allowed such application). With the repeal of s.40 on 6 April 2011, when the FPR 2010 came into force, CPR r.2.1(2) was amended by SI 2011/1045 to exclude Family proceedings for which rules of court could be made under s.75 *Courts Act 2003* (unless allowed by other enactment).

20. S.75 created in general words the power to make Family Procedure Rules governing practice and procedure in Family proceedings but said nothing directly or indirectly about hearings in private or Open Court. Except, we submit, **s.75(5)(a)**:-

75(5) Any power to make [or alter] Family Procedure Rules is to be exercised with a view to securing that— ***Note:*** *[...] repealed 3.4.2006 via 2005 c.4*

(a) the family justice system is accessible, fair and efficient, and [b] ..

— **which Rule 27.10 flouts** because operating a default system of secret justice in chambers and removing all the safeguards guaranteed and intended by Open Justice leads inevitably to unfairness, diminished accessibility, and inefficiency.

21. In the present context the relevant subsections of s.76 are:-

76 Further provision about scope of Family Procedure Rules

(2) Family Procedure Rules may —

(a) modify or exclude the application of any provision of the County Courts Act 1984 (c.28) and, ...[b]

(2A) Family Procedure Rules may, for the purposes of the law relating to contempt of court, authorise the publication in such circumstances as may be specified of information relating to family proceedings held in private.

(3) Family Procedure Rules may modify the rules of evidence as they apply to family proceedings [in any court within the scope of the rules].

Note: *[...] omitted 22.4.2014 via 2013 c.22*

(4) Family Procedure Rules may apply any rules of court (including in particular Civil Procedure Rules) which relate to—

(a) courts which are outside the scope of Family Procedure Rules, or

(b) proceedings other than family proceedings.

(5) Any rules of court, not made by the Family Procedure Rule Committee, which apply to proceedings of a particular kind in a court within the scope of Family Procedure Rules may be applied by Family Procedure Rules to family proceedings in such a court.

(6) In subsections (4) and (5) "rules of court" includes any provision governing the practice and procedure of a court which is made by or under an enactment.

(7) Where Family Procedure Rules may be made by applying other rules, the other rules may be applied—

(a) to any extent,

(b) with or without modification, and

(c) as amended from time to time.

These provisions save for s.76(2A) which was inserted 12/4/2005 via the *Children Act 2004*, and omission of the bracketed words in s.76(3) 22/4/2014, are unchanged today as from commencement. We examine these provisions *seriatim* to see if there is any way any of them permitted the making of Rule 27.10 in force since 6 April 2011.

22. (1) S.76(2)(a) plainly has no bearing on the power to make r.27.10.

(2) S.76(2A) merely authorises rules adjusting contempt law concerning publication of information relating to Family proceedings held in private, but says nothing at all about *when* such proceedings can be held in private. So no bearing on r.27.10.

(3) S.76(3) allows modification of the rules of evidence in Family proceedings. See first Ground **31** as to why this does not empower the making of Rule 27.10. We only add here that in case it is not obvious the point that is being made at Ground **31(d)** is that since there is a similar provision in *Civil Procedure Act 1997*, s.1(2) & Sch.1 Para.4 for the CPR to modify the rules of evidence as they apply to courts within the scope of the CPR, then the Civil Procedure Rule Committee could on that basis make an analogous rule for civil proceedings, call it Rule 39.2, to replace the existing Rule 39.2, as follows:-

39.2 (1) Proceedings to which these rules [the CPR 1998] apply will be held in private, except–

(a) where these rules or any other enactment provide otherwise;

(b) subject to any enactment, where the court directs otherwise

Thus neatly abolishing Open Justice altogether! The Principle of Legality would however bar such a Rule, as *ultra vires* the Common law. It would be said that the CPR Committee had no power to abuse the general words of Sch.1 Para.4 to put the whole of civil proceedings into secret courts, contrary to fundamental Common law.

(4) (i) As to s.76(4) there is no evidence that Rule 27.10 was made in this way and if it had been, presumably it would have to say what extraneous rule of court relating to a court outside the scope of Family Procedure Rules or to non-Family proceedings was being applied. In the FPR 1991 was the general provision r.1.3(1) that the CCR 1981 and RSC 1965 should apply subject to the provisions of the FPR and of any enactment, with any necessary modifications, to Family proceedings in a County Court and the High Court respectively. Further, the FPR 1991 could and did, via s.84(5) *SCA 1981* for example for the High Court, apply specific rules of the CCR or RSC with or without modification in various parts of the FPR but always stated this: a typical example in FPR 1991 Part VII Chapter 2 *Judgment Summonses* is Rule 7.4(6):-

> **7.4(6)** CCR Order 28 rule 3 (which deals among other things with the issue of successive judgment summonses) shall apply to a judgment summons, whether issued in the High Court or a divorce County Court, but as if the said rule 3 did not apply CCR Order 7, rule 19(2).

(ii) Secondly the Principle of Legality objection would apply even if it were possible to find an extraneous rule of court via s.76(4)(a) or s.76(4)(b) which stated essentially the same as Rule 27.10: for s.76(4) is stated in general terms and there are neither express words nor necessary implication which would permit incorporation of such a rule of court violating the fundamental Common law right of Open Justice. For example, an extraneous rule might be Rule 4.1(1) of the *Court of Protection Rules 2017*, SI 2017/1035: *4.1(1) The general rule is that a hearing is to be held in private.* That Rule is permitted under the *Mental Capacity Act 2005* (c.9) which expressly authorises a default privacy rule of that kind in Section 51:-

> **51 Court of Protection Rules**
>
> (1) Rules of court with respect to the practice and procedure of the court (to be called "Court of Protection Rules") may be made in accordance with Part 1 of Schedule 1 to the Constitutional Reform Act 2005.
>
> (2) Court of Protection Rules may, in particular, make provision— ...
>
> (h) for enabling or requiring the proceedings or any part of them to be conducted in private and for enabling the court to determine who is to be admitted when the court sits in private and to exclude specified persons when it sits in public;

But it would be a bizarre stretch for the Family Procedure Rule Committee to say they could make Rule 27.10 by invoking s.76(4)(a) to apply *Court of Protection Rules 2017* Rule 4.1(1) to all Family proceedings with a nice modification under s.76(7)(b) so that you end with Rule 27.10 exactly.

(iii) Ironically perhaps, the *Civil Procedure Act 1997* Sch.1 Para.5 has provisions very close to some of those in s.76 *Courts Act 2003*. Sch.1 Para.5 is:-

> *Application of other rules*
>
> 5(1) Civil Procedure Rules may apply any rules of court which relate to a court which is outside the scope of Civil Procedure Rules.

(2) Any rules of court, not made by the Civil Procedure Rule Committee, which apply to proceedings of a particular kind in a court within the scope of Civil Procedure Rules may be applied by Civil Procedure Rules to other proceedings in such a court.

(3) In this paragraph "rules of court" includes any provision governing the practice and procedure of a court which is made by or under an enactment.

(4) Where Civil Procedure Rules may be made by applying other rules, the other rules may be applied—

(a) to any extent,

(b) with or without modification, and

(c) as amended from time to time.

Thus Sch.1 Para.5(1) is identical to s.76(4)(a) with the substitution of "Civil Procedure Rules" for "Family Procedure Rules". *Ergo* if the reasoning of **(ii)** were valid to obtain Rule 27.10 then equally one could use Sch.1 Para.5(1) to apply FPR Rule 27.10 which relates to the Family Court, a court outside the scope of Civil Procedure Rules, in the Civil Procedure Rules and thus end again with a new CPR r.39.2 identical to Rule 27.10 and so again destroy Open Justice for all civil proceedings. We conclude that such reasoning is invalid and s.76(4) cannot be used to make Rule 27.10.

(5) (i) As to s.76(5) there is no evidence that Rule 27.10 was made in this way and if it had then, like s.76(4), one would expect it to state what rule of court not made by the Family Procedure Rule Committee and what court within the scope of Family Procedure Rules that rule was made for that was being applied by Family Procedure Rules to family proceedings in such a court.

(ii) Secondly the Principle of Legality objection would apply even if it were possible to find an extraneous rule of court using s.76(5) which stated essentially the same as Rule 27.10 as applied to the particular court in question within the scope of Family Procedure Rules (that is, prior to 22 April 2014, the High Court, the County Courts, or the Magistrates Courts and one would need 2 applications of s.76(5) to cover both the High Court and County Courts): for s.76(5) is stated in general terms and there are neither express words nor necessary implication which would permit incorporation of such a rule of court violating the fundamental Common law right of Open Justice.

(iii) Thirdly, again with irony, we see that *Civil Procedure Act 1997* Sch.1 Para.5(2) is identical to s.76(5) with the substitution of "Civil Procedure" for all occurrences of "Family Procedure" and substituting "other proceedings" for "family proceedings". For "other proceedings" one can read "civil proceedings" meaning all types of proceeding within the scope of the CPR. So in the period from 6/4/2011 to 21/4/2014 when the Family Procedure Rules, including Rule 27.10, and not of course made by the Civil Procedure Rule Committee, applied in the High Court and County Courts to that particular kind of proceedings called "family proceedings" then it would have been

possible for the CPR Committee to apply Rule 27.10 by Civil Procedure Rules to other proceedings in the High Court and County Courts and so in fact to all proceedings in those courts governed by the CPR. So once more one could end with a new CPR r.39.2 abolishing Open Justice for all civil proceedings in the High Court and County Courts. This *reductio ad absurdum* proves s.76(5) could not and cannot be used to derive Rule 27.10, even if *per impossibile*, one managed to find suitable other rules to apply it.

(iv) Even after 22 April 2014 when the Family Court came into being and s.75 was amended to read:

> **75 Family Procedure Rules**
>
> (1) There are to be rules of court (to be called "Family Procedure Rules") governing the practice and procedure to be followed in family proceedings.
>
> (2) Family Procedure Rules are to be made by a committee known as the Family Procedure Rule Committee.
>
> (3) Family proceedings" means—
>
> (a) proceedings in the Family court, and
>
> (a) proceedings in the Family Division of the High Court which are business assigned, by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981, to that Division of the High Court and no other.

the *reductio ad absurdum* argument can still be run. To apply Sch.1 Para.5(2) now, consider that Rule 27.10, not made by the CPR Committee, applies to these proceedings of a particular kind in the High Court, namely "proceedings in the Family Division of the High Court which are business assigned, by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981, to that Division of the High Court and no other" — so that by Para.5(2) Rule 27.10 may be applied by the CPR to all civil proceedings under the CPR in the High Court, and thus one has the complete abolition of Open Justice in the High Court. So there is no derivation of r.27.10 at any time.

(6) Lastly s.76(7) does not avail because it is predicated on initial use of s.76(4) or s.76(5) to get a rule of court which then in some way can be "modified" to get to Rule 27.10 but whatever "modified" means it cannot mean a complete rewrite, otherwise one could make any rule one liked, and so the rule before modification must already have involved serious infringement of the Common law Open Justice principle which again offends against the Principle of Legality. Once that is allowed then equally it must be allowed with Sch.1 Para.5 of the 1997 Act — and note that Para.5(4) is identical to s.76(7) but with "Family Procedure Rules" replaced by "Civil Procedure Rules" — and then the *reductio ad absurdum* argument runs again.

(7) So in conclusion we submit there is nothing in ss.75,76 *Courts Act 2003* which authorises Rule 27.10 to be made at all at any time — and the Rule has been in force since 6/4/2011 when the FPR 2010 first came into force unchanged to the present day

— and the only other legislation that gave it any legality was s.97(1) *Children Act 1989* in the period 6/4/2011 – 22/4/2014 but limited to Magistrates Courts only. For the record note that ss.75,76 *Courts Act 2003* were fully in force from 12 December 2010 while the FPR 2010, SI 2010/2955, were made on 13 December 2010, laid before Parliament on 17 December 2010, and in force 6 April 2011. Relevant commencement provisions for *Courts Act 2003* are in SI 2005/2744 & SI 2010/2921.

Rule 27.10 is *ultra vires* the *Courts Act 2003* and *ultra vires* the Common law.

23. For a nice description of the Principle of Legality see Lord Hoffmann in *R v. Sec.State Home Department ex parte Simms & Anor* [2000] 2AC 115, [1999] 3WLR 328 HL at 341E which we reproduce here:-

> I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. I agree with it and for the reasons which he gives I would allow the appeals and make the orders which he proposes. I add only a few words of my own about the importance of the principle of legality in a constitution which, like ours, acknowledges the sovereignty of Parliament.
>
> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The *Human Rights Act 1998* will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

24. As for Mr Hames KC's suggestion that the Common law in regard to Open Justice had itself changed since the days of *Scott v. Scott* [1913] AC 417 the correct principle here is from Lord Brandon of Oakbrook in *Reg. v. D. [1984] AC 778* at 804/805:

> "The common law, however, while generally immutable in its principles, unless different principles are laid down by statute, is not immutable in the way in which it adapts, develops and applies those principles in a radically changing world and against the background of radically changed social conventions and conditions".

So far as there has been adaptation since 1913 it is surely in the direction of *increasing* Open Justice: from the trials of actions in courts [Earl Loreburn in *Scott* at 445] to nearly all hearings in courts or tribunals where the judicial power of the State is being exercised [Toulson LJ in *R v. City of Westminster Mags.Court ex p. Guardian News & Media Ltd & Anor.* [2012] EWCA Civ.420, [2013] QB 618 CA, at Para.70].

25. <u>Clause 4 of the Order</u> Clause 4 is:-

> **4.** The Intervenors' main Application in Form C2 dated 18 November 2022 for Leave to Intervene, is refused (and consequentially no Relief or Remedies as sought therein is granted).

The detailed Grounds **35–59** largely stand as their own Skeleton but we add further argument in support. Grounds **35–37** raise the Judge's procedural unfairness in barring access to the key Transcript of Hearing for 27 June 2022. Not only to the Intervenors but, which is further evidence of a calculated and unfair strategy by the Judge, also to the Applicant Father Mr Alcott, a full Party. In his Skeleton below (will be in Core Bundle) dated 9/2/2023 and supported by a Statement of Truth he said:-

> 27. The Applicant notes his urgent EX107 Application, dated 30/12/2022 [*date typographical corrected at Hearing 20/2/2023*], for the Transcript of the 27/06/2022 Hearing has not been granted. The Applicant was a party to those proceedings and there are no grounds to deny him that transcript.
>
> 28. The Applicant sought the transcript to assist him with his response to the Applicant's Skeleton Argument. The Applicant was legally represented at that hearing but is now a Litigant in Person so no longer has access to the notes of his former solicitors, therefore he intended to rely on the transcript to assist him with his response. The Applicant has been disadvantaged by being denied a transcript he was entitled to.

The Applicant Father also raised at the Hearing on the 20 February 2023 his request again for the Transcript but the Judge side-stepped the request.

26. To expand on Ground **38** concerning the Judge's contradiction and confusion about her own findings, the Extract 13/4/2022 (to be in Core Bundle annexed to Judgment) she provided to the Intervenors disproves as a matter of record her conclusion at Judgment §11 that there were no significant findings against them, but not in the part she focused on. The findings recited in the Order 27/6/2022 do not appear at Finding 8(iii) in the Extract or as proved, but Finding 8(i) in the Judge's Schedule column finds "Proved" the Mother's allegations in her column that: "F goes to Daily Mail <u>with F4J</u> <u>falsely accusing</u> M of denying contact for 4 months and F <u>in concert with F4J</u> organise a campaign/march outside M's BBC offices ... <u>accusing her of child abuse</u>. The article published by the Daily Mail <u>caused M professional embarrassment</u> .... M alleges F deliberately tried to <u>sabotage her career</u> <u>by coordinating movements of F4J</u>". It is not sustainable to pretend that these are not significant findings <u>against F4J</u> (and so all the Intervenors) as well as the Father in 2018.

27. Furthermore, these findings are <u>denied</u> by F4J and had Leave to Intervene been granted would have been properly addressed: F4J were not in any way responsible for the Daily Mail article in March 2018 but when it appeared it did move them to write to the BBC suggesting the BBC ought to investigate their employee M, a rôle model for children, for *possible* child abuse by denial of contact, because of the D.Mail article; F4J did not prejudge and did <u>not accuse</u> M of child abuse when they wrote to the BBC. Finding 8(iii) records M's allegation that F4J wrote to the BBC in March 2018 accusing M of being a child abuser, but the judge's column does <u>not</u> record this as proved. See also here Ground **79.** The BBC correspondence will be produced.

28. Further, as Ground **80** observes, the Extract contains errors of record about dates and impossible findings: **(i)** In Finding 4(iii), September 2016 the Judge finds proved that F4J were helping F put his story in the newspapers (at time of Hague Convention battle), yet F only contacted F4J first in January 2017 via its Helpline and F4J had only known anything about the case before then through reading the newspaper reports; **(ii)** Also in Finding 4(iii) Sept.2016 the Judge finds proved that, *"It is clear from the messages between Ms Taylor and the father and Ms Alcott [F's sister] that he was assisting the press in tracking down the mother so they could take photographs of her with Mr Cooper"*. The Judge here is confusing a February 2018 article in the Daily Mail about Ms Ashworth having a baby with Mr Cooper with events in 2016. F4J could not have known anything about Mr Cooper in 2016 save by time travel; **(iii)** Also in Finding 4(iii) for January 2017, the Judge finds proved accusations about social media publications involving F4J, but it was only from March 2018 that F4J published anything about the Alcott/Ashworth case on social media and their website. Indeed they had no more contact with Mr Alcott after the 1 hour or so Helpline advice session when he had telephoned in Jan.2017 until February 2018, except his informing them of the successful Contact outcome following their advice.

29. Plainly there was a *prima facie* case of significant adverse findings being made against the Intervenors and the Judge was duty bound as such to grant Leave to Intervene so there could be proper investigation on the merits. So much is clear from the Extract, from the Recital in the Order of 27 June 2022, and from the Judge's own Judgment at §49. See also Grounds **44–46.**

30. Clause 6 of the Order Clause 6 is:-

> **6.** The Intervenors' application in the course of the Hearing on 20 February 2023 for provision to them of the full unredacted Transcripts of the Hearings held in Case ZC17P00039 on 27 June 2022 and 8 February 2023 (the latter being a Pre-Trial Review which the Proposed Intervenors were invited to attend), and adjournment of the part-heard main Application dated 18 November 2022 of the Intervenors pending provision of those Transcripts, is refused.

Grounds **60–63** dealt with this. We add the following in further argument. Firstly, there was an issue as to where the findings referred to in the Recital of the Order 27/6/2022 could be located as they could not be found where the Judge claimed they were in the Extract and the Father's Skeleton 9/2/2023 stated relevant findings were made on 27 June 2022 on some manner of application made by the Mother through counsel. On 27/6/2022 the Mother's counsel was applying either for removal by F4J of the articles and documents in the public domain that she objected to and regarded as defamatory and professionally damaging, based on adverse findings of the Judge about F4J, or as a fallback that the Judge should send a request contained in the High Court Order for the day that they be removed (the latter is what happened).

31. But Devereux KC could hardly do that without clearly identifying the articles and documents and the relevant findings or persuading the Judge to make new findings that day to achieve the Mother's aim of obtaining an effective libel or malicious falsehood ruling against F4J , which she hoped to be able to publish, by a High Court FD Judge yet without the inconvenience of expensive due process in Open Court in a libel/malicious falsehood claim in the KBD. This would of course all be on legal aid financed by the taxpayer, for a KC and junior to boot, notwithstanding that legal aid is not available for such actions if commenced in the proper manner. It was not a child welfare issue and arguably it was a disgraceful abuse of process in the FD and waste of taxpayers' money. Yet the Order with its adverse Recital was made and sent to F4J.

32. In the above circumstances it is submitted that the Appellants were entitled to disclosure of the Transcript of Hearing for 27 June 2022 since it was necessary if justice was to be done on their Intervenors' Application. Without disclosure there could be no fair hearing as required at Common law and by virtue of Article 6(1) ECHR as enacted into English law by the *Human Rights Act 1998*. It was monstrous that the Learned Judge having libelled and damaged professionally the Intervenors (judicial privilege apart) by a Recital summarising serious adverse findings by the Court, for which the Appellants had had no opportunity to be heard before they were made, should then deny them the means to ascertain precisely the provenance of those findings — when and in what circumstances made, on what precise application, and what their precise content was — so that they could seek appropriate Remedies.

33. Disclosure is standard in civil actions for good reason and there was no reason to deny it here given the non-Family law subject matter of the Intervenors' complaint; however, for the unusual nature of this type of Intervention case law also mandates disclosure. Please refer to *Re W (Minor)*, [2016] EWCA Civ.1140, [2017] 1WLR 2415 CA at Paras. 74, 79, 95, 97(d) *mutatis mutandis* as the position of the Intervenors was not the same as with the aggrieved witnesses in that case. In the circumstances therefore there was unfairness and serious procedural irregularity by the Judge persistently refusing the Transcript 27/6/2022 and when it became impossible for the Appellants' advocate on 20 February 2023 to sensibly continue further without it, refusing it once more and refusing an adjournment so that it could be obtained.

34. A further procedural irregularity was manifested at the 20/2/2023 Hearing when the Judge proved herself incapable of even remembering what had taken place at the critical 27/6/2022 Hearing and Guardian's counsel, Mother's counsel, and Mr Alcott could not agree who had actually made the application on 27 June 2022. Mother's counsel said it was the Father, the Judge then asked, *"Was it Father or the Guardian"*,

Mr Alcott interjected that it was not he who made the application, Guardian's counsel confirmed it was the Mother, but then the Judge and Mother's counsel continued to accuse the Father of being involved with the application, with the Judge saying, *"I can't be certain Father did not request it, but Father did support it"*, to which Mother's counsel replied: *"I am instructed it was the Father's barrister. There was no C2 application made by the Mother, but it was consensual"*. Mr Alcott disputed this.

35. But worse than that, the Judge couldn't even remember her own Recital correctly which has led to 3 different versions of the crucial 27/6/2022 Order appearing in the records of these Proceedings, including the Judge putting an erroneous one in her own written Approved Judgment. The 3 versions of the key Recital Paragraph 1 are:-

(i) Draft Order by Mother's Counsel 27/6/2022

> 1. UPON this court approving and positively supporting the removal of articles and documents, placed on the internet by the organisation "Fathers For Justice", relating to the mother, KATY ASHWORTH, the father BEN ALCOTT and the child CHARLIE ALCOTT, the court having found that these articles intended to cause professional embarrassment to the mother and to ruin her reputation.

(ii) Approved Judgment of Arbuthnot J 21/2/2023 - Para.34

> 1. UPON this court approving and positively supporting the removal of articles and documents placed on the internet by the organisation "Fathers For Justice" relating to the mother Katy Ashworth, the father Ben Alcott and the child Charlie Alcott, the court having found that these articles [were] intended to cause professional embarrassment to the mother and damage her reputation.

(iii) Order for 27/6/2022 Sealed 13/7/2022

> 1. **UPON** this court approving and supporting an invitation being issued to the organisation 'Fathers For Justice' for the removal of articles and documents, placed on the internet by them, relating to the mother, KATY ASHWORTH, the father BEN ALCOTT and the child CHARLIE ALCOTT, the court having found that these articles intended to cause professional embarrassment to the mother and to damage her reputation.

36. This sort of confusion only confirms the necessity for having the Transcript for 27 June 2022. The serious irregularity of refusal of this Transcript both prior to the Hearing on 2/2/2023 and on renewed oral application at the Hearing not only denied the Intervenors a fair hearing, but it also meant the Judge herself was not fully furnished with the facts, as none of the Parties who were present, at both Hearings, could agree what had actually happened. The Transcript was also important for purposes of verifying, true or not, the Father's Skeleton 9/2/2023, supported by Statement of Truth, which provided evidence about what occurred on 27 June 2022. The importance of having the other Transcript for the PTR 8 February 2023 is covered in the Grounds **61–63** and is essential for verifying, true or not, the Father's Skeleton 9/2/2023 section providing evidence about the PTR and the Judge's alleged misconduct on that occasion which if true meant that it was impossible for the Appellants to have a fair hearing on 20 February 2023 and recusal was inevitable.

37. <u>Clause 7 of the Order</u> Clause 7 is:-

> **7.** The Intervenors' application in the course of the Hearing on 20 February 2023 for leave to make an immediate application for recusal of Mrs Justice Arbuthnot as regards the intervenor proceedings, is refused.

The Grounds **64–67** stand as their own Skeleton.

38. <u>Clause 8 of the Order</u> Clause 8 is:-

> **8.** The Intervenors' application to be provided with a copy of Ms Janet Broadley's Response to the Complaints by Ms Nadine Taylor, 2nd Intervenor, dated 30 August 2022 and 21 October 2022 about alleged professional misconduct of the 1st Respondent's Solicitor Ms Janet Broadley in the context of Case ZC17P00039, is refused.

To the Grounds **68-69** we add the following argument. First we state, albeit trite law, that any judge in the High Court or County Court or Family Court can certainly remove a solicitor or counsel for cause from acting in proceedings before the judge on grounds of misconduct related to or arising in those proceedings. In the High Court there is also the general supervisory jurisdiction of that Court over solicitors as Officers of the Supreme Court (original meaning). We submit that a judge seized of proceedings cannot abnegate responsibility to investigate and take appropriate action over misconduct or alleged misconduct by an instructed solicitor in the proceedings. Any court has power and duty to ensure proceedings are fairly and justly conducted in it.

39. The Bundle for the Hearing on the 20/21 February 2023, was prepared by the Respondent Mother's Solicitor Janet Broadley. Contained within the Bundle, were the two Statement made by Nadine Taylor, sent to the Judge on 30 August 2022 and 21 October 2022. The Statements set out a very detailed and serious complaint about the Respondent Mother's Solicitor, Janet Broadley. Neither the Court nor the Judge had ever acknowledged receipt of the Statements, until they appeared in the Bundle. The Appellants had set out in their 18/11/2022 C2 Application several complaints relating directly to Janet Broadley in the context of case ZC17P00039. These were expanded upon in their Skeleton 30/1/2023. All those documents were before the Court in the Bundle, and it was clearly considered important enough an issue for the Judge to accept inclusion of Miss Taylor's Statements in the Bundle.

40. What was not included in the Bundle though, was the Statement <u>the Court itself</u> asked Janet Broadley to write, in response to Miss Taylor's. Although never acknowledged or shared with the Appellants, according to the Father Mr Alcott Janet Broadley was ordered by the Court to file that Statement on 19 September 2022. Ms Broadley filed the Statement late, and only served it on the parties named within the *Children Act* Proceedings; it was not served on Miss Taylor, despite it being a direct response to her Statements. Thus the Court had already accepted jurisdiction to investigate.

41. Janet Broadley is also the subject of a formal investigation by the SRA, after Miss Taylor providing them with copies of her two Statements and the Judge was fully aware of this and updated on the fact at the Hearing on 21 February 2023. When Dr P raised (on 21/2/2023) the matter of Janet Broadley's misconduct with the Judge, and asked for a copy of her 19 September 2022 Statement, she replied that the matter of Janet Broadley was not for her, or her Court and Miss Taylor should seek redress through the SRA. That was of course an error of law: the Court did have jurisdiction and the *Children Act 1989* proceedings in which the misconduct arose were before it.

42. On 21 February 2023 in trying to justify the existence of Ms Broadley's Statement at all the Judge appeared confused as to why it was even ordered (even though she had ordered it), if as she claimed, it had no bearing on the *Children Act* Proceedings or the Appellants' Application. Counsel for the Guardian had to step in and remind the Judge that it was in fact the Guardian who had requested the Court order a Statement from Ms Broadley, following two urgently listed Hearings on 7 & 13 September 2022, because of a social media campaign by the Appellants directed at Ms Broadley and her misconduct. Details of the actual misconduct are set out in the Intervenors' Application 18/11/2022 and in their Skeleton below 30/1/2023, both to be in the Core Bundle. From those details it is manifest that the Judge was wrong in her view that the actions of Ms Broadley had nothing to do with her or her Court, or the *Children Act* Proceedings she was overseeing. She had plainly thought the opposite earlier on and had properly ordered Ms Broadley to file her Statement.

43. The Learned Judge offered no discernible reason, or any legal argument as to why she refused to provide Miss Taylor/the Intervenors with a copy of Ms Broadley's Statement other than her blanket refusal that it had nothing to do with their Application or the *Children Act* Proceedings. That reason was plainly wrong. As the Intervenor individuals manifestly had *locus standi* and legal right to complain, and the Court had in fact already accepted jurisdiction, then elementary fairness and justice required that they be given a copy of the Response to their Complaints, regardless of non-party/intervenor status. It is submitted further that as there was an obvious direct impact on the Intervenors' Article 6 and Article 8 ECHR rights and possibly rights at Common law to fair and due process, then they had a legal right to the disclosure of Ms Broadley's Response Statement.

44. <u>Clause 9 of the Order</u> Clause 9 is:-

> **9.** The Intervenors' and their advocate's (in his personal capacity as also affected) application that the standard order preamble rubric forbidding disclosure in public of the names of the child, parties and advocates named in the order without leave of the court be not included (save in regard to the name of the child) on the instant Order, is refused.

The Grounds **70–73** stand as their own Skeleton.

45. <u>Clause 10 of the Order</u> Clause 10 is:-

> **10.** The Intervenors' and their advocate's (in his personal capacity) application that they do have Leave (insofar as such Leave be required) to publicly report forthwith on the whole of the instant Intervenor Proceedings on 20 & 21 February 2023 including submissions and Judgment with no anonymisation save that of the name of the 2nd Respondent child, is refused.

The Ground **74** stands as its own Skeleton

46. <u>Clause 11 of the Order</u> Clause 11 is:-

> **11.** The Intervenors' application for Leave to obtain a Transcript of the whole of these intervenor Proceedings for the first day of hearing on 20 February 2023, is refused.

To the Grounds **75–77** we add the following in supporting argument. Ground **77** stated that, *"The Transcript was and is needed by the Appellants for these Appeal proceedings"*. There are two aspects to this need. Firstly simply as an aid to we litigants in person in preparing the Notice of Appeal, Grounds, Skeleton and future submissions oral or written depending on whether Leave to Appeal is granted or not. As parties for the day on their own Application, albeit not full Parties in the main *Children Act 1989* child welfare proceedings, there is no ground in law for the refusal (certainly none has been given by the Judge) and arguably the Appellants have a legal right to the Transcript of the Proceedings on their own Application 18/11/2022. We have done the best we can thus far but with some prejudice to the ability to put our best case forward for the Court of Appeal and for LTA to be granted. That is unfair.

47. Secondly, a number of the Grounds of Appeal and some points in this Skeleton need examination of the Transcript 20/2/2023 to verify whether those Grounds or points are made out, because they refer, for example, to alleged misrepresentation by the Judge in her Judgment of submissions and arguments made on 20/2/2023 or, in the case of the Open Justice applications, they refer to the nature of the proceedings at various stages as actually conducted on 20/2/2023 as not requiring privacy and exclusion of the public.

48. Here is a list, possibly not exhaustive, of Grounds &c where there is a need for the Court of Appeal to have a full Transcript of the Hearing on 20 February 2023, with in each case brief reasons.

(1) Ground **5.** Did the Judge wrongly conflate the 1st and 2nd OJ applications?

(2) Ground **6.** Did the Judge misrepresent some of Dr P's OJ submissions?

(3) Ground **10.** Need to verify if there was any need to require secrecy for the hearing of the 2nd OJ application.

(4) Ground **13.** Ditto.

(5) Ground **23.** Need to verify that nothing in the proceedings on 20/2/2023 required conducting the substantive Intervenors' case in secret.

(6) Ground **51.** Need to verify Judge's incompetence or not in wrongly assessing certain of Dr P's submissions.

(7) Ground **55.** Alleged misrepresentation by Judge of Dr P's submission and Intervenors' case.

(8) Ground **62.** Need to verify Judge's own comments on serious accusations made against her in Father's Skeleton 9/2/2023.

(9) Ground **64.** Misrepresentation by Judge as to what occurred when Dr P sought to make a recusal application.

(10) Ground **66.** Ditto.

(11) Ground **74.** Need to verify if any reason why should not publicly report on the 20/2/2023 proceedings.

(12) Skeleton **§§34,35.** Judge's inability during Hearing to remember truth of what took place at 27/6/2022 hearing and her own Recital.

49. It is therefore submitted that this is one of those cases where it is necessary and will assist the Court of Appeal to have produced and filed a full Transcript of Hearing.

50. <u>Clause 12 of the Order</u> Clause 12 is:-

> **12**. The original requests by Form EX107 by the Intervenors for 5 Transcripts of hearings respectively on 17/2/2022, 27/6/2022, 7/9/2022, 13/9/2022, & 22/11/2022 which were effectively renewed by a Submission to the Court dated 17 February 2023 (and which need Leave of the Court to procede to the Transcribers as the Intervenors were not and are not Parties in Case ZC17P00039), are refused.

To the Grounds **78–81** we add the following in supporting argument. Essentially as with Clause 6 of the Order, the Appellants had need of the Transcripts in order to make their case on their Intervenors' Application 18/11/2022. On 28 November 2022 the Appellants made five (5) EX107 Applications for Transcripts of 17 February 2022, 27 June 2022, 07 September 2022, 13 September 2022, and 22 November 2022, to be used in furtherance of their initial 18/11/2022 Application.

51. Miss Taylor requested the Transcript of her attendance and oral evidence, only, a period of approximately 45 minutes, at the Fact Finding on 17 February 2022. Miss Taylor was, by default a party to her own cross examination, the section of proceedings by way of her own written statement, attendance as a Witness and it being her oral evidence.

52. Matthew O'Connor and Fathers For Justice Ltd sought the Transcript of the Hearing on 27 June 2022, which was the Hearing at which the Mother made an Oral Application to remove articles from the F4J website and social media accounts and at which the Learned Judge recited the finding reproduced *supra* at **Para.35(iii).**

53. Matthew O'Connor and Fathers For Justice requested the Transcript of the Hearing on 7 September 2022. This Hearing was listed at short notice to specifically discuss the matter of the Appellants, without their knowledge, and at which the Order

of 27 June 2022 was considered again, agreed and sent out to them. Further, there was a request for the Transcript of the Hearing on the 13 September 2022, which was again listed without the Appellants' knowledge, and where the Court discussed the Intervenors' adverse response to the Order and at which a renewed version of the Order was sent out to them. Given the conflicting accounts, and confusion displayed by the Learned Judge during the Hearing on 20 February 2023, and indeed the contradictory accounts by the four parties, including the Learned Judge, who actually did attend the Hearings on 27 June, 7 September and 13 September 2022, along with the three different versions of the 27 June 2022 Order now presented to the Court within these proceedings alone, the Appellants argue the latter two Transcripts are significantly more important than they were back in November 2022.

54. Finally, Miss Taylor made an Application for the Transcript of the Hearing on the 22 November 2022 where the Appellants' C2 Application 18/11/2022 was discussed at length, again in their absence, and from which Orders were drawn up setting a timetable for the filings of statements and their Application to be heard.

55. On 17 February 2023 the Appellants filed a further request for the now six (6) Transcripts, the list now including the Transcript for the PTR of 8 February 2023, and this was accompanied by a detailed Written Submission in which they said the deliberate delay in dealing with their request for Transcripts, severely impacted on their ability to file a Skeleton Argument, or indeed to argue their case at all.

56. Given the serious disclosures contained in the Father's Response 9/2/2023 to the Appellants' Skeleton, the Learned Judge put no weight on the fact that the Father, who was present at the 17 February 2022, 27 June 2022, 7 September 2022, 13 September 2022, 22 November 2022, and 8 February 2023 Hearings, disputed the Judge's account of what happened at these Hearings and in particular made very serious allegations about the Learned Judge's procedural conduct thus denying the Appellants the right to a fair hearing or their right to be fully informed about the decisions made in respect of them and their Application, and not just on the point of the Judgment and Findings of 13 April 2022.

57. The Judge was not open to any view other than her own, even when that was clearly at odds with what she had recorded in Orders.

58. The Intervenors' Applications for Transcripts did not impinge on the *Children Act* Proceedings as the Learned Judge would have had, as is always the case, the provision to redact from the requested transcripts any *Children Act* matters that related specifically to the child, or any information from a Transcript that was not relevant to the area of the Intervenors' Application.

59. The persistent refusal of the Judge to accede to Transcript requests (not all attempts are set out above) and even refusing the Father Mr Alcott Transcript overlapping Transcript requests albeit he was a full Party does cry out for explanation, and there is strong suspicion that it was done deliberately to damage the prospects of success on the Intervention case and to weaken the recusal case of the Intervenors and also the similar recusal case of the Father for which of course he had his own evidence and reasons and need for Transcripts, but for which there was some overlap with the Intervenors' case.

LEAVE TO APPEAL **60.** The Appellants gave reasons why it was particularly appropriate in their submission to grant Leave to Appeal in the public interest, but would just like to emphasise here again the importance of the Open Justice and freedom of publication issues. Further, if the *ultra vires* arguments in relation to the notorious Family Proceedings Rules 2010 Rule 27.10 are valid then that Rule should be quashed by the Court of Appeal, which gives an opportunity to then test the Open Court system that applies in Scotland for private law child welfare cases in England & Wales. We tried to test the *ultra vires* argument to destruction but as yet have found no error or missed legislative provision and therefore commend it to the Court.

DATED 16 MARCH 2023 AND SIGNED:-

1ST APPELLANT, NADINE TAYLOR

2ND APPELLANT, MATTHEW O'CONNOR

3RD APPELLANT, FATHERS FOR JUSTICE LTD