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 3rd Appellant/Proposed Intervenor
[Co.Regn 05954235]

AND

BEN JONAS ALCOTT 1st Respondent/Applicant

AND

KATY ELIZABETH ASHWORTH 2nd Respondent/1st Respondent

AND

CHARLIE DANGER ALCOTT 3rd Respondent/2nd Respondent
[Through his Guardian Eileen Carr]

GROUNDS OF APPEAL

INTRODUCTION **1.** To assist the Court of Appeal the Appellants briefly explain first how they became involved in the High Court FD *Children Act 1989* Case *Alcott v. Ashworth & Alcott* ZC17P00039, about child arrangements for the minor child of the Applicant Father Mr Alcott and 1st Respondent Mother Ms Ashworth, the child being 2nd Respondent through his Guardian. The Appellants were not (and are not) Parties in this case but sought to intervene by their Application in Form C2 dated 18 November 2022 of which a copy will be provided in the Core Bundle. The Application was triggered by the decision of Arbuthnot J by Order dated 27 June 2022 to invite, but not order, the 3rd Appellant Fathers for Justice Ltd ["F4J"], of which the 2nd Appellant Matthew O'Connor is a long-standing Director and the 1st Appellant had been in the past Campaign Director of F4J and had also been a witness for Mr Alcott in the *Children Act* proceedings in late 2021/early 2022, to remove from the Internet certain articles and documents alleged to be placed on the Internet by F4J. The Order of 27 June 2022 will be provided in the Core Bundle.

2. A recital in the 27/6/2022 Order stated this:-

> **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 [were] intended to cause professional embarrassment to the mother and to damage her reputation.

— and the judicial invitation to remove followed. After some delay the Appellants duly received the invitation with a copy of this Order and an attached Schedule. It was not clear to them when the findings referred to had been made or what was their precise content. They were aware that the 1st Respondent Mother had applied to the Court for leave to publish findings in the proceedings. They denied libelling Ms Ashworth or committing the tort of malicious falsehood and were concerned that they were going to be libelled themselves by a judicial sleight of hand enabling Ms Ashworth by leave of the Court and protected by judicial privilege to publish material that, outside the privilege of legal proceedings, would be seriously defamatory of them. They objected to the injustice of having had no notice of these alleged findings or any opportunity to be heard and contest them. Accordingly they issued their Application of 18/11/2022 seeking Leave to Intervene and to apply for appropriate Remedies. This came up for hearing before Arbuthnot J on 20 & 21 February 2023 and Leave to Intervene was refused together with various connected ancillary orders, for which Leave to Appeal is now sought from the Court of Appeal. The Grounds of Appeal follow, starting with a precautionary Ground to establish that the Appellants do have *locus standi* to actually appeal to the Court of Appeal (subject to Leave) as they were not Parties and did not in the event achieve Intervenor status in the Court below.

<u>GROUNDS OF APPEAL</u> **3. *<u>Locus Standi to Appeal</u>*** This follows from the Court of Appeal authority *Re W (Minor)*, [2016] EWCA Civ.1140, [2017] 1WLR 2415 CA where at §§39,40 the Court accepted counsel's submission that, *"where a witness applies to be made a party in order to make submissions in relation to specific findings in a judgment, but that application is refused, the witness would then have been a party to that specific application (as applicant) and would have a route to appeal against the refusal"*. This applies *mutatis mutandis* where a proposed intervenor was not a witness, as is clear from the whole discussion in *Re W* at §§31–43.

4. <u>Clause 2 of the Order</u> 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.

For brevity this second level Open Court application will be called the 1st Open Justice application or 1st OJ application. It asked that the 2nd OJ application, namely for the substantive Intervenor Proceedings to be heard in Open Court, be itself heard in Open Court. The Judgment §§18–30 rules on these 2 OJ applications. Again for brevity the Intervenors' advocate (by leave of the Court) Dr Michael J.Pelling will simply be referred to as "Dr P". Grounds of Appeal now follow in respect of Order Clause 2.

5. The Learned Judge wrongly conflated the 1st and 2nd OJ applications (Judgment §§19,25,26,27,28).

6. The Learned Judge misrepresented Dr P's submissions on the 1st OJ application and wrongly found that he had given no reason for acceding to the 1st OJ application (Judgment §§19,27).

7. The Learned Judge erred in law and fact in holding, as a reason for refusing the 1st OJ application, that the 2nd OJ application would involve dealing with the child's welfare or would concern the child's welfare (Judgment §§19,25,26,27,28).

8. The Learned Judge failed to appreciate the important difference in the context of Open Justice, publicity, and privacy, in *Children Act 1989* proceedings, between a description of the nature of a dispute, and direct dealing with the substance of the child's welfare & upbringing & actual evidence concerning that. She wrongly conflated the latter with harmless *"mentioning"* of the welfare proceedings which is all that would be necessary on the 2nd OJ application (Judgment §26).

9. The Learned Judge had no reason not to accept Dr P's submission on the 1st OJ application that the 2nd OJ application would only canvass the nature of the relevant legal issues, which were of some legal interest, and would not go into substantive matters of the child's welfare and upbringing, and she erred in the exercise of judicial discretion to hear the 2nd OJ application in Open Court by totally disregarding and giving no weight to the fundamental principle of Open Justice: in the result her balancing exercise was fundamentally flawed so as to amount to an error of law.

10. The Transcript of the Proceedings on 20 February 2023 covering the 2nd OJ application will prove that Dr P's submissions, and submissions in response and the Judge's decision thereon, did not say anything that would have justified conducting the 2nd OJ application in secret.

11. As evidence of the Learned Judge's unbalanced, even obsessive, approach to privacy it should be noted (Judgment §63 and Order Clause 11) that she has not even allowed the Intervenors to obtain a Transcript of the Hearing on 20 February 2023, or any part of it, in which they were parties on all their specific applications.

12. Bearing in mind the fundamental importance of Open Justice, but also the competing weight given to privacy in child welfare cases, then given the nature of the 2nd OJ application the Learned Judge ought at least to have acceded to the 1st OJ application while reserving the right to either stop Dr P if he began to transgress unacceptably against privacy or to adjourn back into chambers.

13. The Learned Judge failed to take into account (which Dr P's submissions on the 2nd OJ application would not have gone beyond and did not go beyond) what can be lawfully published about *Children Act 1989* proceedings without contempt of court within s.12(1) *Administration of Justice Act 1960* if the proceedings are in private: see the useful summary in *X v. Dempster* [1999] 1FLR 894 FD.

14. There was no Reporting Restrictions Order in place, or pending application for one, relating to any proceedings in Case ZC17P00039. In particular there was no such Order concerning publication of the key Order dated 27 June 2022 which anyway was in the public domain, nor any such Order or pending application to remove the articles and documents in the public domain referred to in the 27 June 2022 Order.

15. While the Appellants mainly rely on Common law rights and principles, the Learned Judge also violated Article 6(1) ECHR as enacted into English law by the *Human Rights Act 1998* since she did not hold the 2nd OJ application proceedings in public or pronounce judgment thereon publicly and did not address the provisions of Article 6(1): in particular she did not explain or justify why, given the nature of the 2nd OJ application and the circumstances of the Intervenor Proceedings, *"the interests of juveniles or the protection of the private life of the parties **so required**"* the press and public to be excluded from all or part of the trial of the 2nd OJ application and thus to permit refusal of the 1st OJ application.

16. The Rule of Court, viz. *Family Procedure Rules 2010* r.27.10, which (Judgment §23) sets a default position of family proceedings being heard in private except where the Court directs otherwise, is *ultra vires* the Common law and the Learned Judge acted unlawfully in holding the 1st OJ application proceedings in chambers in private.

17. The *Human Rights Act 1998* cannot be used to nullify the preceding Ground because the Article 6(1) provisions which permit inroad into public trial are permissive not mandatory –*"but the press and public **may** be excluded from all or part of the trial.."* – and secondly Article 53 ECHR & s.11 *Human Rights Act 1998* (both headed *"**Safeguard for existing human rights"***) prevent limitation or derogation from the Common law human right and fundamental freedom of Open Justice.

NOTE: See Grounds **31–34** for errors of law in Judgment §29 re the *ultra vires* point.

18. **<u>Clause 3 of the Order</u>** Clause 3 is:-

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

The scheme of Dr P's submissions on the 2nd OJ application was to first accept FPR r.27.10 as a valid rule and argue for discretion to be exercised under r.27.10(1)(b) to hear the Intervenor Proceedings in Open Court, and secondly to argue that in any

event r.27.10 was *ultra vires* the Common law, so Open Court was mandatory. Grounds of Appeal now follow in respect of Order Clause 3, following the same order.

19. The Learned Judge had no regard to the need and importance, when deciding whether or not to sit in chambers, of acting *"without Detriment to the Public Advantage arising from the Discussion of Questions in open Court"* [s.XI, *Master in Chancery Abolition Act 1852*, 15 & 16 Vict.c.80, and see also s.XXVII].

20. It was this Victorian Act of 1852 which first permitted *"Applications as to the Guardianship and Maintenance of Infants"* (s.XXVI) to be heard in chambers and Rules of Court (or the Victorian equivalent thereof) to be made authorising this, but the Open Court safeguard of ss.XI,XXVII remained and has persisted ever since in relation to proceedings about children including under the modern *Children Act 1989*.

21. There were a number of legal issues of interest to be canvassed in these rare and unusual Intervenor Proceedings none of which (save possibly one: see next Ground) involved direct dealing with the substance of the child's welfare & upbringing & actual evidence concerning that: the right or not of the Intervenors to intervene and apply for relief; the recusal of the Judge; provision of transcripts and disclosure to non-parties to enable them to make their intervention case; whether a High Court FD or Family Court judge in *Children Act* proceedings can switch to effectively being a libel/malicious falsehood judge within those proceedings in order to protect a parent's reputation including professional reputation when *prima facie* these are matters for the County Court or High Court King's Bench Division; the remarkable policy of a High Court Judge in issuing repeated invitations to an organisation to remove offensive publications rather than making actual orders to remove; the power or duty of the Court to take action over alleged professional misconduct of the 2nd Respondent's solicitor who had improperly used material she had garnered from the 2nd Appellant and his son (child of the first 2 Appellants) re their own private family matter, in the *Alcott/ Ashworth* proceedings; whether on the applicable case law such as *Re W* the Intervenors should have any, and if so what, remedy for adverse findings against them on which they had not been heard and which might be published by Order of the Court; possible contempt proceedings being taken against the Intervenors in regard to their publications and the liberty of the subject being at stake.

22. The one issue that could involve actual evidence or judicial findings in the main child welfare proceedings (ss.8,10 *Children Act 1989*) being aired in the Intervenor Proceedings was to ascertain and consider the actual findings of the Court about the articles and documents in the public domain on the Internet which *"were intended to cause professional embarrassment to the mother and to damage her reputation"*,

which in the 27 June 2022 Order Recital were said to have been made by the Court. Plainly, given the description of these findings and the public nature of the articles there was no reason to suppose these would directly concern the child's welfare or upbringing except in the most peripheral way: they were matters of libel/ malicious falsehood concerning the Intervenors and mother, not the child — there would be no interests of the minor child involved requiring a cloak of privacy to protect them.

23. The Transcript of the Proceedings on 20 February 2023 covering the Intervenors' substantive Application will prove that the submissions and the Judge's decision did not say anything that would have justified conducting the Proceedings in secret. There was no interest of the minor child requiring protection by a cloak of privacy.

24. This is also apparent from Judgment §39 where the Learned Judge locates the finding referred to in the Order 27 June 2022 as "finding 8(iii)" in her judgment of 13 April 2022, but the content of 8(iii) manifestly discloses no interest of the minor child requiring protection by imposed privacy.

25. It is correct that the Extract from her Judgment 13 April 2022, provided to the Intervenors at no notice on 20 February 2023, included other judgment paragraphs and findings which the Judge asserted covered all occasions where the Intervenors are mentioned, but their content also disclose no interest of the minor child requiring protection by imposed privacy of the hearing: however (as the Transcript will prove) the Intervenors' advocate bearing in mind the need to obtain Leave to Intervene before going into the merits of the Application and arguing its substance, concentrated on the 27 June 2022 Order and the finding 8(iii) and even referred to *Re W* Paras.39,40 where the Court of Appeal accepted a submission that amounted to holding that if the court of first instance invited submissions on the draft judgment or (*mutatis mutandis*) on whatever the proposed intervenors objected to, then *ipso facto* they would become actual intervenors or parties (also see Paras.37,38) [see here also Judgment §§31–34, but §33 is a misrepresentation since the Judge had actually *asked* Dr P what effect the Intervenors' Application could have on the welfare proceedings]. The Learned Judge therefore had no excuse for not holding the Intervenor Proceedings in Open Court up to the point where Leave to Intervene was determined.

26. The Learned Judge was plainly wrong in holding at Judgment §§25,26,27,28 that the Intervenor Proceedings could not be severed from the main *Children Act* child welfare proceedings so as to allow the former to be heard in Open Court.

27. The Learned Judge also stated falsely at Judgment §19 that she had been given no particular reason, and at Judgment §27 no reason, by the Intervenors' advocate for the Intervenor Proceedings to be heard in Open Court. The Transcript will prove.

28. The Learned Judge at Judgment §28 erred in law by wrongly fettering her discretion under Rule 27.10 to hear the Intervenor Proceedings in Open Court.

29. The Learned Judge erred in law in her interpretation of Rule 27.10 at Judgment §§24,27 by rejecting the interpretation of Holman J in *Luckwell v. Limata* [2014] 2FLR 168, [2014] EWHC 502 (Fam), and accepting the interpretation of Mostyn J (at the time) in *DL v. SL* [2016] 2FLR 552 FD, [2015] EWHC 2621 (Fam).

30. For the Ground that Rule 27.10 is *ultra vires* the Common law and so the Learned Judge acted unlawfully in holding the Intervenor Proceedings in chambers we repeat and rely upon Grounds **15,16** *supra* and the following in response to the Judgment.

31. The Learned Judge erred in law in holding that the fact that ss.75,76(3) *Courts Act 2003* (c.39) permit Family Procedure Rules to modify the rules of evidence as they apply to family proceedings provides an answer to the *ultra vires* contention, because:

(a) Rule 27.10 in terms concerns the entire hearing, not just the part of the hearing where evidence is being taken;

(b) As a matter of construction, the term "rules of evidence " is not apt to and does not include any rule about whether or not the evidence is taken in open court or in chambers or *in camera*;

(c) The general words of s.76(3) *Courts Act 2003* cannot override the Common law rule or principle as part of Open Justice that evidence is heard in Open Court;

(d) The *Civil Procedure Act 1997* (c.12) states, s.1(2) & Sch.1 Para.4: *"4. Civil Procedure Rules may modify the rules of evidence as they apply to proceedings in any court within the scope of the rules".* [Draw the implication of this!]

(e) In any event even if it were a valid observation, the Judge's point here is irrelevant because no evidence was taken or was expected to be taken in the Intervenor Proceedings.

32. The Learned Judge erred in law in holding that the fact that s.76(2A) *Court Act 2003* permits Family Procedure Rules to, for 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 in private, provides any sort of answer to the *ultra vires* contention.

33. Neither the Learned Judge nor counsel were able to provide any statutory provision or provisions capable of overriding the Common law to permit Rule 27.10 to be made: under the Principle of Legality (as it has come to be known) general or ambiguous words in statute are insufficient to interfere with fundamental Common law rights — see for example Lord Hoffmann in *R v. Sec.State Home Department ex parte Simms & Anor* [2000] 2AC 115, [1999] 3WLR 328 HL at 341E.

34. So far as the Learned Judge relied upon Mr Hames KC's submission that the Common law itself had changed since the days of *Scott v. Scott*, Judgment §22, that

was an error of law. Mr Hames had correctly emphasised that the Common law is judge-made law but when Dr P in reply asked him to produce the case authority where the alleged change in the Common law occurred he could not cite any.

35. **Clause 4 of the Order** 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 first Ground of Appeal against the primary decision to refuse Leave to Intervene, Order Clause 4, is that the Learned Judge's assurance at Judgment §38 that no findings re the Intervenors were made at the hearing on 27 June 2022 is false as a matter of record.

36. The Learned Judge unfairly refused the Intervenors' repeated applications for a full Transcript of the hearing 27 June 2022 made (i) in their Form C2 Application 18/11/2022; (ii) by their standard Form EX107 application 28/11/2022; (iii) by their supplementary submission on Transcripts 17/2/2023; and (iv) renewed by Dr P orally on 20/2/2023 with request for adjournment part-heard [Order Clause 6].

37. The Applicant father did attend the 27/6/2022 hearing remotely and in his Skeleton 9/2/2023 supported by a Statement of Truth, in response to the Intervenors' Skeleton below 30/1/2023, confirms that Arbuthnot J did make findings against the Intervenors on 27 June 2022. The father (a Party) was also refused the Transcript.

38. The Learned Judge contradicts herself in her own Judgment by holding at Judgment §39 that the relevant findings referred to in the recital to the 27/6/2022 Order are to be found in the Scott Schedule of April 2022 findings at Finding 8(iii) March 2018, admitting at Judgment §49 that the findings were described by *"they [F4J & Mr O'Connor] intended to cause the mother professional embarrassment or damage to her career"* and *"To the extent that I made findings at all against F4J and Mr O'Connor these were that they were campaigning in their usual way"*, and yet denying at Judgment §38 that any findings were made against the Intervenors on 27 June 2022 — for, the Finding at 8(iii) in the 3rd (judge's) column of the Schedule actually states in full: *"Although the father brought his argument with the mother to the attention of F4J and provided her personal information to them, they then went further for their own ends. He cannot have been naïve enough not to suspect that they might do that"*. That is very different from the recital in the Order 27/6/2022.

39. The Learned Judge misrepresents the Intervenors' case at Judgment §40 by stating or implying that the Intervenors in their written arguments only relied on civil cases, which is false as a matter of record since extensive express reliance is placed on *Re W (Minor)* [2017] 1WLR 2415, [2017] 1FLR 1629 CA in their Application

18/11/2022 and in their Skeleton below 30/1/2023. They did also rely on civil cases e.g. *R v.County Court at Manchester ex p.MRH Solicitors* [2015] EWHC 1795 (Admin).

40. The Learned Judge erred in law at Judgment §§40,41 by considering the only relevant authorities were Family law ones and in particular *Re W* and *Re S (Care: Residence: Intervenor* [1997] 1FLR 497 CA. Subject matter may vary greatly but the legal principles are the same in civil and family cases. The law isn't different in the FD.

41. The Learned Judge applied the wrong test for granting leave to intervene at Judgment §45, focusing only on there being serious or significant findings adverse to a proposed intervenor which would have serious consequences for him or her.

42. The correct test as appears from *Re W* and other cases is rather that the findings should engage Article 8 or Article 6 Convention rights or Common law rights, to procedural fairness for the aggrieved party: see *Re W* Paras.1,15,57,73,74,88,89,97, 103 and (Common law) *Ex parte MRH Solicitors* at Paras.34,35 (cases cited).

43. The Learned Judge erred in law by setting too high a standard of seriousness as justifying refusal of Leave to Intervene. She appears to have fallen into the error of assuming that intervention is only appropriate if there is a degree of seriousness, significance, and adverse consequences, of the very high level that occurred in the cases *Re W* and *Re S* on which she founded her judgment.

44. The Learned Judge was plainly wrong in implicitly holding that her own admitted findings that *"F4J & Mr O'Connor intended to cause the mother professional embarrassment or damage to her career"* and *"To the extent that I made findings at all against F4J and Mr O'Connor these were that they were campaigning in their usual way"* and *"these articles and documents placed on the Internet by the organisation Fathers for Justice were intended to cause professional embarrassment to the mother and to damage her reputation"* did not engage Article 8, Article 6, & Common law rights to procedural fairness in a situation where these could be published openly by Order of the same Judge if she granted the Respondent mother's pending application for this. The 1st Appellant is included here as well as 2nd Appellant Mr O'Connor & 3rd Appellant F4J Ltd because she was F4J Ltd Campaign Director at a material time.

45. These findings on their face are plainly sufficient to engage Article 8, Article 6, and the Common law, damning as they do F4J Ltd and those who ran it as an organisation which as its usual way of campaigning intentionally defames mothers and intentionally seeks to cause them professional embarrassment and career damage. That publication under authority of the Court of such damning findings would likely damage the Appellants in their campaigning aims and purposes and also in their own

advertised professional capacities as providing fee paid McKenzie friend and legal advice services to parents of any sex involved in disputes and legal proceedings over their children (F4J Help, Advice and Support), needs and needed no further argument.

46. The Learned Judge's conclusion at Judgment §48 is unsustainable and false in all 3 sentences. If not irrational it is plainly wrong and not supported by the evidence. The same applies to other Judgment Paragraphs §§49 & 55 where in order to justify refusing Leave to Intervene the Learned Judge flies in the face of reality and pretends that there has been no damage to and no criticism of the Intervenors, or infringement of their Article 8 or Article 6 rights, and impliedly Common law rights either.

47. The Judgment at §47 completely misrepresents the position of the Intervenors on remedies and anonymisation. In their C2 Application 18/11/2022 they set out exactly what they sought in their extended Form Section 6 Statement, namely *either* all Findings made by Arbuthnot J relating directly or indirectly to the Intervenors be Set Aside or Struck Out in their entirety, *or* that the Court Sets Aside all such Findings and re-holds or holds anew the Fact-Finding Hearing in relation to the allegations made by the Respondent Mother against the Intervenors or linked to them. This was not departed from at the hearing on 20 February 2023.

48. As to anonymisation, this was rejected in their Form C2 Section 6 Statement at Para.49: *"The Applicants do not accept any form of redaction to the existing Findings, as given the public profiles of the Applicants and their distinctive rôles within the wide premise of Family Law and Fathers' Rights, means that even a redacted document would easily identify the Applicants"*. This was also maintained on 20 February 2023.

49. The Learned Judge's conclusion at Judgment §49 that because the Order of 27 June 2022 complained of by Mr O'Connor had been "tweeted" by him (she might have added also, "published on the F4J website") then, *"If any 'damage' had been done to F4J's reputation it can be entirely imputed to his behaviour in tweeting the order"*, is totally misconceived and wrong and a nice case of victim blaming. Mr O'Connor and F4J were not of course publishing the finding in the Order recital as true but rather in the public interest exposing the injustice of the High Court FD and Arbuthnot J making such a finding (impliedly false) without giving the Intervenors any notice or opportunity to be heard, an injustice likely to be compounded if on the mother's application the finding was going to be published by her under authority of the Court.

50. Similarly the Learned Judge's conclusion at Judgment §51 – *"I do not find they will be damaged by a recital in an order which they chose to tweet"* – is wrong.

51. The Learned Judge betrays actual incompetence in her strange claim at Judgment §32 that, *"Dr Pelling remained coy as to why F4J and Mr O'Connor and Miss Taylor needed intervenor status"*. The reason why was crystal clear to anyone who had actually read the Intervenors' C2 Application 18/11/2022 where the C2 Form Section 6 Box to enter Details of Application opens with:

> "This is an Application for Leave to Intervene or to be joined as Parties in the Case and to Apply for Remedies including Setting Aside or Striking Out for the Injustice of various Findings having been made in the case about the 3 Applicants herein, and about the Applicant Father in the case that are related directly or indirectly to the 3 Applicants herein, without giving them any opportunity to be heard and which Findings are erroneous offensive and even libellous save for judicial privilege. The Applicants rely on their rights at Common law and their Convention rights under Articles 6 & 8 of the ECHR as enacted into English law by the Human Rights Act 1998".

– and the 11 page Supplementary Statement annexed to the Form C2 as an extension or continuation of Section 6 enlarged on this at considerable length.

52. The Learned Judge concluded Judgment §32 with the falsehood that: *"Whatever my decision about the intervenor status, I would direct or invite F4J, Mr O'Connor and Miss Taylor to put in written submissions in relation to the publication of the judgment and its anonymization, if they wished to do so".* The resulting Directions Order dated 24 February 2023 permits *only* "representations in writing setting out whether, in the event that the court permits publication, they seek for the judgment [of 13 April 2022] to be redacted" and *not* "in relation to the publication of the judgment".

53. This falsehood was compounded at Judgment §56 where the Learned Judge held, *"F4J, Mr O'Connor and Miss Taylor's rights will be protected by them providing written submissions in relation to the publication or not of the judgment and arguing whether they want to anonymise their involvement with the father, or not"*.

54. In this context in *Re W* at Para.97 the Court of Appeal makes it clear that the court simply not publishing the obnoxious findings does not cure the evil inherent in those findings. This applies *mutatis mutandis* in the circumstances of the instant case. The Intervenors require that the objectionable findings be expunged or reheard.

55. The Learned Judge then further misrepresents the Intervenors' case and their advocate's submissions at Judgment §33 by asserting, *"Dr Pelling in his submissions seemed to be saying that his application for intervenor status was aimed at intervening during the welfare hearing that is to follow. He seemed to say that once the references to F4J, Mr O'Connor and Miss Taylor were removed from the judgment that this might alter the balance of the evidence the father had to face"*. As the Transcript will show there was no such *"aim at intervening in the welfare hearing"* but

only Dr P civilly answering the Judge's own question to him about what effect the Intervenors' Application could have on the welfare proceedings.

56. Similarly at Judgment §46 the Learned Judge attacks a position never taken by the Intervenors: the fact that successful Intervention might have a knock-on effect of improving the father's position in some limited way was never advanced as a reason for granting Leave to Intervene.

57. The Learned Judge's conclusions at Judgment §§52,53 were premature in that the Intervenors were not in a position to advance any case they had concerning the professional misconduct of Ms J.Broadley, mother's solicitor until they had a copy of Ms Broadley's response to the 1st Appellant's complaints — application for which was refused [see Order Clause 8]. The Intervenors do not dispute the relevance of the authority *A County Council v DP, RS, BS (By the Children's Guardian)* [2005] EWHC 1593 (Fam), [2005] 2 FLR 1031 but made no submissions on it in the circumstances and it was unfair of the Judge to prejudge the matter before needed disclosure and then hearing the Intervenors' submissions.

58. So far as the Learned Judge intended her conclusion at §53 as a reason for refusing Leave to Intervene on the main grievance of the Intervenors that was also premature and misconceived because rehearing part of the Fact-Finding Hearing of early 2022 was not the only possible remedy sought if Leave were granted and their Application heard on the merits: in the alternative they sought Striking Out or Setting Aside of the relevant findings with no rehearing or new Fact-Finding Hearing, as fully set out in their C2 Application 18/11/2022. See also Ground **51** *supra*.

59. In conclusion therefore for the above reasons the Learned Judge was plainly wrong to refuse Leave to Intervene in all the circumstances and to not permit the Intervenors' Application to be tried on the merits, thus occasioning significant and irremediable injustice to the Intervenors by a decision not within the reasonable ambit of judicial discretion. As the Intervenors put it in their C2 Section 6 Statement: ***The English judiciary have many privileges but it is submitted that libelling non-Parties and non-witnesses by serious adverse findings without giving them an opportunity to be heard is not one of them*.**

60. **<u>Clause 6 of the Order</u>** 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.

This was plainly necessary if the Intervenors were to be able to properly make their case. The Transcript for 27/6/2022 had already been applied for in writing on 3 previous occasions [see Ground **36** *supra*] and there was good reason to think that new material findings were made at that hearing [Grounds **35–38** *supra*] as corroborated by the father Mr Alcott's own response Skeleton below dated 9 February 2023. The refusal by Order Clause 6 was a serious procedural irregularity and the Intervenors did not have a fair hearing.

61. The refusal of the Transcript for the Pre-Trial Review held 8/2/2023 was also a serious procedural irregularity: (i) the Intervenors were entitled to it as parties on their Application and having been invited as such to attend the PTR; (ii) it was not their fault they could not attend due to a last minute change in the previous fixture; (iii) the Transcript was applied for promptly later in the day on 8/2/2023 by EX107 also copied to the Judge and if she had approved it would have been ready prior to the 20/2/2023 main hearing; and (iv) the father's said response Skeleton supported by a Statement of Truth testified to serious misconduct by the Learned Judge at the PTR whereby she 'descended into the arena', manifested blatant bias, and in the words of Mr Alcott (Skeleton Para.21), *"Arbuthnot J overstepped her remit at the PTR, by using the majority of the time to conduct, in secret, what was effectively a trial run of the forthcoming hearing to ensure she, and both Respondents' Counsel were "on the same page""*. Failure to provide the Transcript was unfair and made the 20/2/2023 hearing unfair as it clearly had important content for the Intervenors.

62. In submission on 20 February 2023 Dr P read out paragraph by paragraph the most serious accusations by Mr Alcott in his Skeleton, at the end of which the Learned Judge responded to the effect that *"if all this is true then that's the end of my career as a judge"*. But only the authentic Transcript could determine the truth and to refuse it and appropriate adjournment meant the Intervenors had no fair hearing of their Application which, we remind, did also contain application for recusal.

63. The Learned Judge gave no reason to refuse provision of the 2 Transcripts other than at Judgment §63 where she said: *"Given my decisions set out above not to give leave for intervenor status I do not allow F4J, Mr O'Connor and Miss Taylor to have the transcripts of any of the hearings"* — which ignores the fact that the Intervenors needed the Transcripts to properly make their case for Leave to Intervene and more.

64. **<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 first Ground of Appeal here is that the Judgment §§58–60 dealing with the recusal matter misrepresents what occurred: again the Transcript for 20/2/2023 is needed to determine the truth. The Transcript will show that it was directly after the refusal of the oral application for the Transcripts for 27/6/2022 and 8/2/2023 [Order Clause 6 *supra*] and adjournment at around 4.00 PM that the Intervenors' advocate, having consulted Mr O'Connor, raised recusal on the grounds that he was not in a position to procede further without them and the Learned Judge was acting unfairly. Time was then taken up with submissions from counsel opposing even the possibility of an Intervenor making a recusal application etc and it was at the end of these submissions at around 4.45 PM that the Judge refused leave to apply for her recusal. The Intervenors had given instructions at the beginning of the day to Dr P that he should first apply for the Open Court matters, then apply for the Transcripts of 27/6/2022 & 8/2/2023, and then if refused those he should procede to recusal because it would be impossible to take the Intervenors' main Application any further without them. Recusal had been included in the Form C2 Application 18/11/2022. Given the judicial encouragement correctly recorded at Judgment §31 Dr P felt constrained not to procede at that stage to the Transcripts issue. Once refused there, recusal followed.

65. Insofar as the Learned Judge accepted counsel Mr Hames KC's submission that an Intervenor non-Party could not apply at all for recusal, even on the part of the proceedings limited to the Intervention, that was an error of law.

66. Insofar as the Learned Judge, at Judgment §61, accuses the application only being made because it was felt that Leave to Intervene would not be granted, that was erroneous judicial speculation and it was made clear to the Judge (the Transcript will show) that with her refusal of the 2 Transcripts and adjournment to obtain them the Intervenors felt they had no choice but to apply through their advocate for immediate recusal for unfairness and inability to prosecute their case any further.

67. Insofar as the attempted application came late in the day that was not the fault of the Intervenors in the circumstances and justice required time to be allowed for an application that the Intervenors were entitled to make. Time had properly been made for the important Open Court applications as a precursor to everything else (including recusal) and as the Judge herself wanted submissions on the relevant case law then it would not have been proper to refuse and possibly might have led to a different decision on the Transcripts application and avoided need for pursuing recusal.

68. **<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.

This was an application made next day 21 February 2023. The Learned Judge's reason for refusal of the application was that there was no reason why the Response to the 1st Appellant's Complaints, which had been filed in the Court, should be disclosed to persons who were neither parties nor intervenors (Leave to Intervene having been by now refused). This is an error of law because the 1st Appellant had been a witness in the s.8 *Children Act 1989* proceedings and as such had been adversely affected, she alleged, by the professional misconduct of the mother's solicitor [C2 Application 18/11/2022 & Intervenors' Skeleton below 30/1/2023]. The misconduct also involved and affected the 2nd Appellant Mr O'Connor and his family: misuse of private information and abuse of client confidentiality/privilege for ulterior motives in ZC17P00039.

69. As the Intervenor individuals manifestly had *locus standi* and legal right to complain, then elementary fairness and justice required that they be given a copy of the Response to their Complaints, regardless of non-party/intervenor status.

70. <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 Rubric as it actually appeared on the Order was in bold and states:-

> **The names of the child, parties, proposed intervenors and advocates of the parties and proposed intervenors named in this Order are not to be disclosed in public without the permission of the Court**

The first Ground of Appeal here is that this Rubric has no legal significance whatever being neither a Reporting Restriction Order, nor an injunction against the Parties & Intervenors, nor an anonymity order under CPR r.39.2(4), nor a civil injunction enforcing the criminal law: see *Gallagher v. Gallagher (No.1)(Reporting Restrictions)* [2022] 1WLR 4370, [2022] EWFC 52 at Para.5(vi) and *Gouriet v. Union of Post Office Workers* [1978] AC 435, [1977] 3 All ER 70 HL.

71. The Learned Judge mistakenly thought such a Rubric was effectively an order preserving the anonymity which she wanted to continue until at least the later proceedings on the mother's pending application for an order allowing publication of her fact-finding judgment of 13 April 2022. She indicated that in the past such rubrics on her Orders had not been put there by her but had appeared administratively when the Orders were drawn up by the Court Associates. Since in the English law system Court orders are made by judges and not by rubber-stamping administrative clerks such rubrics cannot in general have any legal effect whatsoever.

72. The Rubric cannot be construed as a contempt of court warning in relation to the criminal contempt of publishing information relating to child proceedings before a court sitting in private within the scope of s.12(1)(a) *Administration of Justice Act 1960 (c.65)*, not least because s.12(2) specifically excludes publication of orders in such proceedings from that contempt of court but also because that never was a criminal contempt even in wardship: *Re De Beaujeu* [1949] 1 Ch 230, 1 All ER 439.

73. In any event the Rubric is patently absurd in pretending to be able to anonymise the names of advocates. The practice that appears to have grown up in recent years of putting these toothless rubrics on all or nearly all *Children Act 1989* orders whether administratively or by the judiciary needs to be stopped because they bring English law into disrepute and will either be wrongly obeyed by the fearful and ignorant or scorned and ignored by the more knowledgeable.

74. **<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 Learned Judge refused this on the basis of her approach in her Judgment that all child welfare proceedings under the 1989 Act must be heard in private and kept secret but that the Intervention Proceedings could not be severed from the substantive child welfare proceedings so as to allow publicity. This was wrong, as already set out in Grounds **21–26** *supra*, since as the full Transcript of Proceedings for 20 February 2023 will show the child welfare proceedings were only referred to in the most peripheral and harmless way and no interest of the minor child concerned was disclosed that required protection by imposed privacy. Publication should be allowed.

75. **<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.

Although asked for on 21 February 2023 after the main Judgment had been delivered, the Learned Judge's reasons for refusing the full Transcript for 20 February 2023 are presumably the same as set out at Judgment §63, that the Proposed Intervenors had been refused Leave to Intervene and so should not have any Transcripts of any of the hearings in case ZC17P00039. However, the Intervenors had been parties on their Intervention Application – refer again *Re W* at Paras.39,40 – and in that capacity had the legal right to the Transcript of the Proceedings as full participants therein.

76. The absurdity of the Learned Judge's position here is that the 1st Appellant was able to take fairly comprehensive notes of the Proceedings, albeit not up the standard

of an expert shorthand writer. Had she been the latter then that would have been equivalent to a full verbatim Transcript but even this Judge would not have been able to prevent or confiscate such notes. Right to an effective Transcript should not depend on such contingencies.

77. The Transcript was and is needed by the Appellants for these Appeal proceedings as appreciated by the Learned Judge since she also gave as a reason, *"You can ask the Court of Appeal to order the Transcript"* (which indeed is applied for in the N161). There remains a suspicion that she was trying to prevent a possibly successful Appeal, and altogether her petty decision was wholly perverse and unreasonable.

78. Clause 12 of the Order 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.

These should have been allowed earlier before the Hearing on 20 February 2023 as they were reasonably needed by the Intervenors to make their case. As held in *Re W* at Paras.73,74 (cases cited),88,95,97 it is the law that *"Advance disclosure is required in the interests both of fairness and informed decision-making. Without it an adverse decision may not be right; and even if it is, it will certainly not be fair"* [Para.74, citing *Ex p.Hickey (No.2)* [1995] 1WLR 734 CA]. Here the imminent decision is on the mother's pending application to publish findings/judgments in Case ZC17P00039, an application believed to be set down for hearing around the end of April 2023. The Intervenors have not been provided with a copy of this application and do not know precisely what has been applied for (another unfairness of course) but it does include the Judgment/Findings made by the Learned Judge in April 2022.

79. In the instant case access to Transcripts is doubly imperative because this is a Judge who misremembers and misrepresents facts. That has already appeared in some of the Grounds *supra* but there are many more examples [see Court of Appeal Skeleton to be submitted]. Thus Judgment §8 states: *"8. ... F4J had had a campaign against the mother on the mistaken basis that she had been refusing the father's contact with the child. ... F4J accused her of child abuse".* Then Judgment §9 goes on: *"9. The allegations made by the mother formed part of the fact finding. The evidence I had been provided with included extracts from the F4J website and letters they had written to the BBC"*. If you examine the letters written to the BBC you find that it was the Daily Mail that had reported on the mother's denial of contact and that had occasioned F4J's concern and their writing to the BBC asking that the BBC, who employed Ms Ashworth as a CBeebies presenter and as such a rôle model for children,

investigate what, if true, would be a form of child abuse. F4J did not accuse Ms Ashworth of child abuse but submitted that the BBC ought to investigate the matter. As to the supposed *"mistaken basis that she had been refusing the father's contact"* it is extraordinary that the Learned Judge had forgotten that the history of the case from 2017 onwards is a litany of contact refusal and denial which had necessitated a number of applications to the Court by Mr Alcott and had been the reason why he had consulted F4J's Help, Advice and Support Service.

80. As one more example, the Extract provided to the Intervenors and their advocate at commencement on 20/2/2023 when examined proved to contain errors of record about dates and impossible findings, and other findings relating to F4J which were false. But the Skeleton will enlarge.

81. Had the recusal application gone ahead one of the grounds would have been serious incompetence of the Judge or alternatively if that incompetence was calculated then blatant actual bias and deliberate unfairness.

82. <u>Leave to Appeal</u> In addition to all the Grounds of Appeal the Intervenors respectfully submit that the legal issues raised and an Appeal thereon would be to the public advantage in areas of law still developing. Not only is Open Justice in relation to family proceedings in process of changing — the President of the Family Division's Transparency Project — but also there is a developing trend whereby judgments and fact-findings in such proceedings are sought to be published by one party when hitherto they would have remained private, in order to expose wrongdoing or unacceptable or alleged dangerous behaviour of the other adult party. Indeed the Intervenors understand that in Case ZC17P00039 the father Mr Alcott may issue his own cross-application for leave to publish findings and reports etc in the Case about the mother Ms Ashworth: if both party's applications were acceded to there could effectively be a free for all wholesale public attack on each other's reputations including professional reputation, but outside the scope and protection of defamation law because all under the cloak of judicial privilege. Some might think this unseemly and not the purpose of the Family Court or High Court Family Division or in the public interest. Some might think it is not the function of Family Court or High Court FD Judges to become selective arbiters of permissible defamation, sidestepping the libel, slander, and malicious falsehood functions and safeguards of due process of the High Court KBD and County Court.

DATED 9 MARCH 2023 AND SIGNED:-

1ST APPELLANT, NADINE TAYLOR

2ND APPELLANT, MATTHEW O'CONNOR

3RD APPELLANT, FATHERS FOR JUSTICE LTD