The Judgment in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the Judgment itself) may be identified by name or location and in particular, the anonymity of the child and the adult members of their family must be strictly preserved.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO. FAM 2021-0029

BETWEEN:	**T**	**APPLICANT**
AND:	**R**	**RESPONDENT**

Appearances: The Applicant and the Respondent in person

Ms. Laura Clemens (Guardian ad Litem) with Ms Lynne McDonagh of KSG to represent the children

Before: Hon. Justice Richard Williams

Heard: On the papers

Date Delivered: **24 October 2024**

Children Act (2012 Revision) – Application for leave to appeal substantive s.10 children orders - Application for stay of execution of the Orders made in a Judgment pending appeal – Procedure to be followed when making a leave to appeal application - Principles involved in appeals relating to children orders where their welfare is paramount – Test for granting leave to appeal – Guidance of the Court of Appeal in ***KN v MN*** *CICA No 14 of 2015.*

JUDGMENT

Background

1. I have considered this application for leave to appeal and for a stay of my Orders on the papers. I refer to the Applicant/Proposed Appellant as T. I refer to the Respondent as R. Since February 2022[1] there has been a Shared Residence Order in favour of T and R in relation to two children.

[1] In the Consent Child Arrangements Order approved by Court on 4 February 2022.

Those children are also parties to the proceedings via their Guardian ad Litem and they have legal representation.

2. A two-stage substantive child arrangement hearing lasting for over twenty days, spread over various Court sessions over an eleven-month period, was required to consider the applications made by the parents to vary a comprehensive Consent Child Order approved by the Court on 4 February 2022. Following the hearing, which eventually concluded on 21 February 2024, a reserved written judgment was circulated to the parties on 12 June 2024 ("the Judgment").

3. The detailed background in this matter is set out very fully in the Judgment. The Judgment is overlong. As I mentioned in the Judgment, this was due to the manner in which the parties litigated the matter which required the Court to review events which spanned a period of at least ten years and because their approach to parenting issues has throughout been an overly litigious one. A comprehensive judgment was required to provide a 'one stop' source for the relevant findings in the dispute, which should then not need to be later re-explored in the Grand Court and which could be relied upon should the matter return to any Judge in the Grand Court in the future. I understand, when considering the balance to be conducted when deciding a leave to appeal application, that, as a consequence of such an in-depth exercise being conducted in the Judgment, any party who disagrees with the findings and conclusions set out therein may seek to challenge them by appeal. This is because, in relation to (i) T's outstanding relocation application[2]; (ii) the other more recently filed applications[3]; and (iii) any future applications which may be filed, the parties will likely not be able to go behind those findings or to reargue the related factual dispute in the Grand Court.

4. On 13 June 2024 at 10:43AM, the day after the Judgment was circulated, T wrote by email to my Personal Assistant seeking her *"... guidance on the procedural steps necessary to formally file an urgent stay and further procedural steps to thereafter to request and file an appeal"*. A Judge's Personal Assistant is not permitted to give such advice and guidance. On 13 June 2023 at 11:00AM, my Personal Assistant promptly responded by email, in which she appropriately indicated that she was copying Ms. Allenger (Clerk of Courts) and Ms. Lee-Shung (Deputy Clerk of Courts Civ. and Fam) to the email request, as she believed that they were covering for the Registrar of the Court of

[2] See paragraphs 22, 47, 48 and footnote 11 below.
[3] See paragraphs 21, 22, 47, 48 and footnote 11 below.

Appeal. The Registrar's Office, if it felt it appropriate to do so, would be best placed to give any guidance to T. In T's email dated 25 September 2024 to Zorie McBean (Assistant Registrar Court of Appeal) she wrote:

> *"...I sought procedural advice from the Honourable Judge's Personal Assistant, the Civil Registry, and the Family Court, who directed me to the Court of Appeal. I had procedural correspondence with them on the following dates: 13 June 2024, 17 June 2024, 25 June 2024, 26 June 2024, 27 June 2024. The Court's (sic.) of Appeal advised that within 14 days of the judgement, I should file the following documents: notice of appeal, draft Grounds of appeal, application for stay (which they later asked me to refund as a summons for stay), affidavit in support of stay. I had a number of verbal and email communications with the staff (dates listed above) who assisted procedure to follow due process. In compliance with these instructions, I successfully filed all the required documents on 26 June 2024, and all corresponding fees are paid on that date. This was confirmed as complete by the Court of Appeal."*

5. As I had been made aware by my Personal Assistant that there may be an appeal, conscious of the decision of Smellie CJ in ***Panier Sav Burns*** 2001 CILR N-27 that time for filing an application for leave to appeal may not begin to run until the filing of a formal order containing the decision in the Judgment, I drafted an Order on 14 June 2024. That Order was processed on the same date ("the Order").

6. I next heard about an appeal in an email on 1 October 2024,[4] which had been sent by Ms. McBean to my Personal Assistant on 30 September 2024. Ms. McBean attached a number of documents to her email. In her email she wrote:

> *"Ordinarily the Appellant would provide these documents to the Grand Court, however, because she is Appellant in person, I am not quite sure if she has done so. Just giving notice that this application may be coming."*

Attached to the email was:

[4] 1 October 2024, I also later received an email from the Registrar of the Court of Appeal in which she forwarded on an email from Ms. McBean to T and R in which she informed them about the President's Order.

(i) A Summons for a stay dated 26 June 2024 and filed on 27 June 2024[5] - That Summons was issued in the Court of Appeal and sought a hearing before a Single Judge of the Court of Appeal (pursuant to regulation 24 (1) (a) of the Court of Appeal Rules (2014) at the Grand Court of the Cayman Islands for a stay of certain parts of the Order;

(ii) a Memorandum of Appeal dated 24 June 2024, which was filed in the Court of Appeal on 26 June 2024;

(iii) a Notice of Appeal dated 24 June 2024, which was filed in the Court of Appeal on 26 June 2024;

(iv) an Affidavit to Support Application for Stay of Execution, which was filed in the Court of Appeal on 27 June 2024; and

(v) the Order of the President of the Court of Appeal dated 26 September 2024, which was made on the papers having read the Judgment and documents submitted by the proposed Appellant and proposed Respondent. That order provided that:

  (i) the proposed Respondent forthwith be provided with all the appeal documents submitted to the Court of Appeal by the proposed Appellant;
  (ii) the application for permission to appeal be remitted urgently to Justice Williams; and
  (iii) the stay remain in place pending the decision of Justice Williams.[6]

7. Upon reviewing the papers and before I reached out to the parties, I sought guidance from the President about whether he felt that the attorney instructed on behalf of the children through the Guardian ad Litem should also be provided with all the appeal documents submitted to the Court of Appeal by the proposed Appellant. On 7 October 2024, I was informed by the Registrar of the Court of Appeal that the President felt that the lawyer to the Guardian should have copies of the appeal documents.

8. On 9 October 2024, on my direction, my Personal Assistant wrote to T, R and the attorney to the Guardian. They were informed by my Personal Assistant that the President had quite rightly remitted the application for leave to appeal back to me. It was clearly remitted to me as the Judge

[5] Filing date taken as being the date embossed on top right had corner of the document when it is added on the Judicial Portal when a document is filed.
[6] After receiving the email, I was informed that on 16 September 2024, the President had requested a copy of the Judgment and ordered (i) that the judgment being appealed is immediately filed; and (ii) that there be a stay pending further consideration by the President.

below, because the Grand Court Judge is the 'first port of call' when seeking leave pursuant to the Court of Appeal Rules (2014 Revision) ("the Rules"). My Personal Assistant then shared my following comments with them:

> *"I will be dealing with this application for leave to appeal on the papers and will deliver a written ruling. Although (T's) reasons why leave should be given are clearly set out in the documents referred to by the President, I will afford the parties with an opportunity to file brief written submissions if they wish to do so. The parties must comply with the filing dates and the page limitations for any submissions."*

9. T submitted her written submissions on 16 October 2024. The Guardian submitted her written submission on 22 October 2024. R submitted her written submission on 23 October 2024. I have considered those submissions, the Judgment, the President's Orders, the Memorandum of Appeal, the Notice of Appeal, the Summons for a Stay, and T's Affidavit to Support Application for Stay of Execution.

Procedure – Application for leave to appeal and for a stay

10. In this case, T and R appeared in person at the final hearing. However, initially they had retained attorneys who regularly appear in the Family Division. T was in person when she filed her divorce petition in February 2021. McGrath Tonner shortly thereafter came on the record for R. By 1 March 2021, T was being represented by Cayman Family Law. In April 2021 T filed a Notice of Intention to Act in Person. On 23 April 2021, Hampson and Company came on the record for T. On 12 August 2021, T filed another Notice of Intention to Act in Person, so she no longer retained the services of her second firm of attorneys. On 17 February 2022, just over two weeks after the Court had (i) approved the consent final ancillary relief order; (ii) approved the Order; and (iii) had granted the certificate of dissolution of marriage, R filed a Notice of Intention to Act in Person. Both parties have since been representing themselves.

11. It is important to acknowledge that there is a set procedure for applying for leave to appeal and for a stay. They apply equally to litigants in person as they do to parties represented by an attorney. This case and the Judgment writing exercise was made extraordinarily difficult due to the volume of evidential material, most of which was not helpful, which both parties inundated the Court with throughout the proceedings. Despite that, my observations set out at paragraphs 235 and 236 in the

Judgment show why, when I determined that it was appropriate to do so, I tried to take a flexible approach to procedural matters for both T and R. Because I intend the Judgment to contain a comprehensive review with findings and conclusions about all of the relevant family issues to that date, I wanted T and R to feel that they had been given an opportunity to present their cases to the full, whilst at the same time always ensuring that they had been given the opportunity to adequately address any written materials that were submitted by the other parent.

12. However, when it comes to leave to appeal and to stay applications which could have consequences for another Court, my discretion may not be so generously exercised. In ***Barton v Wright Hassall LLP*** [2018] UKSC 12, the Supreme Court has held by a narrow majority that litigants in person have to comply with the rules of court in the same way as legally represented parties. In that case Barton, a litigant in person, issued proceedings against his former solicitors for negligence. He served those proceedings on their solicitors by email, one day before the validity of the claim form was to expire. Under the Civil Procedure Rules service by email is only effective if the recipient has indicated in writing that they are willing to accept service by email. The Defendant's solicitors had not done so, although they had emailed Barton to say that they were instructed by the Defendant. Accordingly, Barton's service was ineffective, his claim form expired, and his claim became statute barred. Barton made an application for the steps he had already taken to be deemed good service (under CPR 6.15). The Supreme Court had to decide whether there was a good reason to deem the steps that Barton had already taken to bring the claim to the attention of the Defendant to be good service. By a majority of three to two, the Supreme Court dismissed Barton's appeal. Lord Sumption stated at paragraph 18 concerning litigants in person:

> *"In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR rule 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties ... Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a*

litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

I see no reason why the same approach should not apply in a case before the Family Division in the Grand Court. The Court of Appeal Rules are easily accessible to the public on the Judicial website or by a general online search.

13. Therefore, I must turn to the procedure that should be followed when seeking leave to appeal and to stay an order/judgment of the Grand Court. Rule 11(5) Court of Appeal Rules (2014 Revision) ("the Rules") state that:

"In any case in which leave to appeal is required, an application for leave shall be[7] *made to the Court below."*

Importantly, Rule 11(5) then goes on to provide how that application must be made. In this case the first application option at Rule 11(5)(a) did not take place, as the Judgment was circulated and not handed down in Chambers. Therefore, pursuant to Rule 11(5)(b), the application made to the Grand Court must be made by Summons or Motion issued within fourteen days of the date upon which the judgment or order is filed. It is only after leave is granted that the appellant must lodge his notice of appeal in Civil Form 1 within 14 days of the date when the order for leave is granted.

14. Rule 21(3) states that where an application for leave to appeal has been refused by the Grand Court, then an application for such leave may be made to the Court of Appeal ex parte within seven days from the date of such refusal. Although not relevant to my consideration, the procedure to be followed (unless otherwise ordered by the Court of Appeal) is that set out in Rule 21A which includes submitting a Form 3A with the hearing being before a single Judge of the Court of Appeal.

15. The Summons filed in the Court of Appeal on 27 June 2024 pursuant to Rule 24(1) is a Summons seeking a stay application before a single Judge of the Court of Appeal. It is not a Summons filed in the Grand Court, or even in the Court of Appeal, seeking leave to appeal. If one takes the starting date to be the date of the Order (i.e. 14 June 2024), and if a properly drafted Summons for leave to appeal had been filed on 27 June 2024, then it would have been filed in time. I have scoured the Court Online Portal, the Grand Court and the Appeal files to see if there are any other Summonses

[7] My emphasis by underlining in this sentence.

or Motions filed in the Grand Court on the online portal. The only other document I have found which touches on the appeal is a Children Act Form C3 dated 24 June 2024. This Form C3 does not appear to have been filed or issued and it may be that this Form is the "application" that T mentions, and which she says she was advised by the Court of Appeal Registry to replace with a Summons[8]. In any event, that Form 3 also does not contain an application for leave to appeal: it only seeks a stay of execution in relation to the same parts of the Order mentioned in the above-mentioned 27 June 2024 Summons filed in the Court of Appeal and an interim order varying part of the February 2022 Consent Child Arrangement Order.

16. T has failed to file a Summons seeking leave to appeal in either the Grand Court or the Summary Court. The application for a stay does not amount to a leave application and neither do the Memorandum of Appeal, the Notice of Appeal and affidavit drafted in support of the application for a stay of execution which were filed in the Court of Appeal. Therefore, a leave application has not been properly made pursuant to the Rules. Even if T now placed a properly drafted Summons for filing in the Grand Court before me, sitting in my capacity as the Judge below, I still could not grant leave as the Grand Court, unlike the Court of Appeal, does not have the power to grant leave to extend the time limits set out in the Court of Appeal rules after the expiry of that time limit. Smellie CJ in ***Streeter v Immigration Board*** 1999 CILR 264 at 269 found that the power of extension of time limits contained in GCR Order 3, rule 5 relates only to matters within the Grand Court's province under those rules.

17. Accordingly, I do not grant leave to appeal. However, I accept that the Court of Appeal may take a different view and may feel, when having regard to the content of the pleadings filed[9], that my approach was a rather pedantic one in relation to what may be viewed as being a purely technical jurisdictional point. I also accept that the Court of Appeal may extend the time to permit an application for leave to be properly made and, conscious of my comments made in the last two sentences in paragraph 3 above, I believe it might be helpful to the parties and to the Court of Appeal if I still go on to review the merits of the leave to appeal application.

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[8] Presumably by T's above-mentioned 27 June 2024 Summons.

[9] As set out in paragraph 4 above, I acknowledge that at paragraph 4 of T's written submissions she sets out what she says *"the Court of Appeal advised"* her to file. I recognise that T makes no mention of being advised by the Court of Appeal Registry to file a Summons for leave to appeal and, if that is correct, it may be a factor for consideration if a further leave to appeal application is made.

18. When considering the jurisdictional issues, I do not feel it appropriate for the Grand Court to deal with T's submissions at paragraph 7-12 in her written submissions relating to her request for direct leave from the Court of Appeal. However, I do not accede to the request of T made at paragraphs 27 and 32 in her written submissions for the Grand Court to wait for directions and ruling from the Court of Appeal before making any decision on leave in this case. The President, by Order dated 26 September 2024, directed that the application for permission to appeal be remitted urgently to me. Therefore, I must deal with the leave application in a timely manner.

Stay application

19. Having refused leave to appeal in circumstances where the President has already felt that a stay should be granted, albeit one to be in place only until I have had the opportunity to consider the leave application, I find myself in a rather unusual position. A stay application is made by way of Summons. There is a stay Summons filed in the Court of Appeal, but not in the Grand Court. As I have not granted leave, the 'rendering an appeal nugatory argument' is a problematic one for T to make. To grant a stay, an applicant ordinarily needs to demonstrate that she has a *bone fide* ground of appeal and a real prospect of success on appeal as well as satisfying the Court that the balance of convenience favours a stay. For reasons I will elaborate on below when I go on to undertake the exercise of considering the merits of the leave application, ordinarily I would not grant a stay if the leave application had been properly brought. A further concern arises when considering the balancing exercise to be applied when deciding whether to grant a stay in children proceedings due to the delay principle set out at s.3(2) of the Children Act (2012 Revision) ("the Act"). That said, in a situation where the President has previously granted stays relating to this proposed appeal, and where it is likely that a further leave application will be made by T to the Court of Appeal, in the interests of justice and fairness,[10] I will take the unusual approach of ordering a stay. However, that stay will expire if no application for leave to appeal is made to the Court of Appeal within 7 days of this Judgment being provided to the parties or, if that application is filed by the due date, the stay will remain in place until the Court of Appeal is able to consider the applications for leave to appeal and for a further stay.

[10] When noting my comments at paragraph 17 above.

The basis of T's leave to appeal application

20. The grounds of appeal relied upon by T are set out in her written submissions as well as in the various documents provided to me by the Court of Appeal Registry.[11] It is evident that most, if not all of them, relate to issues of fact although some are characterised by T as being "errors of law". Therefore, I do not intend to address all of them, although I do have regard to them when I consider the applications for leave and for a stay.

21. T now makes mention of an affidavit that she filed on the Court Online Portal on 5 June 2024. T wrongly believes that this affidavit, filed months after the conclusion of the hearing, should be regarded as forming a part of evidence in the concluded hearing to which the Judgment relates. The June 2024 Affidavit was filed in support of a C3 application filed by T on the same day. In that C3 application, T repeated her ongoing application for a sole residence order. She was applying for what T termed to be an *"immediate and urgent"* lifting of the Prohibited Steps Order which prevented her (in fact, it prevented both parents) from removing the children from the jurisdiction. In relation to the latter *"immediate and urgent"* application, I was aware from the hearing that she intended to remove the children to the UK to visit family members over the school summer holidays. When the application and affidavit were drawn to my attention, the very detailed Judgment had already been completed and it was due to be formatted by my Personal Assistant prior to a perfected copy being sent out to the parties. The Judgment included my decision that the Prohibited Steps Order against both T and R was to be lifted[12], therefore, when the parties saw it on 12 June 2024, they would see that there was no need to list the *"immediate and urgent"* part of the application.

22. I had hoped that the Judgment, in which I analysed and made findings about numerous disputed facts arising over years in the bitter dispute between the parents,[13] would refocus T's and R's minds back onto the children and that hopefully they would pay heed to my unusually graphic observations made at paragraphs 346 and 350 in the Judgment. My expectation was that they should take time to consider the content in the Judgment and then make decisions about the way forward, in particular in relation to any of the remaining filed applications, including the removal from

[11] See paragraph 6 above.
[12] See paragraph 349 (xiii) in the Judgment.
[13] See paragraph 224 in Judgment.

jurisdiction application.[14] I am concerned that T has failed to carefully digest and read the Judgment before submitting her documents to the Court of Appeal because, despite the Judgment showing that the Prohibited Steps Order had been dismissed, she still, at paragraph 17 of her Memorandum of Appeal, asks the Court of Appeal to make *"an immediate and urgent intervention"* to lift that Order.

23. No formal application was made for me to consider T's June 2024 Affidavit evidence when preparing the Judgment. It seems that T felt it appropriate to simply file that evidence and expect (i) the Judge to automatically, apparently without reference to the other parties, include it as a part of his deliberations, or (ii) to again stall delivery of the Judgment (which had already been completed) until there had been yet another hearing to deal with further contested evidence. T's approach to the filing of this Affidavit is an extreme example of her taking the same approach that she purports has been adopted by R and which T relies on as a ground of appeal in her Memorandum of Appeal at paragraphs 29-30 and at paragraphs 14-15 in her written submissions. As I mentioned in paragraph 10 above, I tried to give some flexibility to both parties as they were litigants in person. Both parties were guilty of filing late evidence. In relation to T, for example see paragraph 86 of the Judgment. T would also submit long position statements in which she included evidence that was not in affidavit form[15]. Although some affidavits from the parties may not have been filed by the directed dates, I am satisfied that the acceptance of them did not prejudice the other party.[16] The above comments are relevant to the unspecific paragraphs 34 (Judge's decision to penalize) and 35 (Failure to exclude improperly submitted evidence) grounds of appeal in the Memorandum of Appeal.

24. For completeness' sake, I note that the Memorandum of Appeal also makes reference to, at paragraph 10, and relies upon an email from R dated 17 June 2024. I note that the said email was, of course, sent 5 days after the perfected Judgment had been provided to the parties.

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[14] See paragraphs 155, 224 and 228 in the Judgment. At paragraph 225 in the Judgment, I stated: *"The Court informed the parties that it would not be considering any application in relation to the summer removal application (and the earlier made permanent removal application) until after this Judgment had been delivered because the content of the Judgment would be relevant to any consideration that would have to be given to those applications."*

[15] See paragraph 6 of the Perfected Ex Tempore Ruling from the hearing held on 26 October 2023. Copies were provided to the parties on 31 October 2023.

[16] General comments on Affidavit at paragraph 236 and 87 in Judgment.

25. This case required the delivery of the long overdue Judgment. In the midst of writing a judgment following the March 2023 hearing, I had to cease its preparation. That was caused by the parties seeking to introduce new evidence and events surrounding the Multi-Agency Safeguarding Hub ("MASH")/Department of Children and Family Services ("DCFS") involvement.[17] It meant that there would have to be further oral evidence given and the March 2023 hearing became stage one of a two-part hearing. As stated at paragraph 224 in the Judgment, the total hearing took an astonishing twenty-four days which were spread over too many months. The second stage ended on 21 February 2024 and occupied a further thirteen days of Court time. A further delay in June 2024 in delivering the Judgment arising from the final hearing that had started on 7 March 2023 would have been highly prejudicial to the children, especially in circumstances where the Guardian was highlighting a real concern about the damage of the ongoing delay.

26. Another ground concerns vagueness of the contact provisions in the Order and set out in the Judgment. The evidence before the Court from R was that she would be promptly returning to the jurisdiction[18] and the delay in her doing so was due to issues her employer was encountering with its place of business building. There was no evidence or submissions before the Court as to the contact that could or should take place if R failed to return to Cayman, probably because R's evidence was that she was certain that she would shortly be returning. The issues which a Court and the parties would have to grapple with in relation to any contact for R and the children if she were living overseas would be more complex than those if she were in Grand Cayman.[19] Therefore, it would have been wrong for the Court to have made any child arrangement decisions about that scenario in a vacuum of evidence. Although R did ask for the children to be placed with her for an extended period over the summer school holidays in the UK or in Grand Cayman, there was little or no evidence produced to enable the Court to reach a decision about any UK contact. The Court was not in a position to make any decision about that overseas summer contact between R and the children. However, at paragraph 336 in the Judgment, the Court stated why it felt that any contact could not be for such an extended period of time and that it should be a gradual reintroduction over the summer school holidays in the Cayman Islands. At paragraph 231 in the Judgment, the Court

[17] See paragraphs 82 to 91 in the Judgment.
[18] See paragraph 2 in the Judgment.
[19] See paragraph 2 in the Judgment.

noted that T said that she would be applying for a sole residence order for the children if she was to relocate to the UK, but then I noted:

> *"As R's clear position post hearing is that she will be imminently returning to work and live in Grand Cayman, I do not consider the relocation option."*

27. Another ground of appeal relates to the Guardian's conduct and the Court's approach to her evidence. The Judgment deals in some detail about the Court's views about the weight to be placed on the Guardian's evidence and also about why the Court preferred the Guardian's evidence over parts of the last Court Welfare Officer, Ms. Watling's, evidence. The Judgment also deals with T's complaint about the conduct of the Guardian, which includes referring to the Court's 31 August 2023 Ex Tempore Judgment given concerning the unsuccessful application of T to have the Guardian removed from the case.[20]

28. Another ground of appeal relates to alleged judicial bias in the evaluation of hearsay evidence of Ms. Watling and the Guardian. As mentioned above, the Court set out in some detail why it preferred the evidence given by the Guardian over parts of Ms. Watling's evidence. In addition, at paragraph 222 in the Judgment, the Court highlighted the approach to be taken and the caution to be had in relation to hearsay evidence when stating:

> *"The Guardian, like a welfare officer, may present hearsay evidence to the Court in their reports. When I have regard to the above evidence, which I do with some caution, I am conscious that the above-mentioned members of the school team did not attend court and were not cross-examined. Neither party requested their attendance, and I find the insight provided into the family dynamics given and concerns expressed about T and D to be relevant to my determination."*

29. In her written submissions, a further ground of appeal is the failure to consider material evidence including reports from DCFS and the Guardian regarding the children's wishes and feelings. At various points, the Judgment contains a comprehensive analysis of both the Guardian's and Ms. Watling's written and oral evidence, as well as detailing their reported observations about the different negative and positive wishes (whether that be illustrated by their words or actions) of the

[20] See paragraph 140 in the Judgment.

children concerning contact with R expressed at different times and in different situations by the children. The references are too numerous in the Judgment to set out herein.

30. T also seems to seek that the Court of Appeal orders the completion of the investigation into her complaint against the Guardian before relying on her recommendations[21] and orders the removal of the Guardian and her attorney due to T's concerns set out in her complaint.[22] I am not sure whether T is referring to the application to dismiss the Guardian, which the Court considered and ruled on in August 2023, or in relation to a complaint that she filed, I believe with the Chief Justice, possibly after the Judgment had been delivered. My understanding is that the latter complaint, which was handled independently of me, has been dealt with and no adverse findings were made against the Guardian.

31. A further ground of appeal is about the weight given by the Court to the children's wishes at different stages having regard to their ages. It is also submitted, in T's written submissions, that there has been a misapplication of law because s.3 in the Act mandates that a child's welfare is the Court's paramount consideration. It is submitted that there has been a *"material error in law"* as the children's welfare has not been considered or has been misapplied by the Court. What is often referred to as the 'welfare checklist' was fully addressed at paragraphs 317 to 345 in the Judgment. The Court explored comments that the children had made to various people, and it specifically addressed their wishes when commenting upon the 'welfare checklist' between paragraphs 318 to 328 in the Judgment.

32. A further ground of appeal is the refusal of the Court on 26 October 2023 to vacate the substantive hearing. The Court dealt with that at paragraphs 155 to 159 in the Judgment, where it referred to its Ex Tempore Ruling given on 26 October 2023[23]. On 25 October 2023, for the first time after T had decided in April 2021 to no longer retain her second attorney, T said that she wanted an attorney. By email sent to the Court at 1:30PM on that day, T sought an adjournment of the case management hearing fixed for the next day, saying she was in the process of seeking legal representation. T was informed that the case management hearing would not be vacated. T renewed

[21] Paragraph 59 in the Memorandum of Appeal and paragraph 5 Notice of Appeal.
[22] Paragraph 60 in the Memorandum of Appeal and paragraph 6 Notice of Appeal.
[23] Parties were provided with copies of the Perfected Ex Tempore Ruling on 31 October 2023.

her application at the hearing on 26 October 2023, but this time in relation to the November 2023 substantive final hearing. T informed the Court she had *"reached out to independent parties who I hope can assist me pro bono due to my financial situation".*[24] The Ex Tempore Ruling sets out why the application to adjourn was refused, in particular at paragraphs 7, 35 and 36 therein.

33. I am now made aware, by paragraph 25 of T's written submissions, about the challenges she states that she has experienced when making *"extensive efforts"* to secure legal advice in relation to this appeal. I note that T states that a number of the family law firms which she has approached are conflicted. That may be because of how many family law attorneys have previously been approached and who have offered advice to these parents over the years. I understand that two of the firms mentioned by T in her submissions are conflicted as the Guardian works for one of them and the children's attorney works for another of them. Another firm of attorneys mentioned in T's submissions was used by R in a civil matter. Another firm mentioned by her employed an attorney who assisted T earlier in the proceedings but removed herself from the case. T states that other firms told T that they do not have the capacity to take on this case. This information provided by T fortifies my view, when considering the delay principle in the Act, that it would have been wrong to accede to her application made in October 2023 to vacate the long overdue second stage of the substantive hearing listed for November 2023 on the basis of enabling her to explore possible legal presentation. It is likely that T would have faced the same predicament twelve months ago. The inevitable delays to the long overdue second stage of final hearing (which was listed to commence in less than a month after the adjournment application), which would have occurred while T unsuccessfully searched for an attorney, would not have been in the children's best interests.

34. A further ground of appeal relates to R's mental health management. Her mental health was dealt with at numerous parts of the Judgment. The review includes the views of the parents, the Guardian, the social worker and, importantly, the medical practitioners. The references are too numerous to point out herein, save for paragraphs 79-81 and 299-304 in the Judgment

35. A further ground of appeal is the lack of consideration for the psychological impact on the children. That is an incredibly frustrating issue. I am troubled that it is T who now raises it as a ground of appeal. It seems rather incongruous for T at paragraph 23 c. in the written submissions to state that

[24] See paragraph 6 in the Ex Tempore Ruling.

granting leave to appeal *"would provide an opportunity to ensure that any changes to (the children's) care arrangements are made with full consideration of the emotional and psychological needs, including the potential need for professional assessment and gradual reintroduction of contact"* and for her to raise at paragraph 23 e. in her submissions about an absence of an assessment of the risk to the psychological health of the children. As set out in various parts in the Judgment, T's sentiments are precisely the reason why the Court had repeatedly attempted in vain to persuade the parties to jointly instruct a child psychologist. Significant delay was caused in the proceedings as a result of the parties assuring the Court that they were obtaining a psychologist but needed more time to instruct named psychologist(s) whom they had identified. Hearings were adjourned or long hearing dates given to enable the parties to get a psychologist on board and to afford the expert sufficient time to undertake the necessary assessment. T contributed greatly to the reasons why a psychologist's assessment, assistance and recommendations were not in the end obtained.[25] The Court repeatedly said that the input of a psychologist was required to assist the Court with the decision it had to make and to provide post-hearing welfare recommendations for the benefit of the eldest child in particular, and possibly for both children. Such evidence about any ongoing therapeutic input for the children would have assisted the Court in determining and developing a *"…gradual and child-led introduction of contact"*[26] and more importantly, assisted the children with that process moving forward. That input from a child psychologist would have assisted the Court to understand (i) why the children were saying what it is reported that they were saying to T, Ms. Watling and the Guardian, and (ii) why they were reported to be sometimes acting in an inconsistent manner to that when they saw R. The input would have helped the Court to better understand what the psychological impact might result from a reintroduction of contact and what form of introduction might be better for them. The Court also stressed during the proceedings that ongoing psychological assistance would benefit the children moving forward, especially if there was a possibility of a reintroduction for contact.[27]. The following references at paragraphs 35, 51, 53, 125, 127, 131, 151, 153, 158, 171, 210, 328, 332 and 337 in the Judgment highlight the Court's emphasis on the need for a child psychologist's evidence. The following references at paragraphs 110, 141, 145, 156, 165, 343 and in particular at 156 elaborate, in more detail and with more force,

[25] See paragraph 165 in the Judgment.
[26] See paragraph 15 h. in T 's written submissions dated 16 October 2024.
[27] See last sentence in relation to the eldest child at paragraph 336 of the Judgment.

the Court's views and concerns on the issue of a child psychologist, all of which the parents failed to properly act upon.

36. As mentioned already, I do not intend to go through all the other grounds of appeal contained in the written submissions and the other provided documents because they deal with issues of fact and the exercise of my discretion. They appear to be challenges to my findings of the facts and how I have applied those. It would not be appropriate for me to comment upon whether or not the appeal would be addressing the issues raised at paragraph 24, 33 and 35 in T's written submissions.

Leave to Appeal Application – The law

37. The Court of Appeal has provided guidance when expressing concern about the granting of leave to appeal by the Grand Court Judges against their own findings of fact and against the manner in which the Judges weigh the evidence. My Judgment in ***DT v MP*** FAM 276 of 2017, applied a number of cases which I referred to. The extract below is taken from my **DT** Judgment. In ***KN v MN*** CICA No 14 of 2015, an appeal brought to challenge the findings of fact made by a judge in relation to child sexual abuse allegations made by the mother, Chadwick P. stated the following:

> *"10. .... it is I think, desirable that judges sitting in the Family Court in this type of case should be slow to give leave to appeal against their own findings of fact. If there is a point of principle which needs to be determined by the Court of Appeal, then that would be a reason for leave to appeal to be given. But, if on analysis it can be seen that the challenge to the judge's findings of fact is that the judge weighed the evidence wrongly, then the administration of justice may be better served if judge has confidence in his or her own judgment and leaves it to the Court of Appeal to decide whether to entertain an appeal gagainst those findings of fact.*
>
> *11. In that context, I draw attention to the observations made in this Court in the appeal of B v B (2014) 2 CILR, 234 at paragraph [66]. The issue in that case was whether a child should be relocated out of the jurisdiction. At the end of its judgment this Court observed:*
>
> > *"This appeal was brought with the leave of the judge. I should not be taken to criticise the judge for his decision to grant leave; it may be that he thought there was a perceived tension between observations in Payne - which had been consistently applied by the courts in this jurisdiction - and the more recent guidance given by the Court of Appeal in Re F which required consideration or resolution by this court. But if there were a need for this court to address a point of principle, it was unfortunate that that need arose in a case where litigation costs - which the parties could ill-afford - had already had an effect on the father's*

> *ability to meet maintenance orders which had been made against him. In my view, judges should be slow to grant leave to appeal in cases of this nature."*
>
> *I take this opportunity of reminding the profession and the Family Courts of those observations. Fact-finding hearings are intended to achieve finality in relation to the facts on which decisions as to the child's welfare should be based. That objective is going to be seriously undermined if leave is given to appeal against findings of fact as a matter of course; particularly in circumstances where there is, under the present practice, no transcript of the evidence which was before the judge. If there is a point of principle, then the position may be different. But again judges should have in mind that litigating points of principle is an expensive exercise; and that that expense should not lightly be thrown on parties whose means are better expended in providing for the welfare of the child in circumstances where the marriage has come to an end or broken up. There needs to be finality in these matters without undue expense and without undue delay. Granting leave to appeal in this sort of case is not easily reconciled with that need."* [My emphasis by underlining].

38. In ***JC v IC*** CICA (Civil) Appeal No.14 of 2020, leave to appeal was refused in contested residence order proceedings. It is evident that Goldring P felt that an appeal was not an appropriate avenue for rearguing the facts. This is consistent with the observations of Chadwick P set out above. The President did not accept that the principle of a fair trial and natural justice had been breached. The President found that there was no error in law and that there was no prospect of any appeal succeeding. Having refused leave to appeal, the President stated that in such circumstances no question of granting a stay arises.

39. Chadwick P's observations are consistent with a recognition that a party's ability to appeal against any Children Law order believed to be unfair is limited by a number of legal principles laid down in ***G v G [1985]*** UKHL 13, [1985] FLR 894. Lord Fraser noted in ***G v G*** that:

> *"…the mother appealed to the Court of Appeal (1984) 6 F.L.R. 70. Sir J Arnold P. gave the first judgment and, before dealing fully with the facts of the case, he referred generally to the method of trying appeals in cases concerning the custody of children. After referring to some recent reported cases on the subject, the learned President said, at p.72s:*
>
> > *"Those cases exhibit some degree of homogeneity, of course; but they also seem, at first sight, to exhibit a degree of semantic dichotomy. It is a discernible thread*

> *running through, I think, every one of those cases and the cases cited in them, that it is not decisive of an appeal in this court from the decision of the court below, exercising the particular discretionary jurisdiction of deciding the custody of children (but also, I think, any discretionary jurisdiction), that the result of the exercise of discretion would, or might, have been different if the members of the Court of Appeal had themselves been exercising the discretion. There has to be more than that before the discretionary decision can be overturned. The question, if there be one, is: How much more?"*
>
> *He stated his conclusion in the following passage, at p.73:*
>
> *"I believe that there is a way of reconciling these cases. I believe that if the court comes to the conclusion, when examining the decision at first instance, that there is so blatant an error in the conclusion that it could only have been reached if the judge below had erred in his method of decision - sometimes called the balancing exercise - then the court is at liberty to interfere; but that, if the observation of the appellate court extends no further than that the decision in terms of the result of the balancing exercise was one with which, they might, or do, disagree as a matter of result, then that by itself is not enough, and that falls short of the conclusion, which is essential, that the judge has erred in his method. I cannot think of any case in which this particular issue has had to be faced, in which that method of determination is not intellectually satisfactory, logically supportable or consistent with the result of any of the cases in the appellate courts; and I shall approach this case on the footing that what this court should seek to do is to answer the question whether the court discerns a wrongness in the result of so striking a character as to make it a legitimate conclusion that there must have been an error of method - apart, of course, from a disclosed inclusion of irrelevant or exclusion of relevant matters]."*

40. Fraser J then later, when commenting about appeals in custody cases and other cases concerned with children, said:

> *"The jurisdiction in such cases is one of great difficulty, as every judge who has had to exercise it must be aware. The main reason is that in most of these cases there is no right answer. All practicable answers are to some extent unsatisfactory and therefore to some extent wrong, and the best that can be done is to find an answer that is reasonably satisfactory. It is comparatively seldom that the Court of Appeal, even if it would itself have preferred a different answer, can say that the judge's decision was wrong, and unless it can say so, it will leave his decision undisturbed. The limited role of the Court of Appeal in such cases was explained by Cumming-Bruce L.J. in Clarke-Hunt v. Newcombe (1982) 4 F.L.R. 482, where he said, at p. 486:*
>
> *"There was not really a right solution; there were two alternative wrong solutions. The problem of the judge was to appreciate the factors pointing in each direction and to decide which of the two bad solutions was the least dangerous, having*

> *regard to the long-term interests of the children, and so he decided the latter. Whether I would have decided it the same way if I had been in the position -of the trial judge I do not know. I might have taken the same course as the judge and I might not, but I was never in that situation. I am sitting in the Court of Appeal deciding a quite different question: has it been shown that the judge to whom Parliament has confided the exercise of discretion, plainly got the wrong answer? I emphasise the word 'plainly.' In spite of the efforts of [counsel] the answer to that question clearly must be that the judge has not been shown plainly to have got it wrong."*

That passage, with which I respectfully agree, seems to me exactly in line with the conclusion of Sir Arnold P in the present case, which I have already quoted. The reason for the limited role of the Court of Appeal in custody cases is not that appeals in such cases are subject to any special rules, but that there are often two or more possible decisions, any one of which might reasonably be thought to be the best, and any one of which therefore a judge may make without being held to be wrong. In such cases therefore the judge has a discretion and they are cases to which the observations of Asquith L.J., as he then was, in Bellenden (formerly Satterthwaite) v. Satterthwaite [1948] 1 All E.R. 343, apply. My attention was called to that case by my noble and learned friend Lord Bridge of Harwich, after the hearing in this appeal. That was an appeal against an order for maintenance payable to a divorced wife. Asquith L.J. said, at p. 345:

> *"It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."*

I would only add that, in cases dealing with the custody of children, the desirability of putting an end to litigation, which applies to all classes of case, is particularly strong because the longer legal proceedings last, the more are the children, whose welfare is at stake, likely to be disturbed by the uncertainty."

41. Leave to appeal will only be granted where there is a real prospect of an appeal succeeding, or some other compelling reason for the appeal to proceed. Henderson J rightly remarked in the family ancillary relief matter of ***Maria-Cotanza Lindsay Fear v Richard David Fear & Sharon Hollowell*** D129/2005 (Ruling 25 May 2010):

> *"Leave to appeal is granted where the proposed appeal has a real prospect of success: Telesystem International Wireless Inc. and another v CDC/Opportunity Equity Partners LP & three others 2001 CILR note 21 (Grand Court). Leave may also be granted in an exceptional case because the point at issue is a question of public interest."*

Henderson J went on to say that the latter did not apply in that case. I find in the circumstances of the matter before me, as I did in the ***DT*** case, that it does not apply to this case.

42. In ***CS v SR*** [2013] EWHC 1155 (Fam) permission to appeal was given to a husband appealing a district judge's financial remedy order. In that case Mr. Justice Moylan indicated that he felt compelled to follow the guidance below which was given by Brooke LJ at paragraph 21 in ***Tanfern Limited v Cameron Macdonald & Anor*** (2000) 1 WLR 1311:

> *"Permission to appeal will only be given where the court considers that an appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. Lord Woolf MR has explained that the use of the word of 'real' means that the prospect of success must be realistic rather than fanciful [see Swain v Hillman, The Times, 4 November 1999; Court of Appeal (Civil Division) Transcript No. 1732 of 1999]."*

Conclusions - Leave to Appeal Application

43. In light of Chadwick P's observations in ***KN v MN*** and in ***B v B*** concerning the approach to be taken in certain cases by the Family Courts in the Cayman Islands, I have had the well-known principles expressed in ***G v G*** in mind when considering whether the proposed appeal has a real prospect of success.

44. Even if this appeal which deals with factual issues and the Court's exercise of its discretion had procedurally been properly brought, it is not one that would have a real prospect of success. In reaching that decision I have considered all the grounds set out in T's written submissions and in the other documents that she has submitted to the Court of Appeal.

45. In addition to reaching the conclusion that there is no real prospect of success, I also find that the substance of the proposed grounds of the appeal falls squarely within those mentioned by Chadwick

P in ***KN v MN*** where he sent a clear message to the Grand Court that in family proceedings, where the challenges are to a judge's findings of fact and to his weighing the evidence wrongly:

> *"The administration of justice may be better served if the judge has confidence in his or her own judgement and leaves it to the Court of Appeal to decide whether to entertain an appeal against those findings of fact."*

This approach is not altered by the fact that the President granted a stay when understandably remitting the leave application for me to consider. It is evident that the President wished the correct procedural path to be followed, namely to have the judge below first consider the leave application and he was not prejudging the merits of the leave application or seeking to fetter my approach in that regard when he granted a stay.

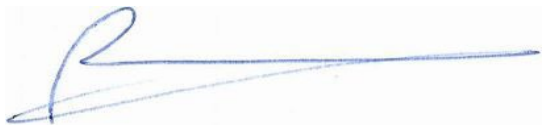
46. Accordingly, leave to appeal is refused. For reasons set out in paragraph 17 above, but with a degree of discomfort when I have regard to the fact that I have refused to grant leave to appeal and to the guidance given: (i) in ***NB v LB of Haringey*** [2011] EWHC 3544 (Fam), where Mr. Justice Mostyn set out principles to be applied in any application for a stay in children family cases; and (ii) at paragraph 48 of the case of ***Trina Solar Limited*** (CICA unreported judgment delivered on 4 August 2023), where Birt JA helpfully set out the principles for granting a stay of execution from a judgment in the Grand Court, I will take an unusual approach and grant a stay. Having regard to Birt JA's observation that *"the overriding feature is the interests of justice"*, in the circumstances of this case, which include the President granting a stay when remitting the leave application to me, I feel that granting a further short stay (which will expire if no application is made to the Court of Appeal within the required time frame) is fair and just.

Footnote

47. I am aware that T's above-mentioned 2023 application to remove the children permanently from the jurisdiction and her above-mentioned June 2024 application repeating her application for a sole residence order (and defunct application to discharge the already dismissed prohibited steps order), are outstanding in the Grand Court. I am also aware that on 11 October 2024, which after T was notified by the Court of Appeal Registry that the leave application was remitted to me, she filed a further Form C3 application with a supporting affidavit. In that Form C3 T seeks: (i) an order to vary the residence order provision in the Order, the Order which she also seeks the Court of Appeal

to consider; (ii) an urgent listing of the relocation application; and (iii) an application for me to be recused from dealing with the case.

48. I will not be listing any of those applications for case management at this stage due to the appeal proceedings. It would be inappropriate, having regard to their nature, to have these Grand Court applications and any Court of Appeal proceedings running in *"conjunction"*[28] with each other. When any appeal proceedings are concluded, then the above-mentioned Grand Court applications can be restored to a mention hearing. The recusal application would have to be the first application to be considered in the Grand Court. The manner in which the Grand Court will deal with the applications (including the recusal application) may be affected by any observations made by the Court of Appeal about the Judge's conduct in the matter and by the outcome of any appeal proceedings. Although the application for my recusal has been made to both the Court of Appeal and in the October 2024 C3 Form, I am of the view that, because the President has directed that the leave to appeal application be remitted to me, I need not consider the recusal application before dealing with the present leave and stay application.



THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT

[28] Paragraph 4 in T's Form C3