Neutral Citation Number: [2021] EWCA Civ 1216

Case No: B4/2021/0833

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
THE PRESIDENT OF THE FAMILY DIVISION
[2021] EWHC 1162 (Fam)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/08/2021

Before:

SIR JULIAN FLAUX
CHANCELLOR OF THE HIGH COURT

LADY JUSTICE MACUR
and
LADY JUSTICE KING

- -

Between:

HIS HIGHNESS SHEIKH MOHAMMED BIN RASHID AL MAKTOUM	**Appellant**
- and -	
HER ROYAL HIGHNESS PRINCESS HAYA BINT AL HUSSEIN	**First Respondent**
- and –	
AL JALILA BINT MOHAMMED BIN RASHID AL MAKTOUM **ZAYED BIN MOHAMMED BIN RASHID AL MAKTOUM** **(by their Guardian)**	**Second and Third Respondent**

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Lord Pannick QC, Richard Spearman QC, Andrew Green QC, Godwin Busuttil, Daniel Bentham, Stephen Jarmain and Jason Pobjoy (instructed by **Harbottle & Lewis LLP**) for the **Appellant**
Charles Geekie QC, Timothy Otty QC, Sharon Segal and Daniel Burgess (instructed by **Payne Hicks Beach LLP**) for the **First Respondent**
Deirdre Fottrell QC and Tom Wilson (instructed by **Cafcass Legal**) for the **Children's Guardian**

Hearing dates: 13 & 14 July 2021

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Approved Judgment

This judgment was delivered in private. It should not be made public in any manner or released to the press pending further direction from the Court.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10:00am on 5 August 2021.

Lady Justice King:

Introduction

1. This is an appeal by His Highness Sheikh Mohammed Bin Rashid Al Maktoum ('the father') against a case management decision made by Sir Andrew McFarlane P ('the President') in ongoing contact proceedings between himself and Her Royal Highness Princess Haya Bint Al Hussein ('the mother') in relation to their two children who are now aged 13 and 9 years respectively.

2. The issue is whether certain case management decisions of the President amounted to procedural unfairness. The President refused to order the disclosure of certain data to a confidential adviser of the father based in Israel in circumstances where he (the President) had made it clear that he would look favourably upon an application made on behalf of the father to instruct a UK based expert under Part 25 of the Family Procedure Rules 2010 ('a Part 25 application'). The instruction of a Part 25 expert would have activated full disclosure of the data in question to that expert.

3. The question for this court is whether, as Lord Pannick on behalf of the father submits, the loss of confidentiality which is the inevitable result of the instruction of a Part 25 expert, is too high a price to pay for access to the data which, Lord Pannick submits, procedural fairness requires the father to have as of right.

4. The key case management decision was made on 12 March 2021, one of many hearings in which directions were made for the future management of the fact-finding hearing at the centre of this appeal ('the fact-finding hearing') heard by the President between 13 -19 April 2021. At the conclusion of the fact-finding hearing the President found:

    i) That the mobile phones of the mother, two of her solicitors, her personal assistant and two members of her security staff had been the subject of either successful or attempted infiltration by surveillance software. The software used is called Pegasus software and was that of an Israeli company, the NSO Group.

    ii) That the surveillance undertaken by Pegasus software was carried out by servants or agents of the father, the Emirate of Dubai or the UAE and that the surveillance occurred with the express or implied authority of the father.

5. The father filed three grounds of appeal. Permission to appeal was given on 15 June 2021 on two of the three grounds:

    Ground 1

    The High Court's finding that there was hacking of the relevant telephones and that this was by the Pegasus system was procedurally unfair because it was based on the evidence of Dr Marczak and Professor Beresford which in turn was reliant on data and on technical analysis by Dr Marczak which were not disclosed to the Father's side.

    Ground 2

    The High Court's finding that the hacking was to be attributed to the UAE, Dubai and the Father was procedurally unfair because of material - Dr Marczak's "victims list" - which was not disclosed to the Father's side and which might on examination have

disproved or weakened the case put forward by the Mother, and/or proved or strengthened the case put forward by the Father that another State or person might have been responsible for any hacking.

6. Permission to appeal was refused on the third ground which sought to challenge the President's overall finding that the hacking was to be attributed to the UAE, Dubai and the father.

7. It follows therefore, that if the President's case management decisions were procedurally fair, there can be no challenge against his finding that the father was directly or indirectly responsible for arranging the hacking which the President found to have taken place.

Background to the Fact-Finding Hearing

8. The issue to be determined at the fact-finding hearing was (i) whether certain mobile phones used or connected with the mother and her advisors and staff had been hacked and (ii) if so, whether the father was directly or indirectly responsible for arranging the hacking to take place. The fact-finding judgment goes into significant detail about the allegations and the vehicle through which the President found the surveillance to have been conducted. It is only necessary therefore for me to set out the background to the extent necessary to understand the issues in the appeal.

NSO Group

9. NSO Group is an Israel based software company responsible for marketing highly sophisticated surveillance programmes for the exclusive use of State Governments and their intelligence services.

10. The software programme which is manufactured and sold by NSO Group for these purposes, and with which the President was concerned, is called 'Pegasus'.

11. Mrs Cherie Blair CBE QC acts an advisor to NSO Group on business and human rights related issues.

12. Dr William Marczak is a post-doctoral researcher in computer science at the University of California, Berkeley. He is also a research fellow attached to 'Citizen Lab', which is an independent research body based in Canada with an interest in electronic surveillance.

13. On 5 August 2020 the mother's solicitor, Baroness Shackleton of Payne Hicks Beach ("PHB") was alerted from two separate sources of the possibility of both her and the mother's phones having been hacked. The sources were:

    i) Dr Marczak, who was engaged in monitoring the internet traffic for several devices used by a Mr X described as a 'UAE activist'. In early August 2020, having identified the IP addresses and other distinctive features of an attempted infiltration of the device of Mr X, Dr Marczak then attempted to discover the identities of other victims. It was in the course of this that Dr Marczak came across the IP address of PHB. Having conducted an internet search of PHB Dr Marczak saw various news stories relating to these proceedings and therefore made contact with a London solicitor who in turn contacted Baroness

Shackleton on 5 August 2020. The solicitor told Baroness Shackleton that Dr Marczak had identified someone at PHB as being possibly targeted by UAE directed spyware and that if interested, Dr Marczak could advise them.

ii) Meanwhile, on the same day a senior member of the NSO Group management team rang Mrs Blair from Israel at what was night-time in Israel. The manager told Mrs Blair that it had come to their attention that their software may have been misused to monitor the mobile phones of Baroness Shackleton and HRH Princess Haya. Mrs Blair was told that steps had been taken by NSO to ensure that the phones could not be accessed again using NSO Group software and he asked for Mrs Blair's help in contacting Baroness Shackleton.

14. So it was that the information that the mother and her associates may have been the victims of hacking through the medium of NSO's Pegasus software came not only from Dr Marczak, but also from NSO themselves via Mrs Blair.

The Data

15. The nature of Pegasus software is that unlike conventional malware, a connection may be made without the owner of the device doing anything at all. Consequently, even the most sophisticated and professional antivirus search mechanisms are unlikely to detect that a device has been hacked by Pegasus software. There will be no trace of Pegasus software on the device as in order to control its functions and harvest data from a device, it does not need to maintain a presence there, even for a very short period of time,

16. Dr Marczak has learnt to use a variety of investigative methods to detect the deployment of Pegasus software. One aspect is through examination of the sysdiagnose files which had been extracted from the phones of the mother, her staff and her solicitors together with the records of network logs and Dr Marczak's own records of IP addresses, domain names and applications which he asserts are relevant to the Pegasus software. Another aspect of Dr Marczak's investigation is by way of the identification of idiosyncrasies of the methods used by Pegasus software in transmitting data to 'proxy servers'. The details of the first idiosyncrasy which Dr Marczak detected, labelled by him as the 'first fingerprint', are already publicly available in peer reviewed papers written by Dr Marczak in recent years. However, the 'second fingerprint', which is a further idiosyncrasy detected by Dr Marczak, is not (to his knowledge) known to others, including to the NSO Group. It follows that the second fingerprint has continuing investigative as well as commercial value to him. Together the sysdiagnose material and the second fingerprint will be referred to as 'the data' in this judgment.

17. The material the subject of Ground 2 of the appeal is a list of IP addresses, somewhat misleadingly termed by Dr Marczak himself as the 'victims list'. The list is not a list of individuals or their devices, but rather a list of IP addresses through which one or more mobile devices may have communicated with Pegasus servers. Given that an IP address does not necessarily tell you anything about whose phone was using it, Dr Marczak regarded the list as a series of 'leads' which he wished to keep confidential. Whilst its specific existence was not set out in Dr Marczak's reports, it is common ground that the list did not inform any of the conclusions as to the fact of hacking reached by either Dr Marczak or the single joint expert Professor Beresford, referred to below.

These proceedings

18. On 7 September 2020 the mother made an ex parte application alleging that she and some of her legal advisers and staff had been the subject of surveillance. A note was filed on behalf of the father denying the father's involvement or knowledge of such activity or of having received any knowledge as a result of such activity. That has remained the father's position throughout. On 21 September 2020 the father raised the defence of Foreign Act of State in relation to the hacking allegations and on 23 September the mother issued an application seeking findings of fact in relation to the allegations of illegal surveillance.

19. On 6 October 2020, at a case management hearing, the President listed the Foreign Act of State hearing. At the same hearing the President made initial directions for the instruction of a single joint expert in relation to cyber security and gave permission at [15] of the Order, 'in the wholly exceptional circumstances of the case, for the father to obtain advice from an expert or experts on cyber security on a privileged basis for the purposes of considering Dr Marczak's witness statement'. The President made a number of conditions in relation to this expert in particular for the identifying of the name of the expert to the court and the provision of confidentiality undertakings.

20. Provision was also made for the disclosure of Dr Marczak's statement in unredacted form (save in relation to identifying information) but, and critically for the purposes of this appeal, by [15(d)] none of the data supplied to Dr Marczak for analysis (the sysdiagnose material) was to be supplied to the father's expert. Permission was given to the father to make an application to vary these two important conditions. The court has consistently refused the father's several informal applications with regard to the disclosure of the data.

21. The father in the light of that permission, instructed a firm of cyber experts called Sygnia who are based in the same city in Israel as NSO. Subsequently in his fact-finding judgment, the President explained that the appointment of a shadow technical adviser to the Appellant had been 'in part justified by a need to level up the forensic playing field in the early stages of the case during which the mother had open access to expert advice from Dr Marczak, yet the father had none'.

22. The court's position throughout has been that whilst it would not countenance disclosure of the data to Sygnia on a confidential basis, it would look favourably upon an application from the father for the instruction of his own UK based expert witness 'on the conventional basis', that is to say full and open disclosure of both the process of instruction and any resulting expert opinion. In the event of such an application being made, the father's expert would have access to all the data which he sought.

23. The conventional basis to which the President referred was an application under the Family Procedure Rules 2010 Part 25 Experts and Assessors, which provide a comprehensive scheme for the use of experts in children's proceedings including the ability to put questions to experts and the use of experts' meetings. It is unnecessary for the purposes of this appeal to set out the rules and/or the accompanying Practice Directions in their entirety, but in the light of the father's objection to making an application under Part 25 on the basis that it is procedurally unfair for him to be obliged to follow this route, it should be noted:

    i) The expert's duty to help the court on matters within their expertise overrides any obligation to the person from whom the experts have received instruction

or by whom they are paid (FPR r. 25.3 (1) and (2)) and they must provide an opinion that is independent of the party instructing the expert (FPR PD 25B para 4.1(e)).

ii) The court will only give permission for expert evidence where it is necessary to assist the court to resolve the proceedings. (FPR r. 25.4(3)).

iii) Where two or more parties wish to put expert evidence before a court the court can direct that the evidence on the issue is to be given by a single joint expert (FPR r. 25.11(1)).

iv) The expert's report is addressed to the court and concludes with a statement of truth confirming that the expert has within the report expressed their 'true and complete professional opinion' (FPR PD 25B 9.1).

24. The fact-finding trial could not proceed until the father's claim of Foreign Act of State was determined. On 29 October 2020 a judgment was given by the President and Chamberlain J rejecting that claim. The Court of Appeal dismissed the father's appeal on 8 February 2021 and the Supreme Court refused permission to appeal on 8 March 2021.

25. Sir Geoffrey Vos, The Master of the Rolls gave the judgment of the Court of Appeal in relation to the rejection by the President and Chamberlain J at first instance of the father's claim that he was protected by the doctrine of Foreign Act of State. It is clear from the judgment of the Master of the Rolls that the focus of the application was to avoid adjudication on the damning evidence of Dr Marczak. The Master of the Rolls recorded at [20] that Lord Pannick had accepted on behalf of the father that the court could determine whether hacking had occurred and whether there was a pool of possible states which might have been responsible for it. Lord Pannick also accepted that the court could determine as a matter of inference whether the father was complicit in the hacking. His submission was that the court could not adjudicate on the evidence of Dr Marczak because the father, as Ruler of Dubai and Prime Minister of UAE, could not be expected to adduce evidence about their intelligence capabilities and the court could not therefore fairly or appropriately determine allegations emanating from the evidence of Dr Marczak.

26. The Master of the Rolls rejected that argument in the following terms:

> "39. It may well be the case that the father cannot adduce evidence about the intelligence capabilities of Dubai or the UAE. But the central issue raised by the allegations is not as to the intelligence capabilities of Dubai or the UAE; it is as to whether private phones were hacked by software accessible only to foreign states including Dubai and the UAE. Once Lord Pannick had accepted that the court could fairly determine **by inference** that the father was complicit in the phone hacking, the issue narrowed. It became, in reality, a question of whether it would be fair to exclude the mother from adducing all available evidence as to the technical circumstances of the hacking. We do not think that would be fair or appropriate in the unusual circumstances of this case."

The Expert Evidence

Instruction of a single joint expert

27. Pursuant to the order of the President of 6 October 2020, a company called IntaForensics had been instructed as single joint expert. IntaForensics filed two reports without Dr Marczak's report being disclosed to them. They were then instructed to file a third report having been given Dr Marczak's report for the purposes of preparing the report with instructions to analyse the same. By an email of 9 February 2021, IntaForensics said that the material supplied by Dr Marczak was beyond their expertise and that they did not consider it to be appropriate to continue with the instruction. They felt however, able to help to the extent that they filed a report dated 16 March 2020 confirming (i) the existence of the unusually named Apps which had been identified by Dr Marczak and (ii) that there was evidence of 5 of the 6 phones having been subject to surveillance and/or interference from an unidentified source.

28. By agreement between the parties a replacement single joint expert Professor Alastair Beresford, Professor of Computer Security at the Department of Computer Science and Technology at the University of Cambridge, was identified. Professor Beresford's research work examines the security and privacy of large-scale computer systems with particular focus on networked mobile devices.

29. Professor Beresford has had access to all the core data including the 'second fingerprint'. Professor Beresford has filed reports, attended an expert's meeting, given oral evidence and been cross examined.

30. The evidence of Dr Marczak which was served on the father in compliance with the order of 6 October 2020, had provided 'considerable non-sensitive detail' in relation to both the sysdiagnose and the 'second fingerprint', which provided Sygnia with an opportunity to analyse and comment on Dr Marczak's methodology. The mother emphasises that not only did Dr Marczak's first report set out full details of the Pegasus apps found on the suspect phones, but also contained extensive tracts of the sysdiagnose material itself.

31. The President observed at [40] that despite the 'clear boundaries' set by his order dated 6th October 2020, Lord Pannick had 'consistently pressed for the disclosure of the core data in the form of sysdiagnose files extracted from the phones of the mother, her staff and her solicitors, together with the records of network logs and Dr Marczak's own records of IP addresses, domain names and applications which he asserts are relevant to the Pegasus software.'

32. At no stage did those representing the father make a formal application for the release of the data as provided for in the order of 6 October 2020. On 12 March 2021 however, the issue having been adjourned over the course of several directions hearings, the President dealt with the disclosure of the data in a judgment ('the 12 March 2021 judgment') which dealt with a number of case management issues including the father's opposition to the convening of an expert's meeting between Dr Marczak and Professor Beresford.

The 12 March 2021 judgment

33. The President explained at [6] of the 12 March 2021 judgment that it had been a 'wholly exceptional course for the court to permit the father to disclose the written material to a shadow expert *and in particular for that expert to be based outside the jurisdiction of this court' [my emphasis].* The President confirmed at [8] that it had never been his intention for Sygnia to develop into a separate expert who would 'have access to the underlying material and conduct their own assessment of it' and that it had 'always been open to the father to make a Part 25 application'.

34. Lord Pannick's position was and remains that the father had no intention of 'inflating' the status of Sygnia to that of an expert whose opinion would be open to the court and filed in the proceedings. It is, Lord Pannick asserted and continues to assert, a basic requirement of fairness that the father's adviser should be permitted to examine the data upon which Dr Marczak's opinion is based in order to provide confidential advice to the father.

35. The father does not suggest that disclosure of the data to a Part 25 expert would have been insufficient to allow him to challenge the evidence of Dr Marczak, or that no suitable experts could be identified in the United Kingdom. Further, it is not part of the father's case that the judge could or should have made it a condition of disclosure of the data for his chosen confidential adviser to be UK based. On the contrary it is clear that the father would not have accepted such a 'compromise' even had it been suggested or appropriate. This is reinforced by that fact that twice during the course of his submissions Lord Pannick said that had the judge allowed disclosure subject to such a condition: 'they would have had to live with that *subject to appeal'.*

36. The father's determination to utilise only Sygnia in the role of expert would have presented an obstacle on a Part 25 application had one been made on his behalf, given that the *Guidelines for the instruction of medical experts from overseas in medical cases* issued in 2011 (guidance which would have had equal application to an expert in these proceedings) is strongly in favour of the instruction of UK experts and requires written justification as to why a UK expert cannot be used. This would be a potentially unsurmountable hurdle given that those representing the father had themselves identified two suitable experts based in this country.

37. The President concluded in his judgment of 12 March 2021, by saying that the disclosure to Sygnia 'is way beyond the line that is required for fairness and is wholly without principle in terms of the way that the courts in this jurisdiction, certainly in the family jurisdiction, approach the instruction of experts'. The President (for the second time in the course of this brief case management judgment) offered to give a more detailed judgment in writing (at [6] & [10]) and emphasised that the stance he took was one based on 'high principle'.

38. No request was made for a more detailed judgment on behalf of the father and the decision was not appealed. Lord Pannick submitted that there had been no point in seeking further details given that it was clear that the President would not change his mind and that the appropriate time to appeal was at the conclusion of the fact-finding hearing.

39. I do not agree. First of all, Lord Pannick is quite open in informing the court that he sees this stage in the appeal process as a launch pad for an appeal to the Supreme Court in relation to the use of confidential or shadow experts in cases involving the welfare of children. It would therefore have been appropriate for those representing the father to have sought clarification from the judge in relation to this, the 'high principle' to which the President referred and the father now seeks to challenge. This is particularly the case when that judge at first instance was the President of the Family Division.

40. Further in my judgment this is one of those cases where an interlocutory appeal could have been justified on the basis that it would have been more convenient to consider the issue before trial even having taken into account CPR PD 52A para 4.6. A successful interlocutory appeal would have led to the disclosure of the data and (presumably) additional cross examination of Dr Marczak without too much delay, whereas reserving the appeal until the conclusion of the fact-finding means that in the event that the appeal is allowed, there will have to be a second fact-finding appeal covering much of the same ground and which would no doubt have the effect of delaying the welfare hearing presently listed for September, well into next year nearly three years after the initial application was made.

41. I should add for future reference, that where a case management decision is not appealed until after the final hearing (which is often the case), it is imperative that any relevant interlocutory judgment is at the forefront of the appeal process, particularly as here, where the subject matter of that interlocutory judgment is the focus of the appeal. In the present case, whilst it is right that the President restated his reasons for refusing to release the data to Sygnia in the fact-finding judgment, no reference was made to the judgment of 12 March 2021 in the father's skeleton argument and the judgment itself is found not in the core bundle, but buried at Divider 29 of the supplementary bundle.

The Welfare Context.

42. Given the nature and extent of the litigation to date together with the vast sums employed by the father in order to achieve his goal (over £2.5m in costs for both sides in relation to this appeal alone) it is easy to forget that behind this appeal is an application for contact being made by a father to his two young children. It follows that no matter how beguiling the submissions outlined below made by Lord Pannick to the effect that there should not be a different approach to litigation in the Family Division from that applied in other jurisdictions, the fact remains that these proceedings are in respect of the upbringing of two children who are habitually resident in this jurisdiction. As a consequence the proceedings are conducted under the umbrella of Section 1 of the Children Act 1989, and accordingly the welfare of these children is the court's paramount consideration, a fact and approach long recognised by the House of Lords and now the Supreme Court (see [74] – [75] below).

43. This appeal is from the second of two fact-finding trials which have taken place. The first was heard between 11 – 15 November 2019. In his judgment at [2019] EWHC 3415 (Fam) which was handed down on 11 December 2019, the President made serious, wide ranging findings against the father concerning:

    i) The forced abduction of one of the father's elder daughters, Princess Shamsa, from England in 2000 by those acting on his behalf;

ii) The restraint and house-arrest of another of the father's daughters, Princess Latifa, in 2002 and in the years following;

iii) The capture and forced return to Dubai of Princess Latifa from a boat in international waters off India by Indian Special Forces and the Dubai military in 2018, and her subsequent house-arrest;

iv) A campaign of fear and intimidation against the mother prior to her departure from Dubai in April 2019, which continued in the form of threats and harassment after she arrived in England.

44. The President's conclusion at [181] of the first fact-finding judgment was that the findings listed above established a consistent course of conduct by the father and his agents over two decades, by which, 'if he deems it necessary to do so', the father 'will use the very substantial powers at his disposal to achieve his particular aims'.

45. The issue then at the heart of the welfare hearing which is yet to take place, is an assessment of risk and in particular the risk that these two children might be, as happened to their two half-sisters, similarly abducted from the care of their mother from whom they have never been parted, and returned to Dubai. Lord Pannick's case was that the hacking allegations the subject of this appeal even if made out, would make no substantial difference to the issue of the father's contact. The President unsurprisingly disagreed and made his view abundantly clear in the fact-finding judgment subject to this appeal:

> "[172] I regard the findings that I have now made to be of the utmost seriousness in the context of the children's welfare. They may well have a profound impact upon the ability of the mother and of the court to trust him with any but the most minimal and secure arrangements for contact with his children in the future.
>
> [173] It does not take long to contemplate just how an individual would react to discovering that their personal phone, and those upon whom they rely for confidential advice, support and protection, have been infiltrated by the most sophisticated spyware that is available, and to know that a very substantial amount of personal data has been stolen, yet not knowing precisely what.

46. The sysdiagnose data (that is, the data from each of the six phones), was not only confidential to the device owners (none of whom, other than the First Respondent, are parties to the proceedings), but potentially contained information relevant to the security of the First, Second and Third Respondents. Moreover, the phones of Baroness Shackleton and Nicholas Manners contained confidential and privileged information relating to their clients. The phone attributed to Baroness Shackleton also contained confidential information relating to her business as a peer. The First Respondent submits that the Article 8 and common law rights of these individuals must be considered before there is any question of such data being sent out of the jurisdiction.[1]

[1] Ibid, para 10(a)

47. Lord Pannick maintains that the data is 'not about the children' but in my view, not only was the issue of hacking highly relevant to the welfare of the children, but the disclosure of the data to Sygnia, an organisation based outside the United Kingdom, had in itself significant welfare implications:

    i) Dr Marczak's evidence, accepted by the President, was that the 'second fingerprint' had continuing investigative and commercial value. That investigative value was directly relevant to the welfare of the children because there was a risk that if it were neutralised through disclosure to the father, further detection of such hacking would no longer be possible through this route and the children would be exposed to risk of harm.

    ii) The sysdiagnose data, drawn as it is from the phones of the children's mother and her advisers, contains highly confidential material which impacts not only on the privacy of the children but, in relation to at least one device, information about the unique security system in place to protect the mother and the children. This is a matter of the utmost significance given the findings made by the President in the first fact-finding hearing.

48. Lord Pannick submits that the fact that Sygnia is a company out of the jurisdiction and not subject to enforcement or committal proceedings is a matter which this court cannot take into account in this appeal as the President made no specific mention of them in his fact-finding judgment. Given that the President has lived and breathed this case for over two years and that the father's legal team failed to take up the President's offer for him to 'give more detail' in relation to his judgment on 12 March 2021, it is in my view a rather unattractive argument to suggest that the President had not in mind that Sygnia is offshore, not least as at [6] of the judgment of 12 March 2021 the President had specifically commented on how exceptional it had been to permit any disclosure to an expert outside the United Kingdom. In my judgment the fact that Sygnia is based outside the jurisdiction is of the utmost significance and is a matter of which the President was well aware.

49. Notwithstanding that the father's solicitors had themselves identified two UK based experts capable of reviewing the work of Dr Marczak (and the Children's Guardian a third) for the purposes of appointing a single joint expert, the father had insisted on using Sygnia, a foreign expert not subject to the ordinary jurisdiction of the English Courts. In addition, Sygnia is not only a foreign expert, but is based in the same jurisdiction as the NSO Group. No evidence was provided as to the extent of any connections between the two companies.

50. As important, the Family Court would have no power to compel Sygnia to give evidence were they not to be called as a witness and any undertakings offered by Sygnia to meet concerns about the sensitivity of the data in question would as the President said be 'practically impossible to enforce'.

51. The father having failed in his attempts to rely on the Foreign Act of State doctrine declined to file any evidence or to offer any explanation as to why a conventional Part 25 application should not be made in the usual way on his behalf. The response made on his behalf on appeal is that a Part 25 response and the loss of confidentiality should not be the 'price' he had to pay for access to the data.

Procedural Safeguards

52. What then given the considerable challenges that managing this case presented, did the President do in order to ensure a fair trial and to give the father an effective opportunity to challenge the allegations of hacking? These are set out in some detail in the President's judgment between [35] and [61] but were summarised by him at [34] as follows:

> "In order to meet the unusual circumstances generated both by the method by which the evidence was introduced into the proceedings, and by the scientific complexity and sophistication of its content, it was necessary for the court to consider a range of procedural steps with the aim of achieving a fact-finding process that was both viable and fair to all the parties. These included the following:
>
> (a) appointment of a confidential scientific adviser to the father and his legal team;
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> (b) appointment of an independent Single Joint Expert ['SJE'];
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> (c) communication between the court and NSO Group;
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> (d) appointment of independent counsel to review the extent of disclosure/redaction of all communications between Dr Marczak, the mother, her staff and her legal advisers;
>
> (e) appointment of a second independent counsel to review information about Mr X;
>
> (f) the presentation of the father's case".

53. The President went on at [65]:

> "Fairness
>
> 65. Having described the various features of these proceedings which are to varying degrees unusual, it is possible to make the following observations as to fairness:
>
> a) every single piece of evidence that has been admitted into the hearing has been fully disclosed to the father and his team. I, as the judge, have not seen any evidence that the father's lawyers and those acting for the children have not also seen. In so far as material has not been admitted into the hearing and has been withheld from disclosure to the father, it is not evidence in the case and forms no part of the material upon which I will make my decision.

> b) In so far as Dr Marczak has examined and commented upon electronic data which has not been disclosed to the other parties and the court, that data has been fully examined and checked by both IntaForensics and Professor Beresford who, subject to minor corrections, have confirmed its accuracy.
>
> c) In so far as Dr Marczak has relied upon data drawn from his investigations over the past five years and more, that data (including the 'second fingerprint') has been disclosed to Professor Beresford who, in turn, has reported upon its validity and accuracy in his evidence.
>
> d) In so far as part of the content within the extensive records of communication between Dr Marczak and others relating to this case has not been disclosed to the court, the father or the children's guardian, that material has been fully considered and, where appropriate, challenged on the issue of disclosure by independent counsel instructed for that task.
>
> e) .....
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> f) The father has at all times been able to apply to have his own openly instructed expert within the proceedings who would be instructed in accordance with the court rules and subject to the same stringent conditions as Professor Beresford.
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> g) Despite having filed no evidence at all and having not put forward a positive case before the court, the father has continued to enjoy all the rights of a party to participate in eth proceedings including making full submissions through counsel and conducting a thorough and extensive cross-examination of Dr Marczak.

54. It is not necessary to expand upon the detail of all those procedural safeguards but perhaps the following matters should be highlighted:

    i) The President allowed the appointment of Sygnia which he regarded as a wholly exceptional course particularly when the expert was based outside the United Kingdom ([6] of the 12 March 2021 Judgment). He allowed his instruction because the father and his team were entitled to have someone technically and scientifically 'sited' in respect of the material to help them understand (initially) the report of Dr Marczak. It was 'never the court's intention' that Sygnia would 'develop into a separate expert who would have access to the underlying material and conduct their own assessment of it'.

    ii) The father's legal team together with Sygnia played a full part in the instruction of Professor Beresford and that whilst that part of the experts' meeting where he tested out the validity of the second fingerprint was redacted, it was explored in detail within the meeting and the meticulous Professor Beresford was entirely satisfied with the answers he was given.

iii) Whilst it is right to note that unlike Sygnia, Dr Marczak became a witness and subject to the openness requirements commensurate with that role, it should be noted that all the mother and her advisers' communications were scrutinised by an independent Counsel who ensured that only essential redaction of the material was allowed notwithstanding that a certain amount of the material predated Dr Marczak becoming a witness in the case. The mother therefore unlike that father, had no confidential scientific advice.

55. Lord Pannick took the Court through each of the factors set out at [65] of the judgment. Whilst accepting the accuracy of each of them he sought to identify why in respect of each of them, they provided in his submission 'no answer' to a failure to permit the disclosure of the data to Sygnia. Whilst I have considered those submissions with care, in my judgment picking off individual features in this way is unhelpful as it fails to look at the totality of the safeguards put in place against the background of the case and the President's approach overall.

56. Finally in relation to the President's approach to fair procedure, it is worth setting out in full that passage of the judgment of the President where he makes it clear that notwithstanding the father's refusal properly to engage in the proceedings in the interests of his children, he took the view that fairness nevertheless required the court to give his legal team licence to be fully involved in the trial:

> "61. In circumstances where the father has filed no evidence at all in response to the allegations, where he has not sought leave to instruct his own open court expert, where there is effectively no substantial dispute between the evidence of Dr Marczak and that of the SJE and where the father does not seek to put forward a positive case before the court (other than to make various and varying suggestions), it might be possible to justify closing down or severely limiting the father's ability to contest the factual allegations. At this hearing, however, the court adopted the contrary course. Lord Pannick was permitted full and equal range to that attributed to Mr Geekie QC and the mother's legal team to advance arguments prior to the hearing and in closing submissions. Most importantly, Mr Andrew Green QC, on behalf of the father, conducted an extensive, most thorough and professionally adept cross-examination of Dr Marczak which was spread over two days and lasted at least seven hours".

The Evidence

57. Before moving on to the examine the way the father's appeal is put and his case that there could be no fair trial unless Sygnia had access to the data, it is useful briefly to look at the form and overall strength of the evidence in support of the allegation that these mobile phones had been hacked and the consequent findings of the President.

58. The evidence that led to the President's unequivocal conclusion that the phones in question had been hacked was all one way. The President reached the conclusion that that was the case after Dr Marczak had been cross examined on behalf of the father by

Andrew Green QC for in excess of 6.5 hours, cross-examination which the President said at [117], not only 'demonstrated cross-examination skills of the highest professional order' but benefited the court by having the matters tested in such detail by an advocate 'who plainly had total command of his brief and the skill with which to deploy that information'. The President concluded:

> "[135] In approaching Dr Marczak's evidence I have exercised a great deal of care. He does not come to the case as an expert in the conventional sense. He stepped forward to offer assistance to the mother and her team which they readily took up. It was only after that that he became a potential witness."

59. The President approached the evidence of Dr Marczak with great care; he had in mind that Dr Marczak had an acknowledged interest in tracking the use of the Pegasus software by the UAE (including Dubai). Having noted these important caveats the President described how he had become more and more impressed by Dr Marczak's evidence saying:

> "[137]..... he presented foremost as a scientist, who worked strictly within the confines of the data and the principles of computer science. His opinions both micro and macro, were carefully built upon and supported by the data and the underlying engineering of the complex systems with which he works. I did not detect and occasion when he might be seeking to stretch the science to fit a pre-determined conclusion in relation to the fact of hacking and the identification of Pegasus software."

60. Professor Beresford, the independent single joint expert, who had access to all the data and the second fingerprint, confirmed Dr Marczak's conclusion that the phones had been hacked using Pegasus software. The President was equally impressed by Professor Beresford who, he noted at [140], had no direct involvement with Pegasus and 'whose independence from having any attraction to one outcome or another was clear, as was his expertise in this narrow and highly complex field'. The President highlighted the meticulous attention to detail shown by Professor Beresford and his need to have issues or assertions fully clarified before he was prepared to 'sign-off on them and move on'.

61. It should be remembered that whilst the father declined to involve himself directly in the litigation, his legal team, with Sygnia in the shadows, were heavily involved in the identification of Professor Beresford, scrutiny of his work, and the setting of questions for the purposes of the experts' meeting (although somewhat surprisingly the father's team, it will be recollected, had argued against the holding of an experts' meeting). Mr Green had the opportunity to cross-examine Professor Beresford in the same detail as that to which they had utilised when cross-examining Dr Marczak, although in the event, the testing of his evidence was somewhat perfunctory.

62. In addition to the evidence of Dr Marczak and Professor Beresford IntaForensics had filed a report. Whilst they had felt unable to tackle the complexities of Dr Marczak's technical report, they were sufficiently confident in their report of 16 March to feel able to express the view that 5 of the mobile phones with which the court is concerned had been hacked.

63. The judge had in addition a letter written by NSO to the court on the 14 December 2020 in response to an order made by the President on 20 November 2020. Whilst couched in understandably careful terms, the NSO letter said that following its investigations 'the working assumptions upon which NSO has based its decision' were that the customer had acted in breach of its contract and that the mobile phones of Baroness Shackleton, her associate (as he then was) and the mother had all been 'compromised'.

64. Following an investigation, the letter went on, 'provisions of services' to the unnamed customer was stopped completely and their contract 'terminated'. This was a course only adopted 'ultimately where necessary' and a measure with very significant commercial consequences for NSO.

65. The President was rightly of the view that on its own, the letter 'might be sufficient to prove' that the phones had been hacked by Pegasus software but that caution was needed. The President referred to the fact that the evidence was only in letter form, albeit from a source well placed to say whether the software had been used. The court could not therefore in the President's view, place the same weight upon it as if NSO had filed a full report and been available to give oral evidence. It was for that reason that the President regarded the NSO letter, rather than being decisive, as being part of the overall picture, The letter, together with the evidence of Dr Marczak and Professor Beresford, supported by IntaForensics led the President to find at [146] that: 'That evidence alone establishes very clearly, and well beyond the tipping point of the balance of probabilities, that hacking by Pegasus of these 6 phones took place.'

66. Finally there was the evidence of Mrs Blair, who had contacted Baroness Shackleton at the request of NSO, whose evidence was unchallenged by those representing the father.

67. The President concluded at [147]

> "I therefore find that all six of these phones have either been successfully infiltrated, or at least the subject of an attempted infiltration, by surveillance software. I find that the software used was NSO's Pegasus software. In relation to the mother, it is clear that the attempt succeeded with a very substantial amount of data (265MB) being covertly extracted from her phone. It is also probable, and so I find, that there was successful hacking of the phones of Baroness Shackleton and Mr Manners. The finding in relation to the other three phones is that there was an attempt to hack into them and that this was part of the same attack by Pegasus software as that affecting the principal three phones."

The Appeal

68. This then is an appeal against a case management decision made by the President. The case management decisions were designed by the President to ensure that the father had a fair trial in the unusual circumstances of the case. It is the father's case that those safeguards are inadequate and that nothing short of disclosure of the data to Sygnia, their confidential adviser, could satisfy their entitlement to a procedurally fair trial.

69. I approach my consideration of the submissions made on behalf of the father having in mind *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA

Civ 5; [2013] 1 FLR 1250, [24]-[38], in which Sir James Munby P emphasised the extreme reluctance of this court to interfere with case management decisions and quoted from Black LJ (as she then was) in *Re B (A Child) (Residence Order: Case Management)* [2012] EWCA Civ 1742; [2013] 1 FLR 963 at [35], who said:

> "a judge making case management decisions has a very wide discretion and anyone seeking to appeal against such a decision has an uphill task."

70. Lord Pannick constructs the foundations of his argument that the father has been the victim of procedural unfairness on two bases:

i) That submissions made on behalf of the mother and the Children's Guardian were based on a misconceived assumption that Sygnia are, or would be, experts in the sense understood by the court.

ii) That in failing to order the disclosure of the data, the Family Division is applying issues of disclosure in a wholly unacceptable way and out of tune with all other divisions of the High Court with the consequence that none of the procedural safeguards put in place by the President can compensate for a failure to make the data available to their confidential adviser.

(i) The proposed role of Sygnia

71. Lord Pannick submits that Sygnia were only ever intended to be confidential advisers. They were never intended to be experts or for any application to be made on behalf of the father which would change their status from that of adviser to that of expert. I do not accept that argument. In my judgment Sygnia were experts instructed on behalf of the father.

72. In any event, what is in a name? Those representing the father can choose to refer to Sygnia as 'confidential advisers' but the fact remains that they are experts in the field of cyber security and that it would be the intention of the father to instruct Sygnia to utilise the data (if disclosed) to conduct a complete parallel analysis to that of Dr Marczak and Professor Beresford and, having done so, to report their findings to the father's team. Confidential advice may be the aim, but the expert opinion of Sygnia, having completed the work, is by necessity to be delivered in some form to those instructing them. In my judgment it was intended that Sygnia would carry out an expert analysis of the data, such analysis to be conducted in the shadows and not disclosed, but otherwise in precisely the same way as Professor Beresford has done in the open.

(ii) The proper approach to evidence in Family Proceedings:

73. At the heart of Lord Pannick's submissions is his assertion that the President's case management decision to refuse the disclosure of the data to Sygnia is an example of the Family Court's singular approach to procedure, which approach results in orders such as the one subject to appeal being made which are procedurally unfair.

74. Lord Pannick starts by reminding the Court that in 2013 in *Prest v Petrodel Ltd* [2013] UKSC 34; [2013] 2 AC 415 at [37] Lord Sumption said that the Family Division does not 'occupy a desert island in which general legal concepts are suspended or mean

something different' (see also *Richardson v Richardson* [2011] EWCA Civ 79; [2011] 2 FLR 244 ('*Richardson*'), at [53] per Munby LJ).

75. In my experience, it would be hard to find a modern Family Judge who does not only respect, but also embraces that view. That family law is indeed not an island and operates under the same umbrella of procedural fairness as every other jurisdiction, that does not mean however that proceedings involving the welfare of children may not operate in certain respects in a somewhat different manner to other civil proceedings, particularly in Wardship proceedings. That this is the case has been confirmed periodically at the highest level over the last 25 years.

76. In the landmark case of *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531 *('Al Rawi')*, Lord Dyson said:

> "63. But I agree that there are certain classes of case where a departure from the normal rule may be justified for special reasons in the interests of justice. Thus as Baroness Hale of Richmond said in *Secretary of State for the Home Department v MB [2007] UKHL 46* , [2008] 1 AC 440 at para 58:
>
> "If....the whole object of the proceedings is to protect and promote the best interests of a child, there may be exceptional circumstances in which disclosure of some of the evidence would be so detrimental to the child's welfare as to defeat the object of the exercise."
>
> Wardship proceedings are an obvious example of such a case: see *In re K (Infants) [1965] AC 201* , per Lord Devlin at p 241A. Cases involving children raise different considerations from those which arise in ordinary civil litigation. That is because the interests of children are paramount. It follows that where the interests of the child are served, so too are the interests of justice".

77. In *Re C (Family Proceedings: Case Management)* [2012] EWCA Civ 1489; [2013] 1 FLR 1089, in the following year, Munby LJ (as he then was) said:

> ".....But these are not ordinary civil proceedings, they are family proceedings, where it is fundamental that the judge has an essentially inquisitorial role, his duty being to further the welfare of the children which is, by statute, his paramount consideration. It has long been recognised — and authority need not be quoted for this proposition — that for this reason a judge exercising the family jurisdiction has a much broader discretion than he would in the civil jurisdiction to determine the way in which an application of the kind being made by the father should be pursued. "

78. Most recently in *Re R (Children)(Import of Criminal Principles in Family Proceedings)* [2018] EWCA Civ 198; [2018] 2 FLR 718 at [62], McFarlane LJ (as he then was) said:

> "The focus and purpose of a fact-finding investigation in the context of a case concerning the future welfare of children in the Family Court are wholly different to those applicable to the prosecution by the State of an individual before a criminal court. .....The primary purpose of the family process is to determine, as best that may be done, what has gone on in the past, so that that knowledge may inform the ultimate welfare evaluation where the court will choose which option is best for a child with the court's eyes open to such risks as the factual determination may have established."

79. It is important to have these more recent observations in mind when moving on to consider whether the views expressed in *Oxfordshire County Council v M* [1994] Fam 151 *('Oxfordshire')* and *Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16 *('Re L')* have stood the test of time. *Oxfordshire* and *Re L* are the two paradigm cases which prohibit the withholding of expert evidence from the court and reflect on the inquisitorial role in family proceedings where the interests of the children are paramount. Significantly, in both cases the constitution who heard the appeal had amongst its number not only family specialists, but commercial judges of the highest order.

80. Lord Pannick's extensive submissions in respect of *Oxfordshire* and *Re L* referred to below were made for the first time in this court. They were not argued at first instance and were not advertised at the oral permission hearing or even cited in the skeleton argument filed on behalf of the father in preparation for the hearing of this appeal. Lord Pannick says he is now simply responding to the mother's late reliance on those authorities and in doing so seeks to frame the issues in such a way as to enable him to invite the Supreme Court to revisit *Re L* which, he says, should be regarded as bad law; the proper law, he submits, is rather to be found in the minority judgment of Lord Nicholls.

81. Mr Otty and Ms Fottrell on behalf of the Children's Guardian submitted that the father should not at this late stage be permitted to launch a root and branch attack on the long established principle found in *Re L* that expert evidence cannot be withheld in children cases, a principle which Mr Otty said was thought/presumed to be accepted by all involved as being the 'high principle' which had underpinned the case management of the father's application in this, as in every other, contact dispute. We have with some reluctance, decided that Lord Pannick may make these fresh submissions in respect of *Oxfordshire* and *Re L*, given that it would appear that these important authorities were specifically raised for the first time by the mother and Children's Guardian in their skeleton arguments filed in response to this appeal. Having said that, it is a most unsatisfactory state of affairs and it would undoubtedly have been of considerable assistance to all had the father's position and the nature of his attack been set out in writing in a supplementary skeleton argument rather than entirely orally and without notice.

82. In *Oxfordshire* the mother wished to consult a child psychiatrist, an adult psychiatrist and a paediatrician on the basis that if the leave sought were granted and reports

obtained, there would be no obligation on her to disclose the relevant report. Sir Stephen Brown, giving the judgment of the court, highlighted that section 1 of the Children Act 1989 is a provision which overrides every other consideration in the application of the Act to this area of the law. He emphasised (at page 161) that Children Act proceedings are not adversarial, 'although an adversarial approach is frequently adopted by various of the parties.' A particularly apposite comment in the context of the present case it might be thought.

83. The duty of the court, Sir Stephen said, is to investigate and seek to achieve a result which is in the interests of the welfare of the child. Sir Stephen formulated the principle as follows at page 162:

> "Children's cases are to be regarded as being in a special category. In these circumstances, the court has power to override legal professional privilege in relation to experts' reports when it gives leave to parties to obtain them. Relevant information should be made available to the court in order that it can arrive at a conclusion which is in the overriding interests of the welfare of the child."

84. This principle was subsequently approved by a majority decision in *Re L,* a case which related to care proceedings, but it is common ground would equally apply to private law children proceedings given that both are governed by the welfare principle. Lord Jauncey, with whom Lord Lloyd and Lord Steyn agreed, drew a distinction between legal advice privilege and legal professional privilege. Lord Jauncey explained that litigation privilege is an 'essential component' of the adversarial procedure. If therefore, he said at page 25 G, care proceedings are 'essentially adversarial...litigation privilege must continue to play its normal part. If they are not, different considerations may apply.' Lord Jauncey went on to agree with the view of Sir Stephen Brown in *Oxfordshire* that care proceedings are essentially non-adversarial, and therefore took the view that it was at large for the House to 'determine what if any role [litigation privilege] has to play in care proceedings'.

85. Lord Jauncey analysed the difference between non-adversarial and adversarial proceedings, saying at page 27C:

> "In the latter case the judge must decide the case in favour of one or other party upon such evidence as they choose to adduce, however much he might wish for further evidence on any point. In the former case the judge is concerned to make a decision which is in the best interest of the child in question and may make orders which are sought by no party to the proceedings: sections 10(1)(b), 31(5), 34(5) of the Act"

86. Importantly for the purposes of the present appeal Lord Jauncey went on to say:

> "I would add that if litigation privilege were to apply to Dr France's report *it could have the effect of subordinating the welfare of the child to the interests of the mother in preserving its confidentiality.* This would appear to frustrate the primary object of the Act." *(my emphasis)*

87. Finally Lord Jauncey said that for his part, rather than putting it as Sir Stephen Brown had in *Oxfordshire* that the court has the power to override litigation privilege, the better view is that litigation privilege does not arise in the first place in inquisitorial proceedings.

88. The minority view in *Re L* was expressed by Lord Nicholls with whom Lord Mustill agreed. It is this minority view upon which Lord Pannick is heavily reliant in support of his submission that *Re L* was wrongly decided. Lord Nicholls said at page 30H that in his view:

> "Clear words, therefore, or a compelling context are needed before Parliament can be taken to have intended that the privilege should be ousted in favour of another interest. The Children Act 1989 contains neither. There is no express abrogation of the privilege. Nor do the provisions in the Act, designed to promote the welfare of children, carry with them an implication that in future parents who become involved in court proceedings are not to have the normal freedom to consult lawyers and potential witnesses, and to do so confidentially."

89. Lord Nicholls was of the view that the crucial question is not to what extent the proceedings are inquisitorial or adversarial, but rather what is required to ensure that the proceedings are conducted fairly. It was doubtful in his view, (page 32H) 'whether a parent who is denied the opportunity to obtain legal advice in confidence is accorded the fair hearing to which he is entitled under article 6(1), read in conjunction with article 8'.

90. The parents in *Re L* made an application to the European Court of Human Rights in *L v UK (Case 34222/96)* [2000] 2 FLR 322, arguing that, in requiring any expert report to be disclosed, the mother's human rights had been breached and that she had been deprived of a fair trial.

91. The ECHR declared the application to be inadmissible rejecting it as manifestly ill-founded. Lord Pannick rightly notes that this was an admissibility decision, but equally validly Mr Otty drew to the attention of the court the fact that this was a court of seven judges including the President and Sir Nicholas Bratza. In their judgment the ECHR set out not only extensive extracts from the judgment of Lord Jauncey, but also from that of Lord Nicholls in relation to the submission made by the mother that she had been placed in the invidious position of choosing whether or not to risk obtaining an expert opinion in view of the requirement that any report should be disclosed. The court said:

> "..the Court observes that the other parties in the proceedings would also have had to face this dilemma. In this case, the applicant did choose to obtain an expert report which contained an adverse opinion on one point. Since the applicant, who was legally represented, would have been able, if she so wishes, to seek other evidence to counter the effect of that aspect or to present any arguments relevant to the credibility or weight to be attached to the opinion, *the Court is not persuaded that she was deprived of an adequate or proper opportunity to present her*

case. Nor was she placed in a worse position than any other party in the proceedings". (my emphasis)

92. Notwithstanding the view expressed by the ECHR, Lord Pannick relies rather upon the dicta of Lord Rodger in the *Three Rivers District Council v Bank of England (No 6)* [2004] UKHL 48; [2005] 1 AC 610 (*'Three Rivers (No 6)'*), a case about legal advice privilege rather than litigation privilege. Lord Carswell however set out the conditions for litigation privilege at [102] including, that for litigation privilege to apply, the litigation in question must be adversarial, not investigative or inquisitorial. Lord Scott also said at [29] that litigation privilege was restricted to adversarial proceedings. Lord Pannick drew the court's attention to the judgment of Lord Rodger, at [53] who referred to Lord Nicholls' dissenting judgment in *Re L* in which he had cautioned against basing an analysis of litigation privilege simply on the distinction between 'adversarial' and 'inquisitorial' proceedings. Lord Rodger, whilst seeing the force in the argument of Lord Nicholls, said that consideration of the issue was 'for a case where the matter arises for decision'.

93. Lord Pannick also relied upon in *Re Ketcher* [2020] NICA 31. This was a Coroner's case in Northern Ireland. The court regarded itself as bound by the obiter observations of Lord Carswell and Lord Scott in *Three Rivers (No 6)* set out above. They said at [27] that, although they were attracted by the broader view taken by Lord Nicholls in *Re L,* they did not think that they should follow that approach in the light of the observations in *Three Rivers (No 6)*. It does not seem as if *L v UK* was cited to the court.

94. These two cases, Lord Pannick submits, demonstrate an unease felt outside the family jurisdiction at the validity of the decision of the House of Lords in *Re L.* Lord Pannick says therefore that this appeal represents a case of precisely the type Lord Rodger had in mind in *Three Rivers (No 6)* and which, in his submission, merits the consideration of the Supreme Court. Mr Otty submits with force that that is not this case. In this case, Mr Otty says, the question of whether these proceedings are adversarial or investigatory is simply not the issue; but rather, as Lord Nicholls put it, the question is, have the proceedings been conducted fairly? The father, Mr Otty says, has neither put forward any explanation for refusing to go down the Part 25 route nor provided an adequate explanation as to why in these Children Act proceedings, the commissioning of an expert on Part 25 terms would fail to give him an effective opportunity to meet the allegation that the mobile phones had been hacked.

95. In support of his submission that, as a consequence of the decision of the House of Lords in *Re L,* the approach of the Family Courts is inherently unfair in respect of their approach to confidential experts, Lord Pannick took the Court to a number of authorities which demonstrate the long established and elementary principles of procedural fairness in civil proceedings. The question is, he submits, whether there is something in the circumstances of family proceedings which alters what in another jurisdiction would be the plainest breach of the principles of procedural fairness.

96. The authorities included *Ridge v Baldwin* [1964] AC 40, 64, *Kanda v Government of Malaya* [1962] AC 322, 337, *Brinkley v Brinkley* [1965] P 75, 78, *R (Osborn) v Parole Board* [2014] UKSC 61; [2014] AC 1115, 1149-1150, [66]-[71] and *Gilles v Secretary of State for Work and Pensions* [2006] UKHL 2; [2006] 1 WLR 781, [6]. I refer to some

only and in the briefest of terms given that the principles expounded are accepted by all the parties.

97. In *Kanda v Government of Malaya* [1962] AC 322 (*'Kanda'*), a Privy Council case, a police inspector was dismissed for a disciplinary offence on the basis of a highly critical report from a board of inquiry at which he was neither present nor represented. The officer challenged his dismissal internally and again in the High Court. It was not until the fourth day of the hearing in the |High Court that the report was, for the first time, disclosed to him. Lord Denning emphasised at page 337 that if a right to be heard is to be worth anything it must carry with it 'a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them'. Lord Denning went on to say that the risk of prejudice is enough.

98. *Brinkley v Brinkley* [1965] P 75 (*'Brinkley'*), related to matrimonial proceedings in which unbeknownst to the husband the magistrates took into account during the course of their deliberations allegations of cruelty made against him in earlier proceedings, at which one of the magistrates had presided. Lord Scarman said at page 78 that for the court to have taken into account such evidence, which the accused had had no opportunity to see, hear or challenge, struck 'at the very root of the judicial process'. Lord Scarman quoted from Upjohn LJ in an earlier case, *In re K (Infants)* [1963] Ch 381; [1963] 3 WLR 1517, where he had said that 'It seems to be fundamental to any judicial inquiry that a person or other properly interested party must have the right to see all the information put before the judge, to comment on it, challenge it and if needs be to combat it...'

99. In *R (Osborne) v Parole Board* [2014] AC 1115 (*'Osborne'*), 1149-1150 at [66]-[71], in an analysis about procedural fairness, Lord Reed emphasised at [65] that the court must for itself determine whether a fair procedure is followed. He went on to say:

> "67. There is no doubt that one of the virtues of procedurally fair decision making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. As Lord Hoffmann observed however in Secretary of State for the Home Department v (AF (No 3) [2009] UKHL 28; [2010] 2 AC 269, para 72, the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged.
>
> 68. The first was described by Lord Hoffmann (ibid) as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is

> made, provided they have something to say which is relevant to the decision to be taken.
>
> 71. The second value is the rule of law. Procedural requirements that decisionmakers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions"

100. Lord Pannick submits that the recent case of *Re S (A child)* [2021] EWCA Civ 605 (*'Re S'*) demonstrates in the family jurisdiction an example of unfair procedure which supports his submission in relation to the data. In that case a mother sought leave to oppose the making of an adoption order. The judge having found that there had been a change in the mother's circumstances moved on to consider whether pursuant to the second welfare stage of the test set out at s.47(7) of the Adoption and Children Act 2002 the mother should be given permission to oppose the making of an adoption order. In deciding to refuse permission to oppose on welfare grounds the judge based his entire decision on the contents of a welfare report called an Annex A report, a report which the mother did not see and the contents of which she had no knowledge. Macur LJ in allowing the appeal said at [31] that the mother had a legitimate sense of grievance and had been the subject of procedural irregularity, she not having had disclosure of this key document.

101. In my judgment on its facts, the situation in *Re S* is far removed from that facing the President and merely serves to reinforce the recognition in the family courts that procedural fairness is every bit as much a requirement as in any other court.

Al Rawi

102. Lord Pannick places particular reliance on the decision of the Supreme Court in *Al Rawi*, which held that there is no place for a closed material procedure in ordinary civil cases. *Al Rawi* is relied upon on behalf of the father as authority for the general principle that a party has a right to know the case against him and the evidence upon which it is based (per Lord Dyson, [12]). Lord Pannick also cites Lord Dyson's observation at [47] of *Al Rawi* that it is not sufficient to meet the requirements of procedural fairness that the Court appoints a special advocate to represent the interests of a party, with that party not themselves being shown the material on which adverse findings are based. Lord Pannick relies on this to support his contention that by analogy and contrary to the President's statement at [65(b)], (see [51] above) the appointment of a single joint expert is not sufficient to meet the requirements of procedural fairness.

103. Any consideration of the principle of procedural fairness as discussed in *Al Rawi* must, as Lord Pannick acknowledges, also refer to the observations by Lord Dyson at [63] in relation to the different considerations in cases involving children which are set out at [74] above.

104. Lord Dyson continued at [65] that children and confidentiality cases are 'two narrowly defined categories of case where a departure from the usual rules of procedure has been held to be justified' and that so far as he was aware, 'the procedures adopted in these cases are not regarded as controversial and work satisfactorily'.

105. Lord Mance adopted the same approach at para. [114]:

> "114. Further, once it is accepted, as Lord Dyson does (para 63), that "there are certain classes of case where a departure from the normal rule may be justified for special reasons in the interests of justice", for example wardship and other cases where the interests of children are paramount, that to my mind also makes it difficult to suggest that the court lacks jurisdiction in a strict sense to vary the basic principles of open and natural justice mentioned in para 107 above."

106. Following on from *Al Rawi,* in *In re A (A Child) (Family Proceedings: Disclosure of Information)* [2012] UKSC 60; [2013] 2 AC 66 *('In re A'),* a case also involving a contact dispute; a child X, who was not a child of the family, made allegations of sexual abuse against a father. X was wholly opposed to her identity being disclosed. Baroness Hale concluded that there was no means short of full disclosure to protect the rights of the father and said at [34]:

> "34. It is in this context that it has been suggested that the court might adopt some form of closed material procedure, in which full disclosure was made to a special advocate appointed to protect the parents' interests, but not to the father himself. It faces two formidable difficulties. The first is that this Court has held that there is no power to adopt such a procedure in ordinary civil proceedings: *Al Rawi v Security Service (JUSTICE intervening)* [2011] UKSC 34, [2012] 1 AC 531. That case can be distinguished on the ground that it was the fair trial rights of the state that were in issue, and the state does not enjoy Convention rights. It is arguable that a greater latitude may be allowed in children cases where the child's welfare is the court's paramount concern. But the arguments against making such an inroad into the normal principles of a fair trial remain very powerful. The second difficulty lies in the deficiencies of any closed material procedure in a case such as this. We have arrived at a much better understanding of those difficulties in the course of the control order cases, culminating in *Secretary of State for the Home Department v AF* (No 3) [2009] UKHL 28, [2010] 2 AC 269. The essential requirement of any fair procedure is that the person who stands to lose his rights *has an opportunity effectively to challenge the essence of the case against him.*" (*my emphasis)*

107. Baroness Hale went on at [36] to discuss the flexibility of family proceedings in relation to the receiving of evidence before saying that '[t]he court's only concern in family proceedings is to get at the truth'.

108. Mr Otty is happy to embrace all of the jurisprudence upon which Lord Pannick relies. Both *Brinkley* and *In re A* at [34] he says, emphasise that procedural fairness requires the person accused, regardless of jurisdiction, to have the right effectively to challenge the allegations. In the present case, Mr Otty submits, the father has that right through the medium of the single joint expert and if he chose, by the instruction of his own Part

25 expert. Mr Otty goes on to say that per *Kanda,* the father knows what evidence has been given and what statements have been made affecting him: he has been given a fair opportunity to correct or contradict them.

109. The requirement which applies across all jurisdictions, Mr Otty rightly in my judgment submits, is for a party to be given a fair opportunity to challenge the evidence against him. Baroness Hale would say 'the essence' of the case against him. That does not, Mr Otty emphasises, mean that he or she has to be seen to take the opportunity, all that is required is that it is there for the taking.

110. Lord Pannick accepts that those representing the father saw all the evidence filed (and per *Brinkley* all the material put before the judge, the President not having seen the data), but he submits that that is not enough where the data which informed the basis of the evidence ultimately filed was not disclosed. Mr Otty submits that the father knew the allegations which were made against him and had had sight of the evidence adduced before the court: the only issue which therefore arises for consideration is whether the safeguards put in place by the President, together with the availability of Part 25, has provided that father with an effective or adequate opportunity to challenge the essence of the case, which is 'an essential requirement of any fair procedure' *(Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269 at [59]; *In re A* at [34]).

111. Further Mr Otty reminds the court that it was made clear in *Osborne* that it is for the court to decide what amounts to fair procedure. The President, Mr Otty submits, designed a procedure with scrupulous care in this case. Far, Mr Otty says, from the failure to disclose the data resulting in the poor decision making which concerned Lord Reed in *Osborne*, the father's resistance to making a Part 25 application, coupled with his blanket denial and failure to file evidence, were features which inhibited the court's only concern 'to get at the truth' and must serve to impeach the father's motives.

The Approach in the Family Division

112. Lord Pannick asserts that the Family Division of the High Court in its application of *Re L* was behaving in a manner which was immune to the principles of fairness which apply throughout all other jurisdictions. No other jurisdiction he submits would have refused the disclosure of the data to a confidential expert. Such idiosyncratic case management even if made on the back of *Oxfordshire* and *Re L* was intrinsically unfair and the time has come, Lord Pannick says, for the Supreme Court to look again at *Re L*.

113. It is neither necessary nor appropriate for me to attempt an extensive comparative overview of the rules and practices in other areas of law, not least as the lateness of the challenge to the principles in *Re L* mean that the court has not had the benefit of detailed argument about this aspect of the case. As Mr Otty puts it however, whilst each Division of the High Court shares the same core features of procedural fairness, each Division also has its own individual features which makes a superficial comparative exercise unhelpful.

114. I agree and give only by way of example:

i) In the Administrative Court the father would have had to comply with the duty of candour (CPR 54.16.3) often referred to as the 'cards on the table' principle. He would not have been entitled to rely on bare denials or non-admissions or to withhold information in his possession.

ii) In the Commercial Court the father would have had to serve a Defence with a signed statement of truth. Judgment in default could have been entered or his case struck out if he failed to do so (CPR 12.3, 16.5 & 22.1-2). Further the father would have been required to disclose all the documents in his control in relation to the allegations (CPR 31.6 & 31.8). A commercial litigant who neither pleaded nor evidenced his case would be exposed to findings based on adverse inferences or to an application for summary judgment.

iii) There is provision for an application to be made under CPR 31.19 to allow a party to make an ex parte application to withhold disclosure of a document on the ground that disclosure would damage the public interest.

iv) CPR Part 35 contains a raft of rules governing the use of experts including (at CPR 35.1) the duty to restrict expert evidence to that which is reasonably required to resolve proceedings. The court thereafter controls the evidence, this includes the ability to exclude evidence that would otherwise have been admissible (*Grobbelaar v Sun Newspaper Ltd* Times, August 12, 1999 CA.)

115. In my judgment, whilst *Oxfordshire* and *Re L* were each decided some time ago (1993 and 1997 respectively) they cannot be placed in a silo marked 'outdated' and consideration has to be given to the wider issues set in a contemporary context, including that:

i) In *Al Rawi* Lord Dyson identified children cases as a category of case where a departure from the usual rules of procedure has been held to be justified; such an approach was not, so far as Lord Dyson was aware, controversial.

ii) The importance of expert evidence being available to the court and to all the parties has, since the introduction of the Family Procedure Rules 2010, been embedded in Part 25.

iii) Baroness Hale in *In re A* drew a line beyond which it would not be fair to go in relation to disclosure in cases involving the welfare of children. She made it clear that a wholly unevidenced allegation by an unidentified third party would not be procedurally fair and could not be compensated by a closed material procedure.

116. This was not an *In re A* case; for the reasons set out earlier in this judgment, what was proposed by the father was as much the obtaining of an expert's report with a view to keeping it undisclosed as was the psychiatric report in *Oxfordshire*. The father had access to material and evidence which went far beyond what could be described as the essence of the case. He, exceptionally in children proceedings, had Sygnia to assist in the interpretation of the reports. Further, a single joint expert was instructed together with not one but two independent counsel, who were instructed to scrutinise aspects of the evidence to ensure fairness. The President had made it abundantly clear that notwithstanding its confidential and sensitive nature, and that there had already been a

single joint expert appointed, the data would be disclosed under the banner of a Part 25 order.

117. It is my view that there was no procedural unfairness in the President's case management of this case and that the father was given every opportunity by the appointment of a single joint expert and via the conventional Part 25 route, effectively to challenge the evidence of Dr Marczak by reference not only to his detailed reports but also with the data, had he chosen to take it. To have allowed the father to have the data on the terms he wished would, as Lord Jauncey said in *Re L* at page 27F, 'subordinat[e] the welfare of the child to the interests of the mother in preserving its confidentiality' and would have served to undermine what Baroness Hale in *In re A* at [36] identified as, 'the court's only concern in family proceedings', that is to say 'to get at the truth'.

The 'Get Arounds'

118. This Court is bound by *Re L.* Lord Pannick submits that if the court is of the view that, contrary to his submission, the work of Sygnia for the father would not be that of an expert of the type covered by *Re L*, then there are three 'get arounds' which he says would have enabled the President to order the disclosure of the data to Sygnia notwithstanding the decision of the House of Lords in *Re L* . They are:

i) *Discretion*

119. Nothing, Lord Pannick says, prevents the court from recognising that in certain circumstances fairness requires a party to be given the opportunity to get confidential advice notwithstanding *Re L.* The fact that the President had recognised (at [36]-[38] of the judgment) the need to have an expert in the first place demonstrates, he said, that the President accepted that the high principle to which he referred in his judgment of 12 March 2021 was subject to exceptions.

120. In my judgment the route taken by the President whilst clearly 'discretionary' was exceptional and was strictly circumscribed. That the President took the course he did does not open the door to a wide reaching discretion permitting a court to circumvent the 'high principle' that all expert reports are disclosed in cases involving children where their welfare is the paramount consideration. Indeed, the President made it abundantly clear that there was a bright line between what he was and was not prepared to do. The President was prepared to permit the instruction of what amounted to a confidential interpreter to enable the highly technical report of Dr Marczak to be understood and challenged in cross examination, but he was not prepared to allow the preparation of what was, however Lord Pannick sought to disguise it, a parallel expert report which would not be disclosed to the court, and would be prepared by an expert out of the jurisdiction and by reference to highly sensitive and confidential data.

ii) A Confidentiality Ring

121. It was submitted on behalf of the father for the first time at the oral application for permission to appeal, that there had been what was characterised on his behalf as an obvious solution to the perceived procedural unfairness, a procedure which, it was submitted by Lord Pannick, is routinely utilised in commercial cases where information of considerable commercial sensitivity is often at the heart of a dispute. A

confidentiality ring could, Lord Pannick submitted, have been put in place in order to ensure that the integrity of the data was maintained. That submission has a superficial attraction as a 'get around' to the refusal to disclose the data to Sygnia and in the absence of any reference to *Re L* or any authorities in relation to confidentiality rings at the oral permission hearing, it was a submission which undoubtedly influenced the court in granting permission to appeal.

122. On more detailed consideration however, not least given the father's choice of Sygnia as his confidential adviser, the submission falls at the first hurdle. In *Roussel Uclaf v ICI Plc* [1989] RPC 59 CA *('Roussel')*, the Court of Appeal upheld a decision to withhold the disclosure of documents to experts in a confidentiality ring who were outside of jurisdiction, on the basis that (i) there would be no effective remedy if the confidential material were leaked, and (ii) the applicant for disclosure had failed to establish that there was no appropriate expert within the jurisdiction.

123. More recently in *Oneplus Technology (Shenzhen) Co, Ltd v Mitsubishi Electric Corp* [2020] EWCA Civ 1562; [2021] F.S.R. 13 *('Oneplus')*, an appeal concerning such a confidentiality regime, Floyd LJ considered the management of disclosure in cases in intellectual property litigation where valuable trade secrets were involved. At [19] – [23] he quoted in some detail from Buckley LJ's judgment in *Warner-Lambert Co v Glaxo Laboratories Ltd* [1975] R.P.C. 354. Buckley LJ had answered the question which had been posed, namely how can justice be done and at the same time effect be given to the rights of the parties to the greatest possible extent. The answer to that question, Buckley LJ said, was that '[i]n such a case a controlled measure of disclosure seems best calculated to serve the interests of justice' (*Oneplus,* at [20]). He went on to note that a court should be particularly careful not to expose the defendant to any unnecessary risk of their trade secret leaking to any competitors, particularly so, 'where those to whom the process is disclosed might not be resident within the jurisdiction of the court' (*Oneplus,* at [21]).

124. Floyd LJ went on to draw together a 'non-exhaustive list' of points of importance which he set out at [39], which list includes at (vii) that 'Difficulties of policing misuse are also relevant'.

125. In my judgment in this regard, the Family Court is far from being a 'legal Alsatia where the common law and equity do not apply' (*Richardson)*, there is for these purposes, as was noted by Lord Dyson in *Al Rawi*, a considerable parallel between children's cases and the very different world of commercial cases. The President was doing his level best to ensure that justice was done whilst, at the same time, giving effect to the rights of the parties. This was done by using a controlled measure of disclosure to the father, bolstered by the appointment of a single joint expert who had access to the highly sensitive data together with the use of not one, but two independent counsel, to ensure fair disclosure was achieved.

126. In reality, it might be thought, the father was in a far better position than the parties would have been in a conventional commercial confidentiality ring case given that in the Family Division, unlike in the Business and Property Courts, the father had a solution in his own hands: he could have issued a Part 25 application and his legal team would then have had access to all the protected material.

(iii) Family Procedure Rules rule 12.75

127. FPR r. 12.75(1) (a) provides:

> "(1) A party or the legal representative of a party, on behalf of and upon the instructions of that party, may communicate information relating to the proceedings to any person where necessary to enable that party-"
>
> (a) By confidential discussions, to obtain support, advice or assistance in the conduct of the proceedings.

128. This again marks a new departure in the case by the father. Never in any of the many hearings where the issue arose and the disclosure of the data sought (as opposed to the disclosure of Dr Marczak's reports) was it suggested on behalf of the father that FPR r. 12.75 applied so that the father could, as of right under this rule, disclose the data and documents in the case to Sygnia. The submission seems to be that the President in declining to grant disclosure of the data denied the father's legal team the opportunity to exercise what was their procedural right under this rule to disclose the data to Sygnia, and he was therefore acting in a way that was procedurally unfair.

129. Unfortunately, FPR r.12.75 was referred to in isolation. FPR 12.75 forms part of Chapter 7 of the Family Proceedings Rules entitled *Communication of Information: Children Proceedings*. Any consideration of the application of FPR r.12.75 has to be considered in conjunction with FPR r.12.73: 'Communication of Information: general' and particularly by reference to FPR PD 12G – 'Communication of Information'. Neither of these provisions were brought to the attention of the court either in writing or orally.

130. FPR 12.73 provides:

> "12.73.—(1) For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated—
>
> (a)where the communication is to—
>
> (i)a party;
>
> (ii)the legal representative of a party;
>
> (iii)a professional legal adviser;
>
> (iv)an officer of the service or a Welsh family proceedings officer;
>
> (v)the welfare officer;
>
> (vi)the Legal Services Commission;

> (vii)an expert whose instruction by a party has been authorised by the court for the purposes of the proceedings;
>
> (viii)a professional acting in furtherance of the protection of children;
>
> (ix)an independent reviewing officer appointed in respect of a child who is, or has been, subject to proceedings to which this rule applies;
>
> (b)where the court gives permission; or
>
> (c)subject to any direction of the court, in accordance with rule 12.75 and Practice Direction 12G.
>
> (2) Nothing in this Chapter permits the communication to the public at large, or any section of the public, of any information relating to the proceedings.
>
> "

131. The rule therefore applies to three categories of information in respect of children proceedings:

i) Communications as of right under r.12.73(1)(a) which it will be noted by (r.12.73(1)(a)(vii)) only permits disclosure to an expert whose instruction has been authorised by a court;

ii) Where the court gives permission under r.12.73(1)(b);

iii) Under r.12.75 **and** PD12G but subject to a direction of the court which will include in appropriate circumstances, a direction that communications should not be made.

132. The scheme established by r.12.75 and PD 12G operates by reference to a series of statutory tables by which a person in the first column may communicate to a person listed in the second column information identified in the third column for the purposes specified in the fourth column, but always subject to the direction of the court.

133. Further, FPR r. 12.75 was introduced to allow litigants to discuss their case with people who could offer them support without them finding themselves to be in contempt of court. Confirmation that this is the case can be found in 'Family Justice in View' (Cm 7502, December 2008) at page 24. Changes, it says, were made to the FPR in 2005 in relation to the disclosure of confidential documents in order to allow people to 'seek advice and support from a range of people, including legal advisers, McKenzie Friends, close family members, medical practitioners...and to elected representatives'. These are precisely the categories of persons now identified in the PD12G.

134. An organisation of the type of Sygnia has no place in the table, which is unsurprising given that Part 25 is specifically designed to enable the court to maintain control of the instruction of, and disclosure to, experts.

135. Whilst so far as I am aware the order granting permission to allow the disclosure of Dr Marczak's reports to Sygnia was not expressed to be pursuant to FPR r.12.73(b), it seems to me that that rule provided the jurisdictional basis for the exceptional order made by the President when he gave permission for the reports of Dr Marczak to be disclosed to Sygnia, an organisation who do not fall within either r.12.73(1)(a) or (c).

136. It follows in my judgment that, other than within the confines of the limited discretion described above, the 'get arounds' identified by Lord Pannick do not provide an alternative approach to the disclosure of information to confidential experts or to the requirement for all expert's reports be disclosed to the court in welfare based proceedings concerning children.

Conclusion as to Ground 1

137. The simple question to be answered is: did the President's refusal to allow disclosure of the data to Sygnia amount to procedural unfairness? As already indicated, in my judgment it did not.

138. The allegations of hacking came before the court at a time when it had already made very serious findings against the father. Lord Pannick described them as findings of 'bad behaviour'. In my judgment that is a gross understatement of the gravity of those findings. The unappealed findings are that on two occasions the father has abducted children across international borders. In the midst of proceedings concerned with assessing the risk of abduction by or through the father of his children, the President now had to determine whether the father had facilitated the hacking of the mobile phones of the mother and her advisors with the result that it would be highly likely that he now had access to sensitive and confidential information, including in relation to the mother's security arrangements.

139. Notwithstanding the extreme sensitivity of the sysdiagnose data and the second fingerprint, the President was prepared to allow the father access to all the data had the father followed the standard approach to the testing of expert evidence in children proceedings, namely the making of a Part 25 application with the openness embedded in such an application. What the President was not prepared to do was to allow the father to conduct a parallel analysis using an expert out of the jurisdiction over whom the President would have no control and no sanction.

140. In my judgment the father had an effective opportunity to test the evidence. If he chose not to take it to the full extent because he was not prepared to comply with the procedural processes of the jurisdiction to which he had chosen to subject himself through this application, that was a matter for him.

Ground 2 – Victims List

141. I agree with the mother and the Children's Guardian that the father's submissions on Ground 2 are undermined by the fact that neither Dr Marczak nor Professor Beresford relied upon the 'victims list' in reaching any of their conclusions. Moreover, the President expressly stated at [158] of the second fact-finding judgment that he did not place 'any reliance upon the evidence from Dr Marczak on the issue of attribution.' The father submits that disclosure of the 'victims list' would enable him to investigate alternative possibilities for who else might be responsible for the hacking, and

specifically emphasises that Dr Marczak confirmed that the list contained several IP addresses registered in Jordan. This is a submission which he also advanced before the President, and is recorded at [164] of the judgment.

142. The President held that none of the 'shifting suggestions' of the father for potential perpetrators (which also included Iran, Israel and Saudi Arabia) were supported by any evidence. Instead, his findings on attribution were based on reasonable inferences from the evidence before him (in both fact-findings hearings) and set out at [167] – [171] of his judgment. In my view these inferences were reasonably open to the President and he was entitled to conclude from the father's close interest in these proceedings, his access to Pegasus software as Prime Minister and Head of Government of the UAE, and his evidenced willingness to use the government security services for his own family needs, that it was more likely than not that the surveillance occurred with his express or implied authority.

143. In this context, the father's submissions as to the disclosure of Dr Marczak's 'victims list' raise only a marginal issue and do not begin to satisfy the requisite threshold for disturbing the President's findings of fact on attribution.

Conclusion

144. For the reasons given I would therefore, if The Chancellor and my Lady agree, dismiss the appeal on both grounds. It follows that the findings of the President remain in place, namely that the phones of the mother, her legal advisers and various associates were hacked through the use of Pegasus software and that this surveillance was carried out by the servants or agents of the father and with his express or implied authority.

Lady Justice Macur:

145. I agree.

Sir Julian Flaux C:

146. I also agree.