CARE ORDERS: ASSESSING PROPORTIONALITY AND NECESSITY

Re H-W (Children) [2022] UKSC 17 concerned care orders made with respect to three children aged nine, 11 and 14. At first instance, H.H.J. McPhee of the Hertford Family Court concluded that it would be unsafe for the children to remain in the care of their mother and her partner and therefore made care orders for the removal of the children from the family home into foster care. On appeal, a majority of the Court of Appeal (consisting of Elisabeth Laing and Lewison L.JJ.) dismissed the appeal and affirmed the care orders made by H.H.J. McPhee. The majority concentrated on the limits of appellate review and deferred to H.H.J. McPhee's decision. The dissenting judge (Peter Jackson L.J.), however, was not satisfied with the proportionality assessment undertaken by H.H.J. McPhee and raised doubts as to whether all of the options were fully considered (at [41]–[42]).

There was an appeal to the Supreme Court. Dame Siobhan Keegan, delivering the unanimous judgment of the Supreme Court, allowed the appeal and remitted the case for rehearing before a different judge. After setting out the three principal stages in care order applications, namely, "(i) finding the relevant primary facts; (ii) determining whether the legal threshold for the making of a care order has been crossed (Children Act 1989, s. 31(2)(a)); and, if yes, then (iii) deciding the proper order to make (the disposal or welfare stage)" (at [39]), Dame Siobhan Keegan noted that the appeal did not concern the first two stages and confined the issue to determining whether H.H.J. McPhee erred at the third stage in proceeding too directly from assessing the risk of significant harm to the making of the care orders with respect to the children.

A crucial aspect of Dame Siobhan Keegan's judgment was that the court must consider, when determining whether to make care orders, the possibility of mitigating or reducing the risk of harm as well as the welfare disadvantages and advantages of various options (at [54]–[55]). In this regard, she took the view that H.H.J. McPhee failed to analyse the competing options or assess mitigations in his judgment (at [57]). In particular, with respect to the welfare checklist under the Children Act 1989, she pointed out that H.H.J. McPhee did not have regard to the range of options under section 1(3)(g) (at [59]). Notwithstanding H.H.J. McPhee's thoroughness in relation to the evidence and the facts, she observed, "[t]he difficulty is that one looks in vain for the critical side-by-side analysis of the available options by way of disposal, and for the evaluative, holistic assessment which the law requires of a judge at this stage" (at [60]). Dame Siobhan Keegan therefore held that it cannot be determined whether the care orders made by H.H.J. McPhee were necessary and proportionate (at [61]).

The Supreme Court's decision in *Re H-W* is highly significant and serves as a reminder of the level of detail required of judges in setting out their

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reasoning process as regards the proportionality and necessity of care orders. Indeed, a failure to adhere to this standard has far-reaching consequences. As Dame Siobhan Keegan explained, "[i]f, on appeal, it is found that a judge has unduly telescoped the process, and has not made the side-by-side analysis of the pros and cons of each alternative to a care order, then the likely conclusion is that his decision is, for that reason, flawed and ought to be set aside" (at [51]). This reminder from the Supreme Court is especially timely in view of recent care proceedings cases involving inadequacy of reasons provided in judgments (see e.g. *Re B (A Child)* [2022] EWCA Civ 407, [2022] 4 W.L.R. 42; *Re YW (A Child)* [2021] EWCA Civ 1174; *Re O (A Child)* [2021] EWCA Civ 149).

That said, one questions whether due allowance should be given to the fact that H.H.J. McPhee's first-instance judgment, which extended to 32 pages, was delivered *ex tempore* "immediately at the end of a lengthy hearing" (at [24]). It has been observed that delivering *ex tempore* judgments, which may be necessary or desirable due to exigencies (M. Kirby, "Ex Tempore Judgments – Reasons on the Run" (1995) 25 University of Western Australia Law Review 213, 223), "is no mean feat" (M. Zander, *The Law-making Process*, 8th ed. (Oxford 2020), 296). By contrast, preparing reserved judgments requires extra time on the part of judges (*Shirt v Shirt* [2012] EWCA Civ 1029, [2013] 1 F.L.R. 232, at [35]). In the light of this, there is significant force in Laing L.J.'s observation in the Court of Appeal that "it could [not] be suggested that there is any aspect of this case which was not present in [H.H.J. McPhee's] mind when he delivered his *ex tempore* judgment, even if he has not mentioned every point expressly, or analysed the case in the same way as another judge might have done" ([2021] EWCA Civ 1451, at [67]). Moreover, any scrutiny of H.H.J. McPhee's *ex tempore* judgment should be sensitive to the fact that the case was heard and concluded during the COVID-19 pandemic (at [24]), a period in which the family courts faced difficulties and challenges (*Re O (A Child)* [2021] EWCA Civ 149, at [43]).

Another point is worthy of mention. Towards the end of her judgment, Dame Siobhan Keegan firmly rejected the suggestion of substituting supervision orders for the care orders made by H.H.J. McPhee (at [63]). This was because she took the view that the Supreme Court was not equipped to undertake its own proportionality assessment by scrutinising a revised plan and assessing mitigations (at [63]). In this regard, she relied on the Supreme Court's earlier decision in *Re B (A Child)* [2013] UKSC 33, [2013] 1 W.L.R. 1911, where the majority held that the appellate court should not undertake for itself a fresh assessment of the proportionality and necessity of care orders (*Re B*, at [37] (Lord Wilson J.S.C.), [83]–[90] (Lord Neuberger P.S.C.), [136] (Lord Clarke J.S.C.)). However, in the interests of certainty for the children and the avoidance of delays (at [63]), it is submitted that the contrary opinions of Lord Kerr J.S.C.

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and Lady Hale J.S.C. in *Re B* that the appellate court has a duty to decide for itself the question of proportionality and necessity in care proceedings cases (*Re B*, at [116]–[127] (Lord Kerr J.S.C.), [204]–[205] (Lady Hale J.S.C.)) should be preferred. In line with this, it would have been better if the Supreme Court had undertaken its own proportionality assessment on the facts of *Re H-W* and made supervision orders instead of remitting the case for rehearing before a different judge (at [64]). Doing so would avoid delays in settling arrangements for the family involved and uphold the "central principle of the Children Act 1989" that delays are not in the children's interests (J. Doughty, "Remote Justice – Family Court Hearings during the Pandemic" (2020) 42(3) Journal of Social Welfare and Family Law 377, 377).

At the end of the day, there is no doubt that *Re H-W* was "a difficult case" (at [28]). Indeed, decisions made for the removal of children into public care have profound effects and should be carefully scrutinised (at [32]). However, the appellate court's approach should, as far as possible, strike a balance with the avoidance of delays in the interests of the children's welfare. Whilst the Supreme Court acknowledged that the perspectives of both the majority and the minority of the Court of Appeal were "understandable in family law terms" (at [32]), it ultimately concluded that the proportionality assessment at first instance was flawed (at [62]) but nonetheless declined to undertake its own assessment (at [63]). With the case being remitted for rehearing before a different judge, one can only hope that it will not be "a lengthy process" before arrangements are finally settled for the family involved (at [64]).

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LIGHTS, CAMERA, NO ACTION: THE INTERFACE BETWEEN CONTRACT LAW AND UNJUST ENRICHMENT

Bank of New York Mellon (International) Ltd. v Cine-UK Ltd. [2022] EWCA Civ 1021 continues a trend of judicial reluctance to save contracting parties from the unexpected consequences of the pandemic. In this case, certain cinema operators had not paid rent for the periods in which they were forced to close under COVID-19 regulations. Their landlords brought claims under the leases for unpaid rent and applied for summary judgment. The cinema operators' defences denying liability for rent were framed in three alternative ways: (1) rent cesser clauses, (2) implied terms and (3) failure of basis. All three grounds were rejected at first instance ([2021] EWHC 1013 (Q.B.) and [2021] EWHC 2591 (Ch))

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