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Enforcing Mediation Agreements: Where Are We Now? *Mann v Mann*[1]

Erich Suter

1. The Original Orders and the First Mediation

This case concerned financial arrangements following the break-up of a marriage. In 1999 there was a consent order dealing with ancillary relief. Both parties then applied to vary the order with the wife applying for the order to be capitalised. In 2005 Charles J. ordered the husband to pay a lump sum of £1.3 million, on a clean break basis, plus child support and costs. The husband was granted leave to appeal. The parties took part in a mediation through the Court of Appeal mediation scheme which resulted in a new agreement whereby the lump sum was reduced to £926,000; of which £700,000 was to be paid by December 31, 2006. If an instalment was missed then the mediated agreement would dissolve and the original order of Charles J. would take full effect. That mediated agreement was put into effect by a consent order made by Wall L.J. The husband paid only £315,000 by the due date; which meant that the mediated agreement dissolved and Charles J.'s original order was revived.

2. The Next Onslaught

In April 2010 the wife issued a statutory demand for the outstanding balance of the capital sum together with interest—a total of just under £2 million. Following a number of hearings an agreement was entered into in November 2011.

The first recital to the November 2011 agreement stated that:

> "The Parties by the Agreement intend to set out their intention to use reasonable endeavours to attempt to compromise all existing legal disputes between them and to provide for the present and future maintenance of [the wife]."[2]

It was clear that this "compromise" was intended to be achieved through mediation: the definition section of the agreement defined "the mediation" as "a mediation in which the parties intend to participate by the 31 January 2012, on the terms set out below".

Under the substantive terms of the agreement the husband agreed to pay:

- a monthly sum of £4,000 until a binding agreement had been reached in mediation;
- a lump sum of £20,000; and
- the deposit and rent on a certain property for the wife to live in until a mediated settlement had been reached. The husband was also to be personally liable for the rent.

The terms of the mediation were that it was to determine:

- the amounts which the husband should pay to the wife;
- the interest on that amount; and
- the instalments in which the sum would be paid to the wife.

As consideration for agreeing to the mediation and to the other terms of the agreement the wife agreed not to pursue her statutory demand or to make any further statutory demands and both parties agreed to discontinue their respective appeals.

[1] [2014] EWHC 537 (Fam).
[2] [2014] EWHC 537 (Fam) at [4].

A number of attempts were made to set up a mediation between the parties during the period between January 2012 and May 2013, but to no avail. Each party blamed the other for this failure.

The husband paid the agreed lump sum of £20,000 and continued to pay the £4,000 per month. In October 2012 the wife moved from the original property into a slightly cheaper one. The husband continued to pay the rent on the property until October 2013 when he claimed he had run out of money.

In December 2013, the wife issued an application for general enforcement under the Family Procedure Rules 2010 (FPR 2010) r.33.3(2)(b) saying that the husband owed her just under £2 million in terms of the outstanding award plus interest. The husband responded by saying that the wife was debarred from seeking enforcement of the original order by virtue of the November 2011 agreement which required that the matter be dealt with through mediation. The wife countered by saying that the court could not force or coerce her to mediate, whatever she might have agreed. So the question was: could the court enforce an agreement to mediate?

3. Is an Agreement to Mediate Enforceable at Law—Or Void for Uncertainty?

The first basis on which an agreement to mediate can fall foul of the law is the basis that, as an agreement to enter into an assisted negotiation—which is what mediation is—the agreement might be seen as being, in effect, an "agreement to agree" or an "agreement to negotiate". In *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd*[3] Lord Denning M.R. said[4]:

> "If the law does not recognise a contract to enter into a contract (where there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force … It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law."

This was followed in *Paul Smith Ltd v H&S International Holding Inc*[5] where Stein J. (as he then was) held that a clause which provided that "the parties shall strive to settle [their disputes] amicably" did not create an enforceable legal obligation. *Courtney* was also applied by the House of Lords in *Walford v Miles*.[6] In *Walford* all negotiations were "subject to contract". The claimant sought to imply a clause into the agreement that if the defendant wanted to sell its business it would "negotiate in good faith with the claimant". The House of Lords held that this would be both unworkable in practice and inherently inconsistent with the position of the parties who were negotiating "subject to contract". The terms of the agreement to negotiate were too uncertain to be enforceable. Lord Ackner (with whom the rest of their Lordships agreed) said:

> "… while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content."[7]

There is, however, a difference between contracts which are purely executory (i.e. where nothing has been done by either party under the contract) and those which have been executed in part by either one or both parties.

[3] [1975] 1 W.L.R. 297 CA.
[4] [1975] 1 W.L.R. 297 at 301–302.
[5] [1991] 2 Lloyd's Rep. 127.
[6] *Walford v Miles* [1992] A.C. 128 HL.
[7] *Walford v Miles* [1992] A.C. 128 at 138G.

In *British Bank for Foreign Trade v Novinex*[8] the Court of Appeal upheld an agreement to pay "an agreed commission on any other business transacted with your friends". The Court approved this passage from the judgment of Denning J. at first instance:

> "The principle to be deduced from the cases is that if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other. In the ordinary way, if there is an arrangement to supply goods at a price 'to be agreed', or to perform services on terms 'to be agreed', then although, while the matter is still executory, there may be no binding contract, nevertheless, if it is executed on one side, that is, if the one does his part without having come to an agreement as to the price or the terms, then the law will say that there is necessarily implied, from the conduct of the parties, a contract that, in default of agreement, a reasonable sum is to be paid."[9]

And in *F & G Sykes (Wessex) Ltd v Fine Fare Ltd*[10] under a five-year agreement chicken breeders agreed with a supermarket chain to provide a set number of chicks in the first year and thereafter "such other figures as may be agreed". In this case the agreement contained an arbitration clause. Lord Denning M.R. held:

> "In a commercial agreement the further the parties have gone on with their contract, the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain. When nothing has been done, it is easier to say that there is no agreement between the parties because the essential terms have not been agreed. But when an agreement has been acted upon and the parties, as here, have been put to great expense in implementing it, we ought to imply all reasonable terms so as to avoid any uncertainties. In this case there is less difficulty than in others because there is an arbitration clause which, liberally construed, is sufficient to resolve any uncertainties which the parties have left … You can either imply a term that, in default of agreement, the number shall be a reasonable number, with a subsequent provision that in case of any dispute as to what is reasonable, it should be determined by arbitration: or, alternatively, run the two terms together and say 'such reasonable figures as the arbitrator may determine'. Whichever is adopted, it all comes to the same thing."[11]

There is, however, a difference between a provision for arbitration, which is determinative of the parties' rights, and mediation or negotiation, which is not. This distinction was accepted by McKinnon J. in *Halifax Financial Services v Intuitive Systems*.[12] In that case there was a contract for supply of software design services. The "dispute clause" provided for: "senior representatives of the Parties" to meet within 10 business days of being given notice of the dispute and to

[8] [1949] 1 K.B. 623 CA.
[9] [1949] 1 K.B. 623 at 629–630.
[10] [1967] 1 Lloyd's Rep. 53 CA.
[11] [1967] 1 Lloyd's Rep. 53 at 57–58. The distinction between contracts which are executory and those which are partly or fully executed was also emphasised in *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery AD* [2001] EWCA Civ 406; [2001] 2 All E.R. (Comm) 193; [2001] 2 Lloyd's Rep. 76 at [69] where Rix L.J. giving the judgment of the court listed a set of 10 principles which can be deduced from the authorities in this area—although he said that these were non-exhaustive. This analysis was followed by the Court of Appeal in *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] EWCA Civ 156 to enforce "agreements to agree" various aspects of a settlement agreement between parties with an ongoing contractual relationship including: shipping charges, treatment charges and refining charge—all of which were left by the terms of the contract "to be agreed" between the parties.
[12] [1999] 1 All E.R. (Comm) 303.

> "meet in good faith and attempt to resolve the dispute without recourse to legal proceedings. If the dispute is not resolved as a result of such meeting, either Party may, at such meeting (or within 10 Business Days from its conclusion) propose to the other in writing that structured negotiations be entered into with the assistance of a neutral adviser or mediator."

In the event of those negotiations failing, the dispute could be referred to the court unless the parties agreed to arbitration within a specified period. McKinnon J. held this provision not to be enforceable on grounds of uncertainty. He held that the courts had consistently declined to compel parties to engage in co-operative processes, particularly good faith negotiation because of the practical and legal impossibility of monitoring and enforcing the process.

In *Cable & Wireless v IBM United Kingdom*[13] Colman J. had to consider a case where the dispute resolution clause contained a provision at cl.41 as follows:

> "41.1 The parties shall attempt in good faith to resolve any dispute or claim arising out of or relating to this agreement … .
>
> 41.2 If the matter is not resolved through negotiation, the parties shall attempt in good faith to resolve the dispute or claim through an Alternative Dispute Resolution (ADR) procedure as recommended to the parties by the Centre for Dispute Resolution. However, an ADR procedure which is being followed shall not prevent any party or local party from issuing proceedings."

In that case Colman J. distinguished cases where there was a contractual requirement merely to negotiate in good faith from the situation here. In this case the parties had gone further than just requiring good faith negotiation. Here they had set up a specific set of machinery with which to deal with matters. He explained that "agreements to negotiate in good faith" are not enforceable because of the difficulty in policing them. In this case, however, the parties had put together a set of specific obligations which were sufficiently defined to be enforced. He held:

> "I conclude that clause 41.2 includes a sufficiently defined mutual obligation upon the parties both to go through the process of initiating a mediation, selecting a mediator and at least presenting that mediator with its case and its documents and attending upon him. There can be no serious difficulty in determining whether a party has complied with such requirements."[14]

In *Petromec Inc v Petroleo Brasiliero SA*[15] Longmore L.J. considered the provisions of an agreement to "negotiate in good faith". In that case he distinguished *Walford v Miles*[16] on the basis that, whilst the House of Lords had held in *Walford v Miles* that "a bare agreement to negotiation has no legal content" because either party can withdraw from it at any time, in this case there was a structured agreement drawn up by a set of city solicitors and the requirement to negotiate in good faith was contained within this complex agreement. He said:

> "It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has no legal content, to use Lord Ackner's phrase, would be for the law deliberately to defeat the reasonable expectations of

[13] [2002] EWHC 2059 (Comm); [2002] 2 All E.R. (Comm) 1041.
[14] [2002] EWHC 2059 (Comm); [2002] 2 All E.R. (Comm) 1041 at [29].
[15] *Petromec Inc v Petroleo Brasiliero SA* [2005] EWCA 891; [2005] All E.R. (D) 209.
[16] *Walford v Miles* [1992] A.C. 128 HL.

> honest men to adapt slightly the title of Lord Stein's Sultan Azlan Shah lecture[17] delivered in Kuala Lumpur on 24 October 1996."[18]

Longmore L.J.'s remarks on the question of enforceability of the "obligation to negotiate in good faith" were not necessary to the decision,[19] but they do seem to indicate the direction in which the courts are moving towards enforcing agreements to negotiate—and hence to enter into mediation. In terms of the objections to enforcing agreements to agree, Longmore L.J. identified three types of objection:

- that the obligation is an agreement to agree and too uncertain to enforce;
- that it is difficult, if not impossible, to say whether, if negotiations are brought to an end, the termination is brought about in good or in bad faith; and
- that, since it can never be known whether good faith negotiations would have produced an agreement at all or what the terms of any agreement would have been if it had been reached, it is impossible to assess any loss caused by breach of the obligation.

Of the first he said that where the agreement was contained as part of a structured agreement this objection could not be sustained; of the third he said that the courts are used to having to assess losses in difficult cases. The objection which he considered carried the most substance was the objection that it was difficult to know whether or not negotiations had been brought to an end in bad faith. On this Longmore L.J. said:

> "But the difficulty of a problem should not be an excuse for the court to withhold relevant assistance from the parties by declaring a blanket unenforceability of the obligation. Once the fraud amendment has been permitted, the court is going to have to consider the reasons why the negotiations were terminated in any event. If fraudulent representations as to the intention to continue negotiations were made, the obligation to negotiate in good faith is likely to fall away as a separate obligation; if there was no fraudulent representation, it is perhaps less likely that there will have been bad faith in terminating negotiations but it will not be particularly difficult to tell whether there was or not."[20]

Perhaps a reflection of that well-known dictum "that the state of a man's mind is as much a fact as the state of his digestion".[21]

In *Holloway v Chancery Mead Ltd*[22] Ramsey J. also examined the authorities in considering whether or not an ADR clause was enforceable. He concluded that the requirement to go through the National House-Building Council (NHBC) Resolution Scheme was an enforceable requirement. He considered that for an ADR clause to be enforceable there needed to be three elements:

> "First, that the process must be sufficiently certain in that there should not be the need for an agreement at any stage before matters can proceed. Secondly, the administrative processes for selecting a party to resolve the dispute and to pay that person should also

[17] Lord Stein, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433. Specifically approved and followed also by Thomas J. giving the judgment of the court in the New Zealand Court of Appeal in *Hideo Yoshimoto v Canterbury Golf International Ltd* [2000] NZCA 350 at [59] to [60]: "in contract law effect must be given to the reasonable expectations of honest people. The expectations which will be protected are those that are, in an objective sense, common to both parties. Generally the law of contract is not concerned with the subjective expectations of a party. Thus, the function of the law of contract is to provide an effective and fair framework for contractual dealing, a function which requires an adjudication based on the reasonable expectation of parties."

[18] *Petromec Inc v Petroleo Brasiliero SA* [2005] EWCA 891 at [121].

[19] As Longmore L.J. himself, noted at *Petromec Inc v Petroleo Brasiliero SA* [2005] EWCA 891 at [115].

[20] *Petromec Inc v Petroleo Brasiliero SA* [2005] EWCA 891 at [119].

[21] *Edgington v Fitzmaurice* (1885) 29 Ch.D. 459 per Lord Bowen.

[22] [2007] EWHC 2495 (TCC).

> be defined. Thirdly, the process or at least a model of the process should be set out so that the detail of the process is sufficiently certain."[23]

In *Mann v Mann* itself, Mostyn J. considered the principles summarised by Hildyard J. in *Wah (Aka Alan Tang) v Grant Thornton International Ltd*[24] as "Relevant guidelines emerging" for determining whether or not an agreement to enter into ADR prior to litigation is enforceable. Hildyard J. considered that:

> "In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the Court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach."[25]

In *Mann v Mann* Mostyn J. concluded:

> "Therefore, any agreement which stipulates mediation before litigation must have its own specific terms carefully examined. If it is clear in what it says about the subject matter of the mediation; what the parties must do; and how they can bring it to an end then it is likely to be upheld."[26]

Having accepted the conditions that Hildyard J. set out in *Wah*, Mostyn J. considered that the process contained in the November 2011 agreement sufficiently set out the subject matter of the mediation and what the parties were required to do. The fact that the agreement did not specify how the parties could end the mediation he considered to be "of no consequence as the intrinsic nature of a mediation is that either party can abruptly bring it to an end, and the reason for doing so would be cloaked with privilege".[27]

So the November 2011 agreement to mediate was not void for uncertainty. Was it otherwise enforceable?

4. Is an Agreement to Mediate Enforceable at Law?

Breach of the European Convention on Human Rights art.6

In *Halsey v Milton Keynes*[28] Dyson L.J., giving the judgment of the Court, held that for the courts to require compulsory ADR would breach the right to fair trial as it would amount to an unacceptable constraint on the right of access to the court.[29] Dyson L.J. concluded

[23] [2007] EWHC 2495 (TCC) at [81]. Although in this case Ramsey J. held that no decision on the enforceability or otherwise of the NHBC Resolution Scheme was necessary because his judgment had dealt with the matter at an earlier stage. See at [66].

[24] [2012] EWHC 3198 (Ch).

[25] [2012] EWHC 3198 (Ch) at [60]. It should be noted that at [57] and [58] Hildyard J. makes some inconsistent statements on the enforceability of "agreements to negotiate in good faith". At [57] he appears to take the view that these are unenforceable—even in an otherwise concluded agreement (except where the terms to be agreed are a fair price). At [58], however, he says that where there is an otherwise concluded agreement the courts "will strain to find a construction which gives it effect". This, he suggests, could involve the court in deciding on the machinery which is appropriate to give effect to the agreement. In my view Longmore L.J.'s analysis of the situation with "agreements to negotiate" is to be preferred—although, of course, only obiter.

[26] *Mann v Mann* [2014] EWHC 537 (Fam) at [19].

[27] *Mann v Mann* [2014] EWHC 537 (Fam) at [31].

[28] [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002.

[29] And would thus be in breach of the ECHR art.6, which is headed: "Right to a fair trial" and provides in Art.6(1), "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

that while the court could and should encourage ADR robustly it could not *compel* the parties to engage in mediation.[30] This element of the decision has been the brunt of many criticisms, not least from the judiciary, but so far primarily outside the court setting.

Sir Gavin Lightman, in a speech in June 2007,[31] expressed his concern at certain aspects of the *Halsey* decision; not least that part of the decision which suggested that court-compelled mediation would be in breach of a person's right of access to the courts under the ECHR art.6.

In December 2007[32] Sir Gavin Lightman gave a speech to the Law Society in which he again expressed his concerns at the decision in *Halsey*.

On this occasion he noted that:

> "In a recent speech at SJ Berwin I gave my reasons for discounting the negative observations in both these regards of the Court of Appeal in Halsey. I seem to have made some progress in my endeavour to set the record straight in this regard, for at a recent conference on mediation I heard a retired Lord Justice express doubt as to what the Court of Appeal had decided and indeed whether it had decided anything."[33]

He went on to note that that was "a constructive (if totally unrealistic) approach". He suggested that there needed to be an authoritative pronouncement to this effect. Because,

> "whilst judges in London can decide for themselves what (if any) weight should be given to the observations in Halsey, in practice district judges in the country are naturally and understandably treating them as law, refusing to order mediation in the absence of such consent".[34]

In March 2008 Lord Phillips of Worth Matravers (the then Lord Chief Justice), in a speech given in India,[35] took the opportunity to state his view. He said that the decision in *Halsey*, insofar as it suggested that for a court to order compulsory mediation would be in breach of the ECHR art.6,[36] was purely obiter.[37] And in May 2008 Sir Anthony Clarke,[38] then Master of the Rolls, in an address to the Civil Mediation Council (CMC), also took the view that the views expressed by Dyson L.J. on the art.6 point in *Halsey* were obiter. He went on to say:

> "Lightman J. expressed the view that district judges are at present bound to follow *Halsey* on this point. It seems to me that that is a pessimistic reading. The substantive issue in *Halsey* had nothing to do with compulsory mediation. The issue before the court then was '[W]hen should a court impose costs sanctions against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution (ADR)?' Whatever the Court of Appeal held in *Halsey* in answer to that question, its comments regarding compulsory ADR were surely what we used to call obiter dicta."[39]

He went on to conclude that "despite the *Halsey* decision it is at least strongly arguable that the court retains a jurisdiction to require parties to enter into mediation".[40]

It might therefore be thought that by the time of the decision in *Mann v Mann*, in 2014, Mostyn J. might have felt able to take the view that the apparent embargo against enforced

[30] [2004] EWCA Civ 576; [2004] 1 W.L.R. 3002 at [9]–[11].
[31] Sir Gavin Lightman, "Mediation: An Approximation to Justice", speech given at S.J. Berwin, June 28, 2007.
[32] Sir Gavin Lightman, "Access to Justice", speech given to the Law Society, December 2007.
[33] Sir Gavin Lightman, "Access to Justice", speech given to the Law Society, December 2007, para.16.
[34] Sir Gavin Lightman, "Access to Justice", speech given to the Law Society, December 2007, para.16.
[35] Lord Phillips of Worth Matravers, "Alternative dispute resolution—an English viewpoint", speech given in India, March 2008.
[36] The ECHR art.6 provides in art.6(1) for the right to a fair trial.
[37] Lord Phillips of Worth Matravers, "Alternative dispute resolution—an English viewpoint", speech given in India, March 2008, p.10.
[38] Sir Anthony Clarke, "The Future of Civil Mediation" (2008) 74 *Arbitration* 419.
[39] Sir Anthony Clarke, "The Future of Civil Mediation" (2008) 74 *Arbitration* 419, 422.
[40] Sir Anthony Clarke, "The Future of Civil Mediation" (2008) 74 *Arbitration* 419, 423.

mediation in *Halsey* should be regarded as obiter, and should not be followed. But Mostyn J., along with most, if not all, judges to date, followed the *Halsey* decision and declined to order enforced mediation. Although he noted that Dyson L.J., in *Halsey*,[41] had suggested that an order could be made to require the parties to take "such serious steps as they may be advised to resolve their disputes by ADR procedures" and that if the case is not settled "the parties shall inform the court what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed". Mostyn J., whilst accepting that Dyson L.J. had said that parties could not be compelled to undertake ADR, and having quoted what Dyson L.J. had said about the orders that might be made, considered that "it might be thought that the nature of the coercion amounts to much the same thing".[42]

Perhaps this general reluctance to go against Dyson L.J.'s "ban" on compulsory mediation is what led Sir Alan Ward, who was a member of the Court of Appeal in *Halsey*, to suggest in *Wright v Michael Wright Supplies Ltd*[43] that the decision in *Halsey* should now be revisited. And this is clearly right in a situation where even the judges in the High Court are reluctant to go against what is clearly the leading authority on the topic. So although the agreement to mediate was enforceable in contract, in *Mann v Mann* [2014] EWHC 537 (Fam), the court's power to force the parties to mediation was still in question under the ECHR art.6 on the basis of the *Halsey* decision.[44]

In *Mann v Mann* Mostyn J. made an *Ungley* Order, the terms of which were:

> "i) If either party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the enforcement proceedings, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make.
>
> ii) The party considering the case unsuitable for ADR shall, not less than 7 days before the commencement of the adjourned enforcement hearing, file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable."[45]

[41] *Halsey v Milton Keynes* [2004] 1 W.L.R. 3002 CA at [30].
[42] *Mann v Mann* [2014] EWHC 537 (Fam) at [14].
[43] [2013] EWCA Civ 234.
[44] It is, perhaps, notable that there is a difference between the Civil Procedure Rules (CPR) which allow a court under r.26.4(2A) to stay a case if it considers ADR appropriate and FPR r.3.3(1)(b): the latter can only be exercised if the parties agree to it. Mostyn J. in *Mann v Mann* urged the Rules Committee to review this. However, he considered that the court could still exercise its powers under FPR r.3.3(1)(b), even if one party was trying to back out of that agreement: [2014] EWHC 537 (Fam) at [27].
[45] [2014] EWHC 537 (Fam) at [36].