

FAMILY COURT OF AUSTRALIA

NAVARRO & NAVARRO

[2019] FamCAFC 32

APPEAL – PARENTING – PROCEDURAL FAIRNESS – Where the father’s challenges on appeal were founded on contentions that the trial judge denied him procedural fairness and natural justice – Where the mother conceded the appeal – Where the Court is satisfied that the appealable errors as contended for, including errors of law, were established – Where the trial judge forfeited the advantage of judicial detachment he would otherwise have enjoyed if he had adhered to each of the principles espoused in *Michel v The Queen* [2010] 1 WLR 879 – Appeal allowed – Costs certificates issued.

Evidence Act 1995 (Cth) s 128

Family Law Act 1975 (Cth) ss 69ZN(4), 97(3)

Federal Proceedings (Costs) Act 1981 (Cth)

Ellis v The Queen [2015] NSWCCA 262

Galea v Galea (1990) 19 NSWLR 263

Huda & Huda and Laham (2018) FLC 93-837; [2018] FamCAFC 85

Johnson v Johnson (2000) 201 CLR 488; [2000] HCA 48

Michel v The Queen [2010] 1 WLR 879; [2009] UKPC 41

Royal Guardian Mortgage Management Pty Ltd v Nguyen (2016) 332 ALR 128; [2016] NSWCA 88

APPELLANT:	Mr Navarro
RESPONDENT:	Ms Navarro
FILE NUMBER:	BRC 9638 of 2016
APPEAL NUMBER:	NOA 97 of 2018
DATE DELIVERED:	21 February 2019 (orders pronounced 13 February 2019)
PLACE DELIVERED:	Sydney
PLACE HEARD:	Brisbane
JUDGMENT OF:	Ainslie-Wallace, Aldridge & Kent JJ

HEARING DATE: 13 February 2019

LOWER COURT JURISDICTION: Federal Circuit Court of Australia

LOWER COURT JUDGMENT DATE: 4 October 2018

LOWER COURT MNC: [2018] FCCA 2860

REPRESENTATION

COUNSEL FOR THE APPELLANT: Mr Kearney SC

SOLICITOR FOR THE APPELLANT: Barry.Nilsson.Lawyers

COUNSEL FOR THE RESPONDENT: Ms Gillies SC

SOLICITOR FOR THE RESPONDENT: Leishman Legal

IT IS ORDERED:

1. The appeal from the orders of Judge Vasta made on 4 October 2018 is allowed.
2. Orders 1, 4 and 5(a) of the orders of Judge Vasta made on 4 October 2018 be set aside.

IN LIEU THEREOF IT IS ORDERED BY CONSENT:

3. That the mother and father have equal shared parental responsibility for the children K born 27 April 2010 and P born 16 May 2012 (“the children”).
4. That in addition to the time otherwise provided for pursuant to the orders of 4 October 2018, the children shall spend time with the father in each alternate week from after school on Thursday to 9am the following Tuesday, commencing 14 February 2019.
5. That each of the father and the mother be and hereby is restrained from causing or permitting the children or either of them to be removed from the Commonwealth of Australia other than in accordance with:
 - 5.1 any prior agreement in writing between the parties; or,

5.2 an order for a Court pursuant to the *Family Law Act 1975* (Cth).

6. It is requested that the Australian Federal Police give effect to Order 5 herein by placing the names of the children and each of them on the Family Law Watchlist in force at all points of arrival and departure in the Commonwealth of Australia and maintain the children's names on the Watchlist until the Court orders their removal, or until 27 April 2028, whichever comes first, save only for the purpose of permitting any travel in accordance with Order 5 herein.

AND THE PARTIES NOTE THAT:

7. Other than the orders made today the orders made by Judge Vasta on the 4 October 2018 continue in force.

IT IS FURTHER ORDERED:

8. The Court grants to the appellant a costs certificate pursuant to s 9 of the *Federal Proceedings (Costs) Act 1981* (Cth) being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the appellant in respect of the costs incurred by him in relation to the appeal.
9. The Court grants to the respondent a costs certificate pursuant to the provisions of s 6 of the *Federal Proceedings (Costs) Act 1981* (Cth) being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the respondent in respect of the costs incurred by her in relation to the appeal.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Navarro & Navarro* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT BRISBANE

Appeal Number: NOA 97 of 2018
File Number: BRC 9638 of 2016

Mr Navarro
Appellant

And

Ms Navarro
Respondent

REASONS FOR JUDGMENT

1. Mr Navarro (“the father”) appeals from some of the parenting orders made by Judge Vasta on 4 October 2018 in proceedings between the father and Ms Navarro (“the mother”).
2. The father’s central challenges on appeal are founded on contentions that the trial judge denied him procedural fairness and natural justice and that the trial miscarried by reason of the trial judge’s conduct, which gave rise to an apprehension of bias against the father.
3. The mother concedes the appeal, her senior counsel acknowledging before us that the father’s challenges on appeal have merit, and the mother does not dispute them.
4. The parties joined in seeking that this Court allow the appeal and set aside the subject parenting orders, and that orders be made with the consent of both parties in lieu of the orders set aside. The parties further sought that by reason of errors of law made by the trial judge, this Court grant to each party a certificate pursuant to the *Federal Proceedings (Costs) Act 1981* (Cth) in respect of the costs incurred by each party in relation to this appeal.
5. At the hearing of this appeal we concluded that the trial judge had made appealable errors as contended for, including errors of law, and we thus made the various orders the parties joined in seeking. These are our reasons for so concluding.

The father's challenges on appeal

6. The father advanced the following grounds of appeal in his Further Amended Notice of Appeal filed on 17 January 2019:

- [1] The learned trial Judge failed to afford procedural fairness to the appellant, for the following reasons:
 - (a) frequent interruption of cross-examination by the respondent's Counsel of the appellant, including re-formulating questions and taking over the cross-examination;
 - (b) argumentative behaviour, and pejorative and gratuitous comments, towards the appellant during cross-examination;
 - (c) frequent interruption of cross-examination by the appellant's Counsel of the respondent, re-formulating questions and taking over the cross-examination, including at times in a manner that bolstered the respondent's case;
 - (d) argumentative and demeaning behaviour towards the appellant's Counsel and embarrassing Counsel in front of the respondent whilst under cross-examination, including demanding the withdrawal of questions to which no objection had otherwise been taken;
 - (e) the making of frequent comments by the trial Judge on matters that were not in issue between the parties, or generally in respect of the appellant's case, as to matters relevant to a final determination.
- [2] The trial miscarried in that the conduct set out above, cumulatively, gave rise to an apprehension of bias and the trial Judge erred in law in dismissing that application, and took into account irrelevant and speculative matters.
- [3] The learned trial judge erred in reducing the father's time with the children in circumstances where the learned trial judge failed to give the father a reasonable opportunity to be heard before determining that his time with the children should be reduced, in the circumstances where this was neither recommended or supported by the family report writer and not sought by the mother in her amended orders sought at trial.
- [4] The learned trial judge erred in finding, contrary to the weight of the evidence, that it was in the best interests of the children to:
 - (a) reduce the father's time with the children;

- (b) give the mother sole parental responsibility;
 - (c) restrain the children's ability to travel to [Country N];
 - (d) for [K] to continue to attend upon Ms [F] for therapy.
- [5] The learned trial judge failed to provide reasons or make specific findings in support of his view the father's evidence was on more than one occasion false.
- [6] The learned trial judge erred in the findings and assessments made in paragraph 165(b) of the Reasons for Judgment
- [7] The learned trial judge erred in fact and in law in his determination of matters relevant to section 60CC(3) including:
- (a) The learned trial judge's finding that the father lacked capacity to provide for the emotional and intellectual needs of the children;
 - (b) That the father had ever expressed himself as in the terms of "might makes right" or "the ends justify the means";
 - (c) That such attitude (not a matter of evidence) was dangerous to the children;
 - (d) the relevance of a lack of remorse by the father in relation to the children's moral compass.

(As per original)

7. These grounds were supported by the detailed submissions, with numerous cross-references to the trial transcript, contained in the father's Summary of Argument also filed on 17 January 2019.
8. On 30 January 2019 the father filed an Application in an Appeal seeking leave to rely upon extracts of the audio recording of the final hearing before the trial judge in four particular instances:
 - a) Transcript, 17 September 2018, p 21 ln 20 – 45: audio from 11:06:26 am – 11:08:01 am;
 - b) Transcript, 17 September 2018, p 33 ln 30 to p 34 ln 15: audio from 11:36:54 am – 11:38:55 am;
 - c) Transcript, 20 September 2018, p 344 ln 25 to p 345 ln 10: audio from 12:30:28 pm – 12:31:25 pm; and
 - d) Transcript, 20 September 2018, p 359 ln 45 to p 361 ln 5: audio from 2:43:40 pm – 2:44:48 pm.

9. The purpose of this application was to address the prospect that a bare reading of the written transcript would not convey the full nature and effect of the conduct of the trial judge complained about. As will be further referred to, in all respects the application, having regard to that purpose, is well founded.
10. Senior counsel for the father did not resile from any of the father's grounds of appeal nor from any of the arguments in support of them as contained in the father's detailed Summary of Argument. However, in circumstances where the mother conceded, shortly prior to the appeal hearing, that the appeal should be allowed senior counsel for the father resolved that reference to Ground 1 in his oral argument was sufficient for the purpose of establishing the requisite appealable errors. Further, senior counsel resolved that rather than addressing every aspect, or taking this Court to every transcript reference identified in the father's detailed Summary of Argument, his oral submissions on appeal would be confined to instances seen as illustrative of the father's central complaints.

The trial judge's failure to afford procedural fairness to the father – (Ground 1)

11. In *Michel v The Queen*¹ Lord Brown, delivering judgment for the Privy Council, said of a trial judge's function, *inter alia*:

...Of course he can clear up ambiguities. Of course he can clarify the answers being given. But he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. He must not cross-examine witnesses, especially not during evidence-in-chief. He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced.
12. In *Royal Guardian Mortgage Management Pty Ltd v Nguyen*² members of the New South Wales Court of Appeal cited *Michel* with approval. Basten JA described Lord Brown's statement of principles as "not merely aspirational; they describe the judicial function".³ Ward JA cited the above passage from Lord Brown's judgment together with this:

171. Finally, I note that in *Michel v R* ... Lord Brown, delivering judgment for the Privy Council, identified the ways in which judicial intervention might lead to a miscarriage of justice as including not only interventions that prevent counsel from properly presenting the case but also interventions that prevent the relevant party (there, the defendant) from doing himself or herself justice in

¹ [2010] 1 WLR 879, [34] ("*Michel*").

² (2016) 332 ALR 128 ("*Royal Guardian*").

³ *Royal Guardian*, [18].

the giving of his or her evidence; as well as interventions that deny the basic right underlying the adversarial system of trial, namely that of having an impartial judge to see fair play in the conduct of the case. Lord Brown noted (at [31]) that “[t]he core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials”.

(Citations omitted)

13. These principles and authorities were considered and cited with approval by the Full Court of this Court in *Huda & Huda and Laham*,⁴ a decision delivered on 10 May 2018, in which the Full Court determined that the interventions by the same trial judge as in the instant case during the course of cross-examination in the trial in that case amounted to procedural unfairness.
14. In *Huda*, citing what was said in *Royal Guardian*,⁵ the Full Court accepted that “the ultimate question is always whether the intervention was unjustifiable and resulted in a miscarriage of justice”.⁶
15. The Full Court also observed, again by reference to authority,⁷ that the “number, length, terms and circumstances of the interventions” will be an important consideration in determining whether asserted interventions lead to a miscarriage of justice.
16. These principles draw focus upon a couple of important aspects of cases of this type where the complaints on appeal centre upon interventions of a trial judge in the course of evidence or trial.
17. First, it has long been recognised by the High Court of Australia that:⁸
 13. ...modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx.
18. In the context of parenting proceedings pursuant to Part VII of the *Family Law Act 1975* (Cth) (“the Act”), Division 12A requires the application of specified principles for conducting such proceedings including, as but one example, the Court actively directing, controlling and managing the conduct of the proceedings.⁹

⁴ (2018) FLC 93-837 (“*Huda*”).

⁵ *Royal Guardian*, [169] (Ward JA); citing *Ellis v The Queen* [2015] NSWCCA 262 (Bathurst CJ, RA Hulme and Garling JJ).

⁶ *Huda*, [24].

⁷ *Galea v Galea* (1990) 19 NSWLR 263, 281 (Kirby A-CJ; Meagher JA agreeing).

⁸ *Johnson v Johnson* (2000) 201 CLR 488, 493 (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

⁹ Section 69ZN(4) of the Act.

19. Also, s 97(3) of the Act expresses the statutory imperative that in proceedings under the Act “the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted”.
20. Assessment by an intermediate court of appeal of the nature and purpose of judicial interventions at trial must properly take into account all of these features.
21. Second, highly selective references to the trial transcript may impede, rather than assist, an intermediate appeal court’s assessment of whether or not judicial interventions at trial have resulted in a miscarriage of justice. It is necessary, in addressing that risk, for the appeal court to read and consider the trial transcript in its entirety so that the judicial interventions complained of and focussed upon may be assessed in their proper context.
22. We emphasise that we have carefully read and considered the trial transcript in its entirety together with listening to the audio extracts put before us.
23. As earlier noted, it was only on the morning of the hearing of this appeal that the mother advised that the appeal was conceded.
24. As also earlier noted, in advance of the hearing the father had filed his Summary of Argument on 17 January 2019 in support of his Further Amended Notice of Appeal also filed on that date. The mother filed her Summary of Argument on 7 February 2019. These documents collectively, as well as the father’s Application in an Appeal to which we have referred, required us in preparation for the hearing of the appeal to have extensive reference to the trial transcript, the electronic version of which formed part of the appeal record.
25. Whilst we will focus upon the specific references to those parts of the transcript to which we were directed by senior counsel for the father in the course of his oral submissions on the hearing of the appeal, we ought to emphasise that our consideration of these examples is informed by the wider context provided by more extensive consideration of the trial transcript. It is that wider context which informs the “number, length, terms and circumstances of the interventions” in determining whether the asserted interventions led to a miscarriage of justice.

Transcript, 17 September 2018, p 21 ln 24 – 46

26. Senior counsel for the father highlights that only approximately 10 minutes after the father’s cross-examination had commenced, the trial judge made what senior counsel for the father described as “inappropriate... threats” towards the father concerning his evidence, as follows:

HIS HONOUR: Oh, dear, Mr [Navarro]. Are we going to be going to this? I’ve asked you to answer the question. Not get into an argument with Ms Bertone. Now, Mr Linklater-Steele and Ms Bertone **they will tell you what happens to people who don’t answer the question and don’t listen**

to my directions. Now, if you want to be part of this proceeding, Mr [Navarro], you will listen to the question and you will answer the question. Not go off on your own. I don't – it was, what, 10 minutes ago I warned you about this. Don't go off answering questions that you haven't been asked. **Now, you want to do that, that's fine, but how is it then that I can expect, if I make an order, and I'm not around, that you're going to keep the order? If I say this is the order that the children will do this and this and this how can I be expected to trust that you are going to follow that when here it is in court I've made a recommendation, I've made an order, I've told you what to do, and you just disobey it?---** Your Honour, with all due respect - - -

You will do what I tell you to do. Otherwise that's it. Do you want to have a talk to your lawyer while I go outside about you doing what I tell you to or not?---No, your Honour.

Do you want to do things properly or not? Yes or no?---Yes, your Honour.

Good. Ask your question.

MS BERTONE: Thank you, your Honour.

(Emphasis added)

27. The trial judge also emphasised to the father, repeatedly, that he had to abide by his oath. Indeed a consistent theme of the trial judge's approach throughout was to, erroneously, equate answers the father gave which the trial judge considered to be non-responsive to the question asked, with the father actually failing to "abide by his oath".
28. In our judgment the exchanges quoted are an example of the trial judge unnecessarily cross-examining the father in an openly hostile manner. It bears some emphasis that this began so soon after the cross-examination of the father had commenced.

Transcript, 17 September 2018, p 32 ln 37 to p 33 ln 47

29. To put the following exchanges into context, the evidence established that the father had concealed a recording device or devices in the mother's motor vehicle without her knowledge and thus without her consent.
30. The trial judge, without seeking submissions or affording the father an opportunity to be heard on the point, formed the view that the father had thus committed a criminal offence and stated, wrongly, that he had a duty to report the offence pursuant to s 128 of the *Evidence Act 1995* (Cth). As can be seen in the following exchange, whilst the trial judge warned the father about self-incrimination and giving evidence that might incriminate himself, he nevertheless ultimately refused to grant the father a certificate pursuant to s

128, despite request, and compelled the father to give the evidence notwithstanding that a certificate was refused:

HIS HONOUR: I think I've got to warn him now, don't I? It's an offence under the Invasion of Privacy Act.

MS BERTONE: Well, your Honour, it's not something I'm agitating for, because he has already given that evidence.

HIS HONOUR: I know, but, I mean, you know - - -

MS BERTONE: I take no issue with it, but - - -

HIS HONOUR: Well, I do, because I'm – if – unless I've made a – I've given a certificate pursuant to section 128, **where there is an offence – evidence of an offence, I have a duty to report it.**

MS BERTONE: But, what I meant was, I take no issue with your Honour doing that. I – I don't – I'm not against it.

HIS HONOUR: All right. Mr [Navarro], you understand that there are some things that you may have done in the course of this whole litigation that may be against the law?---Your Honour, I understand - - -

Do you - - -?---I understand.

Do not – okay. Listen to my question – okay – because I'm getting very, very tired of this. You understand that some of the things you said may be against the law- - -?---I understand.

Do you understand? Okay. Now, because of that, if you are asked a question and the truthful answer to that question may disclose that you have committed an offence, you are entitled to say, "I do not wish to answer that question on the grounds that I may incriminate myself." You understand that?---I understand.

Good. Warning is complete.

MS BERTONE: Thank you, your Honour.

HIS HONOUR: Away you go.

MS BERTONE: And when did you put that device in my client's car?---I do not wish to answer that questions, because it may incriminate myself.

All right. Your Honour, I seek an answer to the question, so if your Honour is minded to issue a certificate.

HIS HONOUR: **No, I'm not minded to issue a certificate. This is – this is despicable. If your allegation is correct, this is despicable, and it is**

something that ought be punished. I'm not – I'm not issuing a certificate. He can – he can – he can do that. I can't make any adverse inference to him, but let the – let the chips fall where they may. But if – if there has been a recording where your client says this was recorded and I did not give my permission, he should be prosecuted. That's the end of the matter. And I'm not giving a certificate on that. If I come to the conclusion that he has committed an offence, because of other evidence other than that, you know, what sort of – you know, that – that's – that's a real negative in his – his – I mean, I've got to look at what is in the best interests of the children. **And if someone is committing a criminal offence in furtherance of – I don't know – whatever is going on, that's something I have to take into consideration. I'm not going to be giving a certificate.**

(Emphasis added)

Transcript, 20 September 2018, p 344 ln 27 to p 345 ln 10

31. For reasons which escape us, in the following example the trial judge took issue with a question asked of the mother during her cross-examination. Viewed in context it was entirely legitimate for counsel for the father to test the mother with the question which was asked. The trial judge demanded that counsel for the father withdraw that question, a question to which counsel for the mother had not objected:

Okay. So to use the expression, you elected to stay to gather some more evidence, potentially?---No. I – no, that's not fair.

HIS HONOUR: **That's – that's an unfair question.**

MR LINKLATER-STEELE: Why?

HIS HONOUR: **That's a very unfair question.** You left – you didn't leave so you could gather more evidence. **That's offensive. That is quite offensive.**

MR LINKLATER-STEELE: I don't agree.

HIS HONOUR: **You withdraw it straight away.**

MR LINKLATER-STEELE: I'm not going to - - -

HIS HONOUR: **Withdraw it.**

MR LINKLATER-STEELE: I will withdraw it only because - - -

HIS HONOUR: Good.

MR LINKLATER-STEELE: - - - your Honour has directed me - - -

HIS HONOUR: That's fine. I don't care whether you're morally fine that that is – is not as – as I see it, but you will withdraw it because I have asked you, and I am glad that you have done so.

MR LINKLATER-STEELE: Thank you, your Honour. Ma'am - - -

HIS HONOUR: No. You take a break, please. That's – honestly. We're going to adjourn for five minutes.

(Emphasis added)

32. Leaving aside that we fail to see any legitimate basis for the trial judge concluding that counsel's question was either "very unfair" or "offensive", the audio extract of this exchange evidences that the trial judge had lost his composure when demanding that counsel withdraw the question.
33. With reference to the final sentence of the transcript, the audio extract confirms that it was the trial judge, rather than counsel, who likely needed the opportunity to regain his composure.
34. We interpolate here that relevant to the trial judge's behaviour towards counsel for the father, and relevant to the contention in Ground 1(d) that the trial judge was argumentative and demeaning of the father's counsel and sought to embarrass counsel whilst the mother was being cross-examined, is the following example:¹⁰

MR LINKLATER-STEELE: September was the original date, was it not?--
-No, it wasn't.

HIS HONOUR: I don't think that's the evidence.

THE WITNESS: It wasn't.

MR LINKLATER-STEELE: All right.

HIS HONOUR: That's not the evidence - - -

THE WITNESS: That's not right.

HIS HONOUR: - - - at all.

MR LINKLATER-STEELE: All right. Do you say that the original date for travel was not in September of 2014?---No, the original date was not in September 2014.

All right. When you originally - - -

¹⁰ Transcript, 20 September 2018, p 359 ln 5 to p 361 ln 2.

HIS HONOUR: Just wait. I just want to make sure. So that's your – your client's instructions are that the original date was September 2014?

MR LINKLATER-STEELE: It's deposed to in the mother's affidavit. If I -
- -

HIS HONOUR: Yes, but she says it was August.

MS BERTONE: That's not - - -

MR LINKLATER-STEELE: All right. Okay.

MS BERTONE: It's not.

HIS HONOUR: And that's – I'm just – I'm – I've got to look at what your instructions are, so if your client's instructions are now that the original date was September 2014, then that's something that's very significant.

MR LINKLATER-STEELE: Well, it may be my mistake. That's my – not
- - -

HIS HONOUR: No. No. No. I don't want you to make mistakes. You put your instructions, because this now is becoming very, very crucial.

MR LINKLATER-STEELE: Yes, I understand.

HIS HONOUR: Now, if your client's instructions are that the original date – he's now going to, through you, say that the original - - -

MR LINKLATER-STEELE: No.

HIS HONOUR: - - - date was September 2014 - - -

MR LINKLATER-STEELE: No, that - - -

HIS HONOUR: Well, then why are you asking that?

MR LINKLATER-STEELE: Because - - -

HIS HONOUR: 2014 – unless you have firm instructions - - -

MR LINKLATER-STEELE: No. No.

HIS HONOUR: - - - you shouldn't be making this stuff up.

MR LINKLATER-STEELE: No. I've made a mistake, your Honour. I thought – me, personally – that it was September and it was changed to October.

HIS HONOUR: But you've put to her - - -

MR LINKLATER-STEELE: I - - -

HIS HONOUR: - - - “Is this just coincidence, is it?”

MR LINKLATER-STEELE: No. I accept – I - - -

HIS HONOUR: You did put that to her.

MR LINKLATER-STEELE: Yes.

HIS HONOUR: Don’t tell me you didn’t.

MR LINKLATER-STEELE: No. No. I accept that. I thought that - - -

HIS HONOUR: Well, that’s quite unfair to this witness.

MR LINKLATER-STEELE: All right. I withdraw the question.

HIS HONOUR: You apologise to her, quite frankly.

MR LINKLATER-STEELE: I am very sorry, ma’am.

HIS HONOUR: You understand he has done something wrong?---Yes, I do, your Honour.

(Emphasis added)

Transcript, 20 September 2018, p 393 ln 1 to p 396 ln 47

35. To put the following example in context, in her employment as a sales representative the mother’s employer provided her with a laptop computer. The evidence established that the father had taken possession of the laptop computer and had refused to return it to the mother. The following exchange, during the father’s cross-examination, occurs with respect to the topic of the laptop:

MS BERTONE: So is that together, your Honour, or separate?

HIS HONOUR: Yes, just hold on. All right. So those are the letters that were sent.

Did you actually get the laptop back?---No, I did not.

All right. So it’s still – you don’t know where it is?---No, your Honour.

Well, we might have to add stealing to a list at this rate. Where is the laptop?

MR LINKLATER-STEELE: I don’t know, and I would like to stand down so I can get some instructions from my client, thank you very much, your Honour.

HIS HONOUR: Okay.

...

HIS HONOUR: Okay. I don't see how he has had – because he has had the audacity to challenge. It is that he has the audacity to break the law and to – after getting a letter like that from the – that last comment that he got a letter – received the letter and the laptop has not materialised. That's just unexplainable.

MR LINKLATER-STEELE: But it is unexplained, and again - - -

HIS HONOUR: Yes, and – but what is the only inference open?

MR LINKLATER-STEELE: But your Honour is going to add stealing. Your Honour can't say that.

HIS HONOUR: I can make that comment in this arena. That doesn't mean that that's the concluded view.

MR LINKLATER-STEELE: Your Honour, I would - - -

HIS HONOUR: You of all people would know that the judges do that all the time. Whatever I say during the hurly-burly of the court – once I have to make a decision, then I make a decision. Now, the whole point here is that this is what we've got – is that we have a person who has acted on a number of occasions quietly unlawfully: bugging, hacking and now when asked to return, not the wife's property but someone else's property, ignores it.

MR LINKLATER-STEELE: Well, that's a conclusion that your Honour could - - -

HIS HONOUR: That's the only conclusion open on the evidence.

MR LINKLATER-STEELE: Well, that evidence tendered in re-examination - - -

HIS HONOUR: Yes.

MR LINKLATER-STEELE: - - - to raise the issue of the idea. I accept that your Honour has let the evidence in, but again, that's a conclusion that your Honour could only reach, with respect, which tends to - - -

HIS HONOUR: Well, what's the definition of stealing, then, in your mind?

MR LINKLATER-STEELE: To - - -

HIS HONOUR: That is, to permanently - - -

MR LINKLATER-STEELE: - - - permanently deprive.

HIS HONOUR: - - - deprive.

MR LINKLATER-STEELE: Yes.

HIS HONOUR: And if the laptop was asked to be returned a year ago and it has not been returned, then that's the only logical inference.

MR LINKLATER-STEELE: Yes, but it may well be that there is other evidence, and I'm not saying - - -

HIS HONOUR: But there is no other evidence.

MR LINKLATER-STEELE: But I know that there's no other evidence because it's a matter that's tendered in re-examination where it has never been an issue on the material - - -

HIS HONOUR: But this is the problem. He didn't say that in his - - -

MR LINKLATER-STEELE: He was - - -

HIS HONOUR: - - - evidence when he was there at the witness box. He said, "Yes, I used that laptop. I didn't say I've still got it.

MR LINKLATER-STEELE: Well, nobody asked him.

(Emphasis added)

36. As senior counsel for the father submitted to us on appeal, "stealing" of the laptop was not the only conclusion open to be drawn with respect to the father's conduct. The point is that all of this occurred by way of interruption of the father's cross-examination with the trial judge expressing a concluded view that the father was guilty of the offence of stealing (to be added to a "list" of alleged transgressions by the father) without inviting any opportunity for the father to be heard on the topic.

Transcript, 20 September 2018, p 399 ln 1 to p 400 ln 22

37. In the following example it can be seen that the trial judge concluded that the father had put the mother to unnecessary distress by reason of the questions put to the mother in cross-examination by counsel for the father. In arguing the appeal, senior counsel for the father contended that the thrust of the trial judge's approach was to characterise the father as "malicious" in having his counsel at trial pursue questions of this type. We accept that to be so. The following is the relevant exchange:

HIS HONOUR: - - - quite frankly, her explanation was very instructive, and it was not in her favour, and this is the point you – you know, you are going through a lot of things which, quite frankly, you didn't need to do but

you wanted to do, and I asked on a number of occasions are you doing this on instructions, and you kept saying yes.

MR LINKLATER-STEELE: Yes.

HIS HONOUR: And that's fine because, see, I would have thought – I would have thought – that it was sufficient to simply say to her these emails are all true, and you were having an affair. She says no.

MR LINKLATER-STEELE: Well - - -

HIS HONOUR: That's apt. To do what you did when you were summarising at the end would have been sufficient and then when you are making your final submissions to actually go through and show to me exactly why - - -

MR LINKLATER-STEELE: Yes.

HIS HONOUR: - - - those explanations should not be accepted.

MR LINKLATER-STEELE: I accept that that's - - -

HIS HONOUR: **But that wasn't what you were doing. You were putting her in distress for no reason, and that's why I asked on a number of occasions are you doing this on instructions because, you know, unless you're on another planet you could see this was just totally distressing her. She had been in the witness box for three days, and there was simply no need for it.**

MR LINKLATER-STEELE: Well - - -

HIS HONOUR: Now, a judge is entitled – entitled – to let the parties know that that sort of conduct is conduct that is not exemplary.

MR LINKLATER-STEELE: Yes, I understand your Honour's criticism. The fact of the matter is, however, again, in my submission, what you've just said demonstrates that you are favourably disposed to this lady because, effectively, the challenge to any witness – nobody ever wants to see people put unduly through distress, but if the distress is simply the masking of the idea that what she has been saying to this court on a number of occasions is untrue and in some way that she should be relieved of that responsibility because she cries and that my client is being mean to her, in essence, because he is challenging what are fundamental matters which don't gel because the difficulty, your Honour, is - - -

HIS HONOUR: But that's the point. That's part of argument afterwards because – and this was just totally unnecessary.

MR LINKLATER-STEELE: Yes.

HIS HONOUR: And you and I can have a disagreement, but that does not mean that a fair-minded observer – not your client but a fair-minded observer sitting in the back of court says, “This judge has already made up their mind, and it doesn’t matter what’s said from hereon in nothing is changing it.” Now, you’ve got a long way to go before you get to that.

MR LINKLATER-STEELE: Well, I say to your Honour that your comments collectively reach that level that a person sitting in the back of the court looking at the way that your Honour has reacted, the vehemence of your criticisms, the vehemence and the fact that it’s directed – I appreciate that your Honour has been chiding of the mother, but in terms of the manner in which you react and the extra comments that you’ve made I say – and I can’t take it any further – that those comments well raise the apprehension by the independent observer that we might not have hit the bottom but, effectively, we were surfing the wave, you know, down the mine: that there was nothing that we were saying – fairly substantial, significant challenges to credit fundamental to the matters in terms of parenting, and time and again the end product was chastisement by your Honour to my client. I don’t want to be disrespectful, but we’re going to disagree about that.

HIS HONOUR: Yes, and that’s fine.

(Emphasis added)

38. We emphasise that the foregoing are simply the examples raised by senior counsel during his oral argument in this appeal in circumstances where, as already noted, the appeal was conceded.
39. We are comfortably satisfied, from our review of the transcript of the proceedings and the audio extracts, that the particulars set out in detail in Ground 1 of this appeal, which are quoted above and which we will not unnecessarily repeat, are established.
40. In summary, it is readily apparent that the trial judge forfeited the advantage of judicial detachment he would otherwise have enjoyed if he had adhered to each of the principles stated by Lord Brown as earlier quoted. When regard is had to the volume and tone of voice of the trial judge in some instances within the audio extracts, it is apparent that not only detachment, but also composure, was lost. No valid purpose can be seen to be served in most, if not all, of the judicial interventions complained of, and their nature and extent yield the ready conclusion that they amount to a miscarriage of justice.
41. For these reasons, we made the orders at the hearing set out at the commencement of these reasons.

I certify that the preceding forty-one (41) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (Ainslie-Wallace, Aldridge & Kent JJ) delivered on 21 February 2019.

Associate:

Date: 21 February 2019