Neutral Citation Number: [2023] EWCA Civ 149

Case No: CA-2022-002277

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT WATFORD
HH Judge Richard Clarke
WD20C00420

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 February 2023

Before :

LORD JUSTICE BEAN
LORD JUSTICE BAKER
and
LADY JUSTICE CARR

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H-W (CARE PROCEEDINGS: FURTHER FACT-FINDING HEARING)

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Sharan Bhachu (instructed by **Local Authority Solicitor**) for the **Appellant**
Kate Grieve (instructed by **Bastian Lloyd Morris**) for the **First Respondent**
Emily Beer (instructed by **Crane and Staples**) for the **Fourth Respondent**
Amanda Meusz (instructed by **David Barney and Co**) for the **Children, by their Guardian**
The Second and Third Respondents were not represented at the hearing.

Hearing date : 24 January 2023

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Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 21 February 2023.

LORD JUSTICE BAKER :

1. This is an appeal against a judge's decision to refuse a local authority's application for a further fact-finding hearing in long-running care proceedings in which findings have previously been made that the threshold criteria for making orders under s.31 of the Children Act 1989 were satisfied.

2. At the conclusion of the appeal hearing, we informed the parties that the appeal would be allowed for reasons to be given at a later date. This judgment sets out my reasons for agreeing with that decision.

3. I say at the outset that it was with great regret that I concluded that the appeal had to be allowed. These proceedings started as long ago as March 2020 – in other words at the start of the Covid 19 pandemic. In circumstances described briefly below, they have already been the subject of an appeal to this Court (*Re H-W (Children: Proportionality)* [2021] EWCA Civ 1451) and thence to Supreme Court (*In the Matter of H-W (Children)* [2022] UKSC 17). As a result of our decision on the present appeal, there will be yet further delay before the proceedings are concluded. It is inevitable that by the time they are finally concluded they will have been ongoing for well over three years. Parliament has of course stipulated that care proceedings must be determined without delay and in any event within 26 weeks: s.32(1)(a) of the 1989 Act. Under s.32(5), that period may be extended but only if the court considers that the extension is necessary to enable the court to resolve the proceedings justly. Unfortunately, I am in no doubt that an extension of the proceedings is necessary for precisely that reason.

Background

4. The background to the proceedings is set out in the judgments of Peter Jackson LJ on the earlier appeal to this Court (paragraphs 3 to 7) and of Dame Siobhan Keegan in the Supreme Court (paragraphs 7 to 13) and need not be repeated in detail for the purposes of the present appeal.

5. I shall refer to the family members using the alphabetic identification adopted in the earlier judgments. The mother has six children – A and B, who are now adults and living away from home, and the four children who are subject to these proceedings – C (aged 14), D (12), E (9) and F (2 years 9 months). The four children have three different fathers – F1, the father of C and D, F2, the father of E, and F3, the mother's current partner, who is the father of F. F3 has four older children, one of whom, referred to as G earlier in these proceedings, lived with this family for a short period between 2016 and 2018. At an earlier stage, F3 had been in a relationship with the mother's own mother.

6. The mother was in care herself as a child and she and her children have been involved with the local authority children's services for a number of years. In earlier care proceedings in 2014 concerning A, B, C, D and E, a circuit judge concluded that the children were at risk of neglect and sexual abuse, following findings about the behaviour of A and F2. The proceedings ultimately concluded with a care order in respect of A, a residence order to the mother in relation to the four other children coupled with a supervision order, and an injunction against F2, which remains in force. The local authority's involvement with the family lapsed for a while after the

end of the supervision order but resumed again after further concerns of neglect were reported and continued until October 2019 when the case was closed again. At that point, as Peter Jackson LJ observed (at paragraph 7 of the earlier appeal judgment), the longstanding concerns about neglect and sexual abuse had receded "with signs that the mother was maturing and F3 was seen as a stabilising influence".

7. In March 2020, however, the local authority started further care proceedings in respect of C, D and E after learning of an incident when A, who had been advised to leave his supported living accommodation, had visited the family home and sexually abused E. The mother, F1, F2 and F3 were all joined as parties, respectively the first to fourth respondents. When F was born a few weeks later, the local authority started proceedings in respect of her. Interim supervision orders were made in respect of all four children. A fact-finding hearing took place before HHJ McPhee over nine days in November and December 2020 which concluded with findings, in summary, that:

(1) A sexually abused E upstairs in the family home on 18 November 2019, witnessed by B, while the mother and F3 were downstairs attending to an injured dog;

(2) the mother failed to protect the children from actual sexual abuse and the risk of sexual abuse by permitting A to stay in the family home in that:

(a) she knew that A presented a risk of sexual harm to his siblings;

(b) after B and E told her that A had sexually abused E, she continued to place the children at risk by allowing A to stay in the house overnight;

(c) she failed properly to supervise A, allowing herself to become distracted and A to have access to E upstairs and out of sight;

(3) the mother delayed in reporting the incident to children's services until 21 November 2019;

(4) F3 failed to protect the children from actual sexual abuse and the risk of sexual abuse by permitting A to stay in the family home in that:

(a) he was aware of the risk A presented to his siblings;

(b) he allowed A to remain in the house and became complacent as to the need to protect the children;

(c) he failed to report the incident to children's services;

(5) as a result of the mother's and F3's failure to protect the children, they suffered or were at risk of suffering, significant harm.

8. Following these findings, the interim supervision orders were extended until a welfare hearing which took place before HHJ McPhee over six days in July 2021. The evidence included the opinion of Dr Judith Freedman, a child and adolescent psychiatrist, who carried out assessments of the adults. Of the mother, she said:

> "Her ability to parent is, in my view, uncertain. Her limitations will not change. She is likely to continue to cling closely to her

> children, who are dependent on her and struggle to achieve independence, but love and want to be with her. Her ability to provide a higher level of parenting is non-existent. She is likely to continue as she is, with the only possibility for improvement being the increased stability that F3 seems to have brought to the family. I think it likely that her ability to recognise and protect her daughters from sexual harm is unlikely to change, as this is a major blind spot for her."

Of F3, she said that he:

> "presents as a man who is committed to his children and has brought increased stability to the family. He is not without his short-comings, which include his poor judgment in getting together with M after being with her mother, and also his questionable protection of G when he was living with the family."

9. In his judgment at the conclusion of the welfare hearing, the judge accepted the arguments on behalf of the local authority and guardian that the children should be removed from the care of the mother and F3, saying:

> "I have come to the conclusion that the parents are not capable of providing for the safe needs of C, D, E or F. Those children were each placed at risk of significant sexual harm. E suffered significant sexual harm. I cannot be satisfied that the parents have learned sufficiently, or understand or have the capability of learning and understanding, in the case of M, how to avoid that situation in the future. This was a decision that the parents took in conjunction with the other."

In respect of C, D and E, he made care orders on the basis of the local authority care plan for long-term fostering. He adjourned a decision in respect of F to await an assessment to establish whether B could care for her under a special guardianship order, directing that she should remain at home for the time being under an interim care order.

10. The mother, supported by F3, filed a notice of appeal against the care orders in respect of C, D and E and was granted permission to appeal and a stay of the order pending appeal. On 7 October 2021, this Court by a majority (Lewison and Elisabeth Laing LJJ, Peter Jackson LJ dissenting) dismissed the appeal. The mother and F3 filed separate notices of appeal to the Supreme Court. Permission was granted to both appellants and the appeal heard on 22 March 2022. On 15 June 2022, the Supreme Court delivered a unanimous judgment allowing the appeals and remitting the case for rehearing of the final welfare hearing, expressing the hope that the remitted case and the outstanding case relating to F would be heard together. In the course of her judgment (with which the other Justices agreed), Dame Siobhan Keegan stated (at paragraph 62):

> "the process adopted by the judge is flawed as it did not adequately assess the prospects of various options to mitigate

> the risk of sexual harm. The judge does not state why the emotional damage that each of the very different subject children would suffer under a care plan which separated them from their mother, from their stepfather and no less importantly from their siblings, was proportionate to and necessitated by the identified risk of sexual harm from A, when no instances of harm had occurred since November 2019 and where a protective framework of non-molestation and interim supervision orders was in place."

11. On 23 June 2022, the matter was listed for case management directions before HHJ Vavrecka. An earlier report from the Lucy Faithfull Foundation had recommended that specific work be carried out with F3 to improve his parenting and protective skills. The judge directed that Mr Steve Lowe of Phoenix Forensic Consultants be instructed to carry out that work and prepare a report in the proceedings, and that the final hearing be listed before HHJ Clarke on 21 November.

12. On the same date, however, another child, a 12-year-old girl hereafter referred to as "Y", made allegations of sexual abuse against F3. Y is not related to F3 although her mother was previously in a relationship with F3 which ended before Y was born. Y is subject to a care order following proceedings in 2016-7 in which F3 was involved as the father of her half-siblings, one of whom, G, as stated above, subsequently lived with F3 and the mother for two years. It is accepted by the local authority that no allegations of a sexual nature were raised by Y until June 2022. At that point, a police investigation was started, in the course of which Y was interviewed by the police under the ABE procedure. In summary, she alleged that, over a period of years when she was aged between 2 and 6, she was sexually abused by her parents, another man and F3. It is unnecessary to set out the details of the allegations which included reference to penetrative abuse of the child, sexual activity between the adults in her presence, the stabbing of the child with a knife, and the administration of drugs. F3 was also interviewed and denied the allegations. He was allowed bail on condition that he remained away from the property.

13. On becoming aware of the allegations, the local authority applied for an urgent hearing in these proceedings. At that hearing on 28 July, Judge Vavrecka directed the police to disclose evidence relating to the allegations, including a copy of and transcript of Y's ABE interview, to the local authority for onward disclosure to the other parties. The letter of instruction to Mr Lowe was amended to include the new allegations and the date on which his report was to be filed extended. The final hearing was relisted for a ten-day hearing in January 2023. Meanwhile, all four children remained at home with the mother. The bail conditions on F3 were subsequently lifted but for the time being he has remained living away from the home.

14. Further case management hearings took place before HHJ Richard Clarke on 22 September and 6 October. At the latter hearing, further directions were given for the disclosure of the police material and the service by the local authority of any schedule of further findings it was seeking. A hearing was listed on 3 November to consider the local authority schedule and decide whether there should be a further fact-finding hearing. Subsequently, a substantial bundle of documents relating to the allegations was filed with the court, including the video recording and transcript of the ABE interview and other evidence of statements made by Y. The local authority filed a

schedule, based on Y's allegations, of further findings it was seeking, not only against F3 but also against Y's parents, who are not, of course, at present parties to these proceedings.

The judgment under appeal

15. The hearing on 3 November was listed for one hour. The local authority's application was supported by the guardian but opposed by F3, the mother and other fathers remaining neutral. We were told that in the course of that hearing the judge indicated that he had neither watched the recording of the ABE interview nor read the transcript.

16. At the end of the hearing, the judge delivered an ex tempore judgment. He started by recording that his decision had to be made applying the overriding objective in rule 1.4 of the Family Procedure Rules. He noted that the findings made by HHJ McPhee still stand. He observed that the allegations made by Y related to a period when she was between two and six, that she had been the subject of care proceedings after that in which F3 had been involved, but that no findings had been sought in relation to allegations of the sort now under consideration. He recorded that the child had apparently undergone a child protection medical in 2016 and, although the records of that examination were not available, it seemed that there had been no finding of scarring which might be expected if the child had been stabbed with a knife.

17. The local authority suggested that the hearing listed at the end of January 2023 could be used for the proposed fact-finding. The judge was doubtful about this, observing:

> "The court is required to consider dealing with the case expeditiously and fairly. The court would observe that the chances of the final hearing at the end of January 2023 being utilised as a fact-find in relation to the additional allegations is highly unlikely. The parents of Y would need to be joined as intervenors, and they would need to have an opportunity to obtain legal assistance. Given the fact they would be parents of a non-subject child, query whether they would be entitled to any free public funding whatsoever, but there would need to be an amount of time for them to attempt to obtain legal representation."

He added that it was unlikely that the police investigation would be concluded by January 2023. He concluded that to accede to the local authority's application would have a significant impact on the timetable.

18. The judge continued:

> "24. It is accepted on behalf of the parties that the court must take into account not only the question of the seriousness of the allegations, but also to take into account the likelihood of proving any allegation. It would appear that Y has not been spoken to about whether her allegations should be proceeded with within these proceedings. It is proposed that she could be represented by the solicitors who acted upon her behalf, and

> therefore presumably through a guardian, in the previous care proceedings, and the local authority say that they are prepared to fund it. But this is a child who is now twelve years old. She has raised allegations in June 2022. The court is informed that those allegations were made in light of a discussion earlier this year about the reasons why the child was in care.
>
> 25. The court would be asked to make findings in relation to events which took place between the child being two years old and six years old, which have never been raised until the child was twelve years old, and on which it would appear that there is no medical evidence whatsoever. There has been no assessment as to whether Y would be capable of giving evidence within these proceedings, and also there has been no *Re W* assessment…."

He thought it likely that, if her parents intervened in the proceedings, the court would have to grapple with issues about the disclosure to them of the papers in this case and the disclosure to the parties in this case of the papers in the care proceedings concerning Y.

19. At paragraph 28 of his judgment, he then said:

> "… whilst the court accepts that the allegations in themselves are serious, it would cause significant delay to a case which has already been subjected to significant delay, and when the court looks at the likelihood of the local authority being able to prove the allegations, which it is accepted this court should take into consideration, the court would observe on the current information that the chances of the local authority proving those allegations are low".

At paragraph 30 he concluded:

> "In the circumstances, and having considered all of the matters, taking into account the likely impact, taking into account the severity of the allegations, but taking into account the likelihood that the local authority would be able to prove such allegations, the court is not satisfied it would be appropriate to give the local authority permission to pursue those allegations within these proceedings."

20. Following further submissions, the judge added these paragraphs:

> "32. It is not unusual for a parent within care proceedings to be subject to allegations which have not been proven, and which remain outstanding. That will be the situation that would apply in relation to F3 here. No doubt will already Mr Lowe be considering that fact as part of his report. I do not rule out the possibility that Mr Lowe would then turn round and say, "I cannot provide a report without having a finding in relation

> to this"; if he did, it is not clear to me currently how that would then impact upon this decision, but the court does not have that information and it is part of the reason why I queried with the local authority whether the issue had been raised. But it is common for final hearings to take place where there are concerns and allegations which have not been determined by the court, and the court has to make a decision knowing that those allegations are there.
>
> 33. In those circumstances, I cannot see that, just because an allegation has been made, in itself, it means that there has to be a finding on the allegation, and therefore I am not satisfied that the local authority's application should be granted. Any recommendations to the court will have to be on the basis that an allegation has been made but it has not been proven."

21. The judge then made further case management directions, including a further extension of the time for filing of Mr Lowe's report.

22. On 14 November, the local authority filed notice of appeal against the judge's refusal to order a further fact-finding hearing. Permission to appeal was granted on 21 December.

23. Meanwhile, on 29 November, Mr Lowe's report had been filed. He reported that F3 and the mother had completed the work recommended in the Lucy Faithfull report. Within the report, he stated that:

- F3 "does not hold onto any views of sex and sexuality that might be problematic in terms of them getting in the way of his ability to identify risk and protect from risk",

- there was "no indication, other than the current allegation, that F3 has any problems in terms of sexual regulation, and neither was there any indication in my work with him that he had any abuse supportive views either"

- overall, F3 "does not appear to fit the expected profile of someone who would abuse the children that he has cared for."

Mr Lowe concluded:

> "I am … confident of F3's ability to identify and act upon perceived risk having spent 24 hours with him working through issues of risk and safety. I am also confident that [the mother] will also act in the best interests of the children in terms of their safety and well-being."

Legal principles

24. The principles to be applied by a judge when deciding whether to hold a fact-finding hearing are as set out by McFarlane J in *Oxfordshire County Council v DP, RS and BS* [2005] EWHC 1593 (Fam), as approved and developed by this Court in *Re H-D-H (Children), Re C (A Child)* [2021] EWCA Civ 1192. They have also been the subject

of comment in a number of first instance decisions, most recently by Mostyn J in *Barnsley Metropolitan Borough Council v VW and others* [2022] EWFC 83. For the avoidance of doubt, it is to the statement of principles as summarised in the *Oxfordshire* case and in *Re H-D-H* to which courts should turn when making these often difficult decisions.

25. In the *Oxfordshire* case, at paragraph 24, McFarlane J said:

> "24.The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:
>
> (a) The interests of the child (which are relevant but not paramount);
>
> (b) The time that the investigation will take;
>
> (c) The likely cost to public funds;
>
> (d) The evidential result;
>
> (e) The necessity or otherwise of the investigation;
>
> (f) The relevance of the potential result of the investigation to the future care plans for the child;
>
> (g) The impact of any fact finding process upon the other parties;
>
> (h) The prospects of a fair trial on the issue;
>
> (i) The justice of the case."

26. In approving this statement in *Re H-D-H*, Peter Jackson LJ (with whom other members of the Court agreed), said:

> "20. It is unnecessary to cite other authority. Although the approach outlined in *Oxfordshire* predates the incorporation of the overriding objective into the Family Procedure Rules and the 26-week requirement, in my judgement it remains valid when read alongside the statutory framework. It helps judges to reach well-reasoned decisions and counsel appearing in the present appeals were content to frame their submissions by reference to it. As Mr Rowley QC put it, the decision, properly applied, has stood the test of time.
>
> 21. Many of the factors identified in *Oxfordshire* overlap with each other and the weight to be given to them will vary from case to case. Clearly, *the necessity or otherwise of the investigation* will always be a key issue, particularly in current circumstances. Every fact-finding hearing must produce

> something of importance for the welfare decision. But the shorthand of necessity does not translate into an obligation to conclude every case as quickly as possible, regardless of other factors, and that is clearly not the intention of the administrative guidance. There will be cases in which the welfare outcome for the child is not confined to the resulting order. Not infrequently, a finding in relation to one child will have implications for the welfare of other children. Sometimes, findings that cross the threshold at a minimum level will not reflect the reality. The court's broad obligation is to deal with the case justly, having regard to the welfare issues involved. McFarlane J put it well in paragraph 21 of *Oxfordshire* when he identified the question as being whether, on the individual facts of each case, it is "right and necessary" to conduct a fact-finding exercise.
>
> 22. The factors identified in *Oxfordshire* should therefore be approached flexibly in the light of the overriding objective in order to do justice efficiently in the individual case…."

27. Peter Jackson LJ proceeded to identify a number of examples of how specific factors might be considered within this framework. It is unnecessary to consider those points for the purposes of this appeal.

28. No additional guidance is required beyond what is set out in the *Oxfordshire* case and *Re H-D-H,*, save in one respect. When considering the potential evidential result of a fact-finding hearing it may sometimes be appropriate for the judge to have regard to the apparent quality of the evidence. It will never be appropriate, however, to carry out a detailed evaluation, not least because the court can only make findings on the totality of the evidence and at the case management stage not all of the evidence will have been filed. Anything akin to a mini-trial of the allegations would therefore be wrong in principle and wasteful of time and resources. Although each decision will depend upon the circumstances of the case, the apparent quality of the evidence is accordingly unlikely to be a powerful factor in the overall decision unless it is clear without the need for detailed assessment that the evidence appears to be particularly strong or particularly weak.

The appeal

29. The grounds of appeal are as follows:

(1) the court did not give any/sufficient weight to the arguments put forward by the local authority and endorsed by the guardian that investigation of the findings were necessary for there to be no gaps in the final evidence given their link to the issues in the case and the ongoing assessment of F3 by Steve Lowe;

(2) the court fell into error by not having viewed the ABE or reading the transcript of the ABE at the time of considering the application;

(3) the court was wrong to place weight on the following propositions when refusing the application:

(a) that because the allegations had been made by a child who was 12 and related to when she was aged 2-6, there was no chance the local authority would be able to prove the findings sought;

(b) that because there were no injuries previously indicated in CP medicals that the child had had, that there was no chance the local authority would be able to prove the findings sought;

(c) that there were lots of cases before the court whereby allegations remained in the background and the court was able to make final decisions without them having been investigated by the court.

30. In submissions to this Court, Ms Sharan Bhachu on behalf the local authority stressed in particular that the allegations made by Y are directly relevant to the issues before the court in these proceedings and fundamental to whether or not F3 can stay within the family and protect the subject children from risk of sexual abuse. On behalf of the guardian supporting the appeal, Ms Amanda Meusz submitted that it was difficult to imagine anything that could be more relevant than allegations of this sort, which went to the core issue of protection. She argued that the judge had been wrong to focus on the fact that the allegations were historic, and the absence of corroborating medical evidence, both of which are common features of cases involving this type of allegation. Ms Meusz, who did not appear below, doubted whether the judge had been right to base his decision on an assessment of the likelihood of the allegations being proved. Both Ms Bhachu and Ms Meusz emphasised that, even if he had been entitled to do so, his assessment was flawed because he had not considered all of the evidence.

31. In well-presented submissions in reply, Ms Emily Beer on behalf of F3 acknowledged that, whilst representations made on behalf of F3 to the judge had been structured in line with the *Oxfordshire* principles, he had not been referred to the case law. She submitted, however, that it was clear from the judgment that he applied the overriding objective and took into account those factors which the case law had identified as relevant. Taking those factors into proper consideration on the evidence available to him, the view taken by the judge that the likelihood of the court being in a position to make the findings sought was low, was a reasonable view and well within the bounds of his discretion. When this was balanced by the judge against the significant likely delay he came to a position that a fact finding was not justified or necessary.

32. Ms Beer drew our attention to a number of matters which, she maintained, made Y's allegations implausible, including the fact that (1) there is no other evidence to support the allegations beyond what Y has said, (2) F3 had little if any contact with Y's family at the time the abuse was alleged to have occurred, (3) there was abundant evidence that F3 would not have been available to abuse Y in the way she alleges, (4) there were no allegations of sexual abuse made during the care proceedings involving Y's family, (5) Y's siblings, who have been interviewed by the police, do not support the allegations, and (6) there is no evidence of physical harm to corroborate the allegations. It was submitted that they were all matters which the judge was entitled to take into account as part of his proportionality analysis. Ms Beer also emphasised the potential complexities of a further fact-finding hearing which would involve joining Y's parents as intervenors, the instruction of an intermediary for her father, a *Re W* process to establish whether Y should give evidence, extensive disclosure of police,

local authority and other records, and taking evidence from a number of other witnesses, including Y's adult siblings. Given the inevitable delay that would ensue, in the context of proceedings that have already been ongoing for nearly three years, the judge's decision was plainly within his discretionary case management powers. In the particular circumstances of this case, a fact finding was neither necessary nor proportionate to meet the justice of the case.

33. Ms Beer's submissions were supported by Ms Kate Grieve on behalf of the mother. In oral argument, however, Ms Beer conceded that, if findings were made in line with Y's allegations, the care plans for the subject children would be fundamentally different.

Discussion and conclusion

34. This is an appeal against a case management decision. Judges in family cases are strongly encouraged to make robust case management decisions that ensure that the proceedings are conducted with a focus on the overriding objective. This Court will emphatically uphold case management decisions save in clearly defined and narrow circumstances. As Sir James Munby P observed in *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250, (at paragraph 35):

> "It must be understood that in the case of appeals from case management decisions the circumstances in which it can interfere are limited. The Court of Appeal can interfere only if satisfied that the judge erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

35. I have very considerable sympathy for the judge in this case. He was required to make this difficult and important decision at a one-hour case management hearing, no doubt in the middle of a busy family court list. He was apparently not referred to the relevant case law. He delivered his judgment *ex tempore*. He was understandably worried about the delays that had already occurred in the proceedings and about the further delay that would inevitably result if he allowed the local authority's application. He was rightly sceptical about the local authority's proposal that the hearing in January could be used for a further fact-finding hearing. He was justifiably concerned about the difficulties that might arise through having to join Y's parents to the proceedings, and the potential problems over disclosure.

36. Nevertheless, I have reached the firm conclusion that on this occasion the judge's decision to refuse the application for a further fact-finding hearing was plainly wrong.

37. The decision whether or not to hold a fact-finding hearing is one of the most important case management decisions to be taken in the course of proceedings under Part IV of the Children Act. It is not always a straightforward decision. Care proceedings are quasi-inquisitorial. They are not confined within the tramlines of adversarial pleadings. There is therefore a recurrent danger that they veer off track. In a case with a complex family history, the court will often be encouraged by one party

or another to explore an issue that has been unearthed during the investigation. Judges have to be very careful before acceding to such an application to avoid the unnecessary use of the limited resources available. In deciding whether to hold a fact-finding hearing, it is imperative that they conduct a proportionality analysis by reference to the factors identified in the *Oxfordshire* case and *Re H-D-H*.

38. It is very regrettable that the judge was not referred to either of those cases either in written or during oral submissions. Had he been reminded of the principles identified in those two cases in the position statements and skeleton arguments filed ahead of the hearing, he would have had an opportunity to reflect on the application of the principles to the complex facts of the case.

39. In this case, an analysis conducted by reference to the principles in the case law should have identified that the magnetic factors in deciding whether or not to allow a further fact-finding hearing were the necessity or otherwise of the investigation and the relevance of the potential result of the investigation to the future care plans for the children. As Ms Beer conceded, if these allegations are proved, the care plans for these children will be fundamentally different. The principal issue in these proceedings now is whether the mother and F3 can protect the children from the risk of future harm, in particular sexual abuse. Whether F3 can play an effective protective role is therefore a crucial question. If Mr Lowe's current assessment, which excludes any findings relating to Y's allegations, is accepted, the answer to the question is probably yes. If Y's allegations are true, however, the answer is obviously no.

40. In reaching his decision, the judge attached particular weight to his assessment of the prospects of the local authority proving the allegations. As noted above, whilst each decision will depend upon the circumstances of the case, the apparent quality of the evidence is unlikely to be a powerful factor in the overall decision unless it is clear without the need for detailed assessment that the evidence appears to be particularly strong or particularly weak. In the present case, it is unclear exactly how much of the evidence the judge had considered. He certainly had not seen the video recording or transcript of the ABE interview. This Court has not seen the video but we have read the transcript. It demonstrates that Y seemingly gave a detailed description of the alleged abuse in a free narrative passage at an early stage in the interview. There are other records of statements made by the child to other people in which she also set out details of the alleged abuse. It would not be right simply on the basis of a reading of that material to reach any judgment on the prospects of the court making findings. I am, however, clear that the judge, having not looked at a record of the ABE interview, was in no position to observe that "on the current information … the chances of the local authority proving those allegations are low".

41. It was also wrong for the judge to take into account the apparent absence of medical evidence. Ultimately at a fact-finding hearing, the fact that a near-contemporaneous medical examination disclosed no evidence to support a child's allegation that she had been stabbed would be a relevant factor in determining whether the allegation was true. But to take the apparent absence of medical evidence into account at this point, particularly as the judge had not had an opportunity to consider the majority, or possibly any, of the evidence, was in my view wrong. Equally the fact that Y's allegations were historic is not a matter which should have carried any significant weight in the judge's analysis at this stage. The fact that serious allegations of abuse were not made during lengthy proceedings involving Y's family, and are apparently

not supported by any of her siblings, are plainly factors which a judge would be bound to take into account when conducting the fact-finding hearing but in my view should carry little if any weight in deciding whether the fact-finding hearing should take place at all.

42. For these reasons, I am satisfied that the judge on this occasion took into account irrelevant matters and failed to take proper account of relevant matters. As a result, he came to a decision that was outside the generous ambit of his discretion and plainly wrong. Given the relevance of the potential result of the investigation to the future care plans for the children, there must be a further fact-finding hearing of Y's allegations against F3.

43. In agreeing that this appeal should be allowed, I am not indicating what the ultimate outcome of that fact-finding hearing should be. The points identified by Ms Beer will plainly have to be considered. I accept that there are a number of decisions which will have to be taken as to the preparation for, and the scope and conduct of, the hearing, for example about joinder of parties, disclosure, and whether Y and/or her siblings should give evidence. Those are matters to be determined by the judge to whom the case is allocated. At the conclusion of the hearing, we indicated that we would remit the proceedings to Newton J, the Family Division Liaison Judge for the South-Eastern Circuit, to give directions as to the allocation and further progress of the case.

LADY JUSTICE CARR

44. I agree.

LORD JUSTICE BEAN

45. I also agree.