This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

IN THE WEST LONDON FAMILY COURT

Case No: ZW16C00319

Gloucester House
4 Dukes Green Avenue
Feltham
Middlesex
TW14 0LR

Tuesday, 17th October 2017

Before:
HER HONOUR JUDGE CORBETT

B E T W E E N:

LONDON BOROUGH OF HILLINGDON

and

E

MR S MOMTAZ QC appeared on behalf of the Applicant
MS L DESROSIERS appeared on behalf of the Respondent Mother
MR G BRAITHWAITE appeared on behalf of the Respondent Father
MS J YOULL appeared on behalf of the Child through the Guardian
MR BUNTING appeared on behalf of the Official Solicitor

JUDGMENT (Approved)

HHJ CORBETT:

Introduction

1. This is my judgment in relation to J, a little girl born on [a date in] 2013. There are three main parts to this judgment: firstly, relating to the care proceedings and the main events therein; secondly, a ruling relating to the toxicology evidence (paragraphs 49-85); thirdly my ruling in relation to the costs applications (paragraphs 86-131).

The care proceedings:

2. Care proceedings that were issued by the London Borough of Hillingdon in June 2016. The first respondent to the proceedings, J's mother, is NE, represented throughout these proceedings by her counsel Ms Desrosiers. J's father is WE who has been represented throughout these proceedings by his counsel Mr Braithwaite. J herself has been represented through her Guardian Mr Witchlow, at some hearings by Miss Snowden and at the majority of the hearings her counsel Miss Youll.

3. At a hearing on 5 September 2017, the Official Solicitor had instructed Mr Bunting of counsel to address the court and make some submissions in relation to the way forward and costs. I refer to that in more detail later. The Local Authority have been represented since approximately April 2017 by Mr Momtaz QC.

Threshold Criteria:

4. The final threshold criteria in relation to these care proceeding was agreed between the advocates then appearing at the listed final hearing in January 2017; I find as follows: The relevant date for the determination of the threshold criteria is 14 June 2016 when J was placed under police protection.

5. At the relevant date, the threshold criteria pursuant to Section 31 was met. The parents agreed the following matters:

> (i) The parents have exposed J to ongoing domestic violence in their relationship. On 24 April 2016, the mother wounded the father with a knife which caused a cut to his finger. The father strangled the mother, leaving marks on her neck and an injury to her left eye.
>
> (ii) The parents breached bail conditions imposed after this incident, namely not to contact each other directly or indirectly and the father not to attend the family home or have unsupervised access with J. On 14 June 2016, J was made subject to police protection as the father was found at the property and the parents breached their bail conditions. The father had brought alcohol to the home. The parents exposed J to further risk of serious harm following the incident on 24 April.
>
> (iii) The parents have a co-dependent relationship and place their needs over and above the needs of J. At a core group meeting on 25 May 2016, the mother was adamant that the father did not pose a risk to herself or to J and did not understand why he could not return home as

she was the one who had caused the injury to his hand. On 14 June 2016, the mother told the police that she will allow the father to attend the address in the future if he wishes to see J. On 15 June 2016, the father told the social worker that he had been living in the property until the previous evening.

(iv) The parents have a history of long-standing substance and alcohol misuse. On 15 June 2016, the father told the social worker that he was struggling with his alcohol and cannabis addiction. During a corporate meeting on 25 May 2016, the mother stated that she wanted to address her alcohol dependency issues; that she had self-referred to ARCH and tested positive for cocaine. On 13 May, the mother had reported to ARCH that she was drinking 12.6 units of alcohol daily.

(v) The parents have exposed the child to neglectful parenting and have been found inebriated whilst caring for her. On 24 April 2016, they were intoxicated when the police attended the family home following the domestic violence incident which resulted in their arrest. There were numerous cans of beer found in the property on 14 June when J was made subject to police protection.

(vi) The parents have a long-standing history of children's services involvement. Both parents have previously had their older children removed from their care respectively.

(vii) Historically, there have been mental health concerns in respect of both parents. In 2012, the mother took medication for depression and had a six month stay in rehabilitation for her drugs and alcohol addiction. In June 2012, the father took an overdose. On 17 April 2016, the father attended accident and emergency complaining of feeling suicidal and anxious.

Background:

6. An interim care order was made by consent on 17 June 2016 and was renewed throughout the proceedings by consent. I have been responsible for case managing J's case throughout the proceedings, since the matter was re-allocated to me; it originally having been allocated to the magistrates.

7. At the issues resolutions hearing on 31 October 2016, it was clear that one of the key issues was the parents' long-standing substance and alcohol misuse and its potential effect on their ability to parent J. At that point the Local Authority's plan was that J should not return to her parents; that she should either be made subject to a Special Guardianship Order in favour of some maternal relatives, I do not need to go into detail about that, or the plan would be adoption.

8. Ms Desrosiers, on behalf of the mother, filed a detailed position statement in advance of the final hearing that was due to start on 16 January. The father's solicitor similarly set out a position statement. The parents' case was that they sought a 12-month supervision order and for J to return to their care. The parents were saying at that point that the Local Authority had not provided adequate assistance to them at the outset of proceedings, which the parents say they would have benefitted from, and which they welcomed. Ms Desrosiers set out that the mother has been committed to engaging in programmes, that those that she has been on she has found extremely useful and that she welcomed assistance from the Local Authority.

9. The mother disputed the hair strand test results which had been produced in relation to her use of alcohol. She had consistently said in her evidence and to professionals and through her counsel, that she had not drunk alcohol since J went into care on 12 June 2016. She made it very clear that she sought to adduce evidence of the positive evidence of her abstinence and sought further hair strand tests to be produced urgently during the week of the listed final hearing.

10. A major issue at the commencement of that hearing in January 2017 was whether the parents were, at that time, a realistic option to resume the care of J and whether they could meet her needs in the light of the threshold findings, the history of alcohol and substance misuse, Dr Wilkins' opinion that the mother's most significant problem has been her alcohol misuse and, more recently, cocaine use, the mother's mental health issues, the length of time that the parents have been abstinent and their prognosis for continued abstinence, their history of domestic violence and their insight into the effect on J of their alcohol and substance misuse; in the round, their capacity to protect J.

11. The parents submitted that the Local Authority had minimised positives with regard to parental engagement and that the Local Authority had a closed mind about the disputed evidence regarding the mother's abstinence.

12. The Guardian, by the time of the commencement of the January 2017 hearing, was not in a position to recommend reunification of J to her parents, despite their progress and commitment towards her. Through his counsel he said, 'this is because the risk from the past means that there is a real risk of further significant problems regarding drug and alcohol use and physical abuse between the parents. However, the Guardian will consider any further evidence from the experts that might assist and reconsider his recommendations to the court that the risks to J could be safely managed at home'.

13. The parents' position required a proper and fair consideration by the court. I approached the case on that first day with a very open mind as to what would be the right outcome for J. On the first day I acceded to the request by counsel for the mother that there should be additional hair strand tests covering a three-centimetre segment. Those hair strand tests would be made available later in the week of that listed final hearing, which in fact they were.

14. The issues set out by the parents' advocates were not explored in detail in evidence during the January hearing as it had to be adjourned due to difficulties which arose regarding the 'reliability and provenance of the Local Authority evidence'; a phrase which is repeated throughout case management orders made since then.

15. On the second day of the hearing, evidence was called from Dr Wilkins, adult psychiatrist, and Dr Newman from PAI Family Safety Assessments. At that point, the latest January hair strand test results were not available. The advocates had the opportunity to ask questions of Dr Wilkins and Dr Newman and, for the purposes of this judgment, given the final agreed welfare outcome, I do not need to record a summary of their evidence.

16. On 18 January 2017, the hair strand test in relation to the mother was produced which had a negative result for alcohol, in that neither EtG nor FAEE was detected. On that day I was told by counsel then acting for the Local Authority that the previously allocated social worker who

was due to give evidence was 'reluctant' to give evidence and that an issue had arisen as to the extent to which the contents of a statement in her name, the final evidence, was in fact her evidence. After giving the Local Authority counsel time to take instructions, which took most of the morning and into the afternoon, I was told by her that the Local Authority were not relying on the evidence of that social worker and they no longer intended to call her as a witness, that they would call instead the newly allocated social worker to speak to the Local Authority's care plan. Local Authority counsel then informed the court that she was professionally embarrassed, and I gave her permission to withdraw from the case.

17. On the next day, day four of the listed hearing, 19 January, I was told by the new in-house advocate who appeared on behalf of the Local Authority that the statement in the bundle was in fact the evidence of the previously allocated social worker and that the Local Authority would be able to establish this and the Local Authority did wish to rely on her evidence. The Local Authority was unable to inform the parties and the court why there had been this change in their position. Despite my hearing on 19 and 20 January, further evidence about the drafting, amending and filing of the Local Authority evidence, I was left with grave concerns about the state of the evidence. It was clear by then that the listed final hearing could not be completed or even get substantially underway. I noted in my order of 25 January that the timetable for J was again extended to a final hearing the week commencing 19 June, 'this is because of difficulties that arose during the listed final hearing regarding the reliability and provenance of part of evidence which has necessitated court enquiry into whether there has been any abuse of procedural fairness on behalf of the Local Authority in this matter'.

18. I directed that there be transcripts of the hearing from 16-20 January, obtained and funded by the Local Authority. At the hearing on 20 January, the Local Authority agreed to fund a Domestic Violence Intervention Programme, which was welcomed by the parents. In addition, on that day, I found it essential and necessary for the court to direct that an independent social worker undertake a parenting assessment, 'due to the court's concern regarding how the Local Authority potentially prepared its evidence, and what was said by the Local Authority about the status of the social worker's evidence at court and whether it did or did not rely on her parenting assessment of the parents, thus giving rise to a potential procedural irregularity'.

19. I also provided in this order for an addendum by Dr Newman to be filed after the DVIP interim report. Further, I directed that the Local Authority file and serve statements from a number of employees and former employees.

Events since 20th January 2017:

20. Since then, there have been, at the majority of the hearings, two orders drawn, one a traditional case management order and also an order regarding the enquiry into the issue of procedural fairness. A separate bundle was created which contains documents relating to the issue of procedural fairness. This ran alongside the main bundle.

21. I am conscious of the decision of the Court of Appeal in *Re W (a child)* [2016] EWCA Civ 1140. Further, in light of the Local Authority's collective acceptance of responsibility for its failures in this case, and their concessions made, and the anticipated claims (not yet issued) pursuant to the Human Rights Act by J and her mother, which I shall detail in a moment, I do not propose to say any more about what took place in court from 16-20 January 2017.

22. Since the adjourned hearing in January, I have had to conduct approximately 10 hearings. I have attempted to investigate as to why the final hearing could not go ahead in January, which has taken up the large majority of the court's and the advocates' time. The court orders detail how much effort was put into the obtaining of evidence from this Local Authority. Sometimes having to be ordered again and again due to shortcomings in an earlier document filed by them. For example on 3 February, a direction I made that the Local Authority manager file a statement led to a direction on 15 March that the court's direction be complied with, as in my judgment, the statement had not contain the necessary information for the court.

23. The Local Authority filed a 'concessions document' for a hearing listed on 18 May. By this date they were represented by Mr Momtaz QC. The Local Authority at the hearing on 18 May were urged by the court to consider their concessions document further which they did. Their updated concessions document is dated 22 May, prepared for an issues resolutions hearing on 24 May.

24. The suggestion of the Local Authority instructing independent counsel to carry out a review had been one of the suggestions made on behalf of the Guardian by Ms Youll. I considered that it was a suggestion that had merit and I encouraged the Local Authority to consider this when the matter came before me on 18 May. By 22 May that indeed was their position.

25. By this point, the independent social worker, Ms Ware, had almost completed her investigations and it appeared highly likely that she would be recommending return of J to her parents' care. This did appear to be the probable final outcome for J, but updated reports were still awaited at that point from the other experts.

26. I heard submissions on 24 May about what sort of hearing I should conduct thereafter. In an order made that day I record that I approved the Local Authority's proposal to conduct an independent review by independent leading counsel, Janet Bazley QC, 'to establish what went wrong in J's case and whether there are wider implications in other cases involving the London Borough of Hillingdon and to make recommendations for good practice in the future'. I declined to hold a fact-finding hearing to determine the procedural irregularity issue due in part to the delay that this would cause to J's proceedings, and in part because I had accepted the proposal that Ms Bazley QC carry out an independent review.

27. Turning to the document headed 'The Local Authority's Updated Concession Document 24 May 2017' which I consider deserves to be read in full.

'1. The Local Authority, having further reviewed the evidence it has filed in respect of the procedural irregularity issue and considered the comments made by the court at the hearing on 18 May makes the following concessions:

a. It was wholly unacceptable for the Local Authority to file a number of documents, statements in particular unsigned and undated.
b. It was wholly unacceptable to file some statements without a statement of truth.
c. The Local Authority should have clearly identified authorship of a number of joint documents, in particular the final statement dated 24 October 2016, the child and family assessment dated 12 October 2016 and the special Guardianship assessment dated 26 October 2016. The documents should have been much clearer as to which

individual was responsible for drafting each part of each document.

d. The process of revision which produced the final version of the statement dated 24 October 2016 went over and beyond the normal quality assurance process and the statement was significantly amended including removing some positive evidence in relation to the parents. This was wrong and should never have happened.

e. The final version of the final statement dated 24 October 2016 which was filed and served was substantially different to the version drafted by the allocated social worker, who did not see or sign the statement before it was filed.

f. It would have been a reasonable assumption for the other parties in the court to make that the statement which was filed was largely, if not completely the evidence of the allocated social worker.

g. The Local Authority took insufficient steps to rectify the errors accepted at d-f above between the end of October 2016 and the beginning of the final hearing in January 2017. In particular, given that the allocated social worker had left the Local Authority's employment shortly after the statement was filed, the Local Authority should have sent the social worker the evidence which was filed in her name well before the final hearing started so that she could have the opportunity to refresh her memory and raise any queries in relation to her evidence in good time for the final hearing.

h. In the absence of the formerly allocated social worker's oral evidence provided on 20 January, it was wrong for the Local Authority to inform the court on 19 January that the final version of the statement was entirely the social worker's statement; that she approved it and that it was able to evidence that.

i. The Local Authority was wrong to describe the social worker as hostile.

j. The Local Authority was wrong to inform the court that their counsel had, 'slightly misinformed' the Assistant Director.

k. The Local Authority was wrong to waive legal privilege on 19 January.

l. The Local Authority was wrong to seek to rely on the social worker's evidence even on 19 January, given the difficulties with the revision of the statement which has been accepted above.

2. The Local Authority sincerely apologises to the court and to the parties for all these errors.

3. The Local Authority accepts that these errors will have cost implications and invites the parties to provide a schedule of their costs for the final hearing in January and all subsequent hearings. The court will, in due course, be referred to the Supreme Court decision in *Re T (Children)* [2012] UKSC 36.

4. The Local Authority fully accepts collective responsibility for its failures in this case and submits that it is not necessary for the court to make findings against its individual employees. However, if such findings are sought, they are likely to have an impact on the professional standing and even job prospects of each professional. In such circumstances, each professional would need to know what findings are sought against them and have access to

independent legal advice. The court is referred to the case of *Re W (A Child)* [2016] EWCA Civ 1140.

5. It is not accepted that there was a culture or ingrained procedure within the Local Authority which regularly produces tainted or unbalanced evidence. The court has expressed some concerns as to whether similar situations may have arisen in other cases. Over the last year there have been 39 final hearings in care proceedings involving this Local Authority. In 28 of those cases, the final statements were signed by the social workers. Further, the Local Authority submits that the problem would have come to light if repeated in other cases. Professionals take a solemn oath to tell the truth before giving evidence. The Local Authority submits that it is inconceivable that any reputable social worker or indeed any professional, would adopt any document not their own.

6. The Local Authority has taken proactive steps to ensure that the errors made in this case would not be repeated in future including, but not limited to;

a. Ensuring no unsigned or undated statements are filed within proceedings.
b. Ensuring that every statement has a statement of truth, particularly where the Local Authority evidence is not included in the national social work evidence template.
c. Ensuring that authorship of every part of a document, particularly where documents are prepared by more than one person, is clearly identified on the fact of the document itself.
d. Ensuring that the final statement and care plan are read and approved by the head of service or deputy director.
e. Ensuring that all professionals who have left the Local Authority's employment prior to any hearing at which they give evidence, receive any evidence in their name at least seven days before such hearing so that they can properly refresh their memories and if necessary raise any issues as to the provenance or accuracy of their evidence.
f. Providing independent training for all the Local Authority social workers and team managers as to the importance of producing balanced evidence and in particular, comprehensively identifying both the strengths and weaknesses of parenting capacity on the national social work template for final evidence.
g. Instructing independent counsel to undertake an independent review in order to establish what went wrong in this case and make recommendations for good practice in

the future'.

28. During the hearing in January of this year I only heard from Dr Newman and Dr Wilkins and the formerly allocated social worker A and a manager B. Ms Bazley QC had the opportunity of meeting and speaking to a large number of employees which she sets out in her report.

29. Following the January hearing and prior to the actual final hearing in June, the mother and father underwent programmes of work including but not limited to the domestic violence intervention programme. The mother found for herself and attended a well-being programme, cocaine and alcohol anonymous, where both of the parents play a responsible role, not just as attenders. The father has been employed throughout the proceedings. He has funded his attendance on an Everyman project. He has funded work with Relate for both of the parents.

30. The most recent hair strand test in May 2017 and indeed the January hair strand test in relation to the mother was negative for all illicit substances. The father has been drug and alcohol free for over a year.

31. The independent social worker, Ms Ware, recommended that J return home in her final evidence in her report at E434. She says in her conclusion,

> (i) 'The parents have long-standing drug and alcohol dependency which has affected their relationship and parenting. Since J was removed almost a year ago, they have tried hard to address their difficulties. They have fully engaged with all assessments directed by the court and followed recommendations to engage with drug and alcohol services as well as DVIP. Both have been abstinent for almost a year which reflects their engagement and commitment to address their difficulties. Their contact with J is good and they show their ability to prioritise and meet their daughter's needs at contact. Such is the quality of contact that it is to move to some unsupervised contact which is part of the Local Authority's plan to rehabilitate J to her parents' care. The Local Authority has indicated their intention to ask the court for a supervision order and for J to return to the care of her parents. I would concur with such a plan, however there needs to be close monitoring and safeguards in place. Although abstinent for a year there was still a risk that the parents could relapse which would compromise their parenting and put J at risk. The parents must continue to engage with professional support offered and attend cocaine and alcoholics anonymous. A stringent contract with clear expectations of the parents might assist a supervision order and ensure that J is protected'.

32. The Local Authority filed a final care plan and final statement from the currently allocated social worker setting out that J's interests were best met by a return to her parents, the making of a supervision order and a supervision plan with written agreement which was signed by the parents.

33. J's Guardian filed his final report. He acknowledges that the parents have made progress and he says, at paragraph 33, 'It appears to me that there is a strong argument to support and supervise J at home. On balance I conclude that the events of the last year, where the parents

have worked hard to address the risk issues, means that I cannot argue for permanent separation, despite a history that suggests that there could be an increase in risk to J in the years ahead. Her parents and the Local Authority need to work together in the long term to minimise those risks'. He recommended that J is returned to the care of her parents and is made subject to a 12-month supervision order.

19th June 2017 final hearing:

34. At the listed final hearing, on 19 June 2017, I heard submissions on the toxicology issue to which I will refer in a moment, and given the Threshold Criteria pursuant to s31 Children Act 1989 had been agreed and that all parties agreed that J should return home to her parents under a supervision order, I felt able to rule that I had all the information needed to make a welfare decision about J. The review to be conducted by Ms Bazley QC was not by then available but I was satisfied that I could and should make a final order in respect of J on that day, 19 June.

35. In determining what order to make if any, J's welfare has been at all times my paramount consideration. I considered that it was in her best interests pursuant to s1 Children Act 1989 to make a final order and indeed, I also considered it was in her parents' best interests to make a final order on that day (albeit of course their interests were not paramount). I said then that the parents have been through so much and in my judgment, they all needed finality. J moved back to her parents in late July and when the matter came before me on 5 September I was told that this had gone well, and J had been observed to be happy and content.

36. I made directions that day for cost schedules to be served and I adjourned the question of the costs applications to 5 September. I did not, on 19 June, give any detailed judgment.

Events since 19th June 2017 final hearing: the hearing on 5th September 2017

37. Ms Bazley's review report is dated 23 July 2017. For the purposes of this judgment, I record that Ms Bazley has reached certain conclusions and has made certain recommendations, but it is important to note that, other than set out herein, I have not seen the witnesses give evidence. By 'witnesses' I mean the people with whom Ms Bazley spoke for the purposes of compiling her review. I have not seen them give evidence, nor have I heard submissions about their evidence. Ms Bazley concluded that there was 'procedural irregularity in relation to the E case'. The Local Authority fully accepts the conclusions and recommendations of Miss Bazley's report.

38. The matter came before me on 5 September, listed for submissions upon costs, and following the outcome of Ms Bazley's report.

39. I have already read out the Local Authority's concession document dated 24 May. In particular, at its paragraph 6 a-g, the Local Authority sets out that it has taken proactive steps to ensure that the errors made in this case will not be repeated in the future.

40. In the Local Authority's position statement for 5 September, Mr Momtaz QC said

> (i) 'The Local Authority fully accepts the conclusions and recommendations of Ms Bazley's report. The Local Authority has taken or will take the following steps to address the issues raised:
>
> (ii) 11a. The Local Authority has fully implemented all the

> proactive steps set out at paragraph six of its updated concessions document dated 22 May. [I have referred herein to this document as dated 24 May the day of the hearing]
>
> (iii) 11b. To address the concern expressed by three of its former employees, that this Local Authority was an unusually difficult place to work, the Local Authority has introduced a new structure to improve its working environment'.

41. Mr Momtaz sets out how that structure will look. Importantly, Mr Momtaz says that the role of the care proceedings case manager has been clarified within the Local Authority in accordance with the guidance provided by the President of the Family Division, to make clear that it does not include any direct supervisory responsibility or make any substantive changes to the Local Authority's evidence. The Local Authority has also arranged court and witness training for its employees with independent counsel.

42. Mr Bunting represented J through the Official Solicitor, who has instructed Leigh Day Solicitors to advise J about a potential claim for damages, I assume also for a declaration in respect of delays and procedural failings within the care proceedings. No party objected to Mr Bunting making submissions. As at 5 September, no Human Rights Act claim had been issued by either the mother or J, the mother having also instructed solicitors in this regard, the father having indicated that he did not propose to issue any such claim. The Official Solicitor had agreed a limitation period extension with the Local Authority to 13 September.

43. Despite my ruling on 24 May that I would not conduct a fact-finding hearing into the events leading up to and during the January 2017 hearing and subsequent events, on 5 September the mother submitted that I should conduct such an exercise and make additional findings. Counsel on behalf of the Official Solicitor filed a position statement with attached authorities and addressed me in oral submissions. He invited me not to express any view in respect of the conclusions in Ms Bazley QC's report, saying that there is a risk that if I did express a view, that would unduly influence any subsequent court that comes to consider the same factual issue in J's anticipated damages claim.

44. He submitted:

> a. 'A court determining a damages claim in this case should be permitted to determine the facts for itself. In any event, given that Ms Bazley's report was not prepared to assist the court in its consideration of welfare issues, there is no necessity for the court to express any view about Ms Bazley's conclusions at this hearing'.

Given that I have not heard witness evidence or submissions about matters concerned in that review, I do not necessarily accept the submission that anything that I would say would unduly influence any judge actually hearing evidence and submission in a civil claim. However, I do not consider that it would be appropriate for me, for example, to compare what individuals said to Ms Bazley with what they said or did not say in court to me, or what they said or did not say in any document.

45. I had, on 24 May, already decided not to hold a factual enquiry and had decided to accept the Local Authority's proposal that they would instruct independent counsel to carry out a review. I saw no reason on 5 September to depart from the decision I made on 24 May.

46. The Threshold Criteria is agreed. All parties agree that J's welfare is best met by her returning to the care of her parents. The evidence filed for the final hearing in June supports a finding that J's welfare is best met in the care of her parents and that a supervision order is necessary and proportionate. The Local Authority say in their final evidence that the parents have provided J with consistently good quality contact. They have engaged with domestic violence and substance misuse interventions and demonstrated a commitment to maintain their changes. J wants to live with her parents. During periods of parental abstinence there have been no concerns about their capacity to provide basic care. On 19 June, I had no hesitation in approving orders to facilitate the return of J to her parents' care based on the evidence I then had. In the light of this, it is not necessary or proportionate for me to conduct any further enquiry.

47. The actions of this Local Authority in preparation for and at the January 2017 hearing, and subsequently, have led to an adjournment of the final hearing to June and therefore J remained in foster care all that time. It is a testament to the parents that they have not relapsed during this delayed care proceedings process. They were expecting to participate in a five-day final hearing in January, seeking J's return to their care, putting forward arguments through their advocates which I set out early on in my judgment. Final orders in respect of their daughter were not made until five months later on 19 June.

48. The Local Authority, the Guardian, and Helena Ware set out how the parents have cooperated well with professionals during this long process. I wish to record that from my perspective, they have conducted themselves impeccably whilst in my court.

Toxicology:

49. Ms Desrosiers on behalf of the mother has raised concerns since just before the January 2017 hearing about the hair strand tests carried out in respect of the mother. The mother had at that stage undergone three sets of hair strand testing. The first set confirmed drugs use during a period pre-dating proceedings, which was not in dispute. The second set is negative for drug use May to September 2016. A marker for alcohol use was detected in the sample June to September 2016. Counsel makes the point that the testing is not segmented. The mother last admits drinking alcohol on 12 June 2016.

50. Ms Desrosiers submitted in January 2017 that the Local Authority and the court should treat with extreme caution the 'positive readings for alcohol use' and should use other indicators to assess whether the mother has been drinking, notably her general engagement, the fact that she had not presented as being under the influence of alcohol during proceedings, during regular contact and whilst engaging with a number of professionals, and that she had tested negative when attending ARCH since the commencement of these proceedings, and engaged well with prevention programmes.

51. On behalf of the mother, questions were put to the toxicology testing companies.

52. The issue that I have been asked to rule upon is whether the toxicology reports as prepared by the companies Lextox and Cansford Laboratories comply with Practice Direction 25 FPR 2010, and the specific duties placed upon experts. The particular issue is whether the date ranges which are occasioned by differences in hair growth rates need to be clearly set out in expert reports to enable the court and parties to fully understand what is being said.

53. Further, Ms Desrosiers has submitted that a clear warning should be placed on the face of such a toxicology report to the effect that the dates are an estimate and should not be read exactly. The father and Guardian support the mother's submission; the Local Authority has been neutral about this issue.

54. Both of the companies involved in the mother's testing, namely Lextox and Cansford Laboratories were invited to intervene within the proceedings, neither chose to intervene. Lextox, which I will set out in a moment, corresponded but did not send any representative to the hearing on 19 June. In attendance on that day was Mr Wickes, from Cansford.

55. Since that hearing on 19 June, Jackson LJ (as he now is) has handed down a judgment dated 29 September which involved three toxicology companies: Re H (A Child: Hair Strand Testing) [2017] EWFC 64.

56. In his customary way, Jackson LJ delivered a seminal judgment covering the matter of hair strand tests. Lextox, who were involved in the case before me were one of the interveners in that case. Just to turn briefly to the Re H case. It is said at paragraph one of Jackson LJ's judgment that it considers the science of hair strand testing for cocaine and the way in which expert reports on the test results are presented. At paragraph three Jackson LJ says:

> 'There is an underlying factual issue. Has the mother, in his case, been using drugs albeit at a low level during the past two years? She adamantly denies doing so. With one significant exception, the other evidence supports her. The exception is a body of scientific information from hair strand tests taken over the two-year period which are interpreted by the testing organisations as showing low level cocaine use for at least some of the time'.

57. In the case before the learned judge, he says further at paragraph 21 that, 'the Local Authority', in his case:

> 'Argues that the hair strand testing shows that complete abstinence has not been achieved which raises the level of risk that that child will get caught up in future drug use of the kind seen in the past. It also argues that the hair strand test show that the mother has not been telling the truth and consequently that she cannot fully be trusted'.

58. Very similar contentions were made in the case before me. With respect, I entirely agree with Jackson LJ's assessment of the situation at paragraph 25:

> 'Any assessment of a family situation whether carried out by the court or other professionals, involves the gathering and analysis of a range of information. Most of the information is factual and in some cases it will be interpreted by experts who will express an opinion. That will be the case when scientific investigations, such as hair strand tests are carried out. These tests can provide important information, but in order for that to be of real use, the expert must a. describe the process, b. record the results and c. explain their possible significance, all in a way that can be clearly understood by those likely to rely on the information. If these important requirements are not met, there is a risk that the results will acquire a pseudo certainty, particularly because, unlike most other forms of information in this field, they appear as numbers'.

59. The Re H judgment from paragraph 26 onwards sets out that hair strand testing has been considered in several previous cases and Jackson LJ refers to cases to which I have also been referred in *Re F (Children) (DNA Evidence)* [2008] 1 FLR 328, *London Borough of Richmond v B & W & B & CB* [2010] EWHC 2903 (Fam), *Bristol City Council v Mother & Others* [2012] EWHC 2548 and *London Borough of Islington v M & R* [2017] EWHC 364.

60. Further, that judgment at paragraph 28 sets out 12 propositions which were agreed between the expert witnesses from whom the learned Judge had heard. I note in particular paragraph 28(2) that the experts before him agreed as follows:

> 'Human head hair grows at a relatively constant rate ranges as between individuals from 0.6cm, or in extreme cases as low as 0.5cm to 1.4cm or in extreme cases up to 2.2cm per month. If the donor has a growth rate significantly quicker or slower than this, there is scope both for inaccuracy in the approximate dates attributed to each 1cm sample, and for confusion if overlaying supposedly corresponding samples harvested significant periods apart'.

61. As far as I can see, there is no other matter of relevance in respect of the growth rates contained within His Lordship's judgment. I note paragraph 57 however 'Report writing and reading'. Jackson LJ stresses that the responsibility for making proper use of scientific evidence falls both on the writer and the reader namely that the writer must make sure as far as possible that the true significance of the data is explained in a way that reduces the risk of it becoming lost in translation. The reader must take care to understand what is being read and not jump to a conclusion about drug or alcohol use without understanding the significance of the data and its place in the overall evidence.

62. Further in that case Lord Justice Jackson set out a number of suggestions in relation of the writing of reports in paragraphs 59, with which (unsurprisingly) I entirely agree.

63. Turning to the case before me. A report dated 30 June 2016 from Lextox, covers a period they say from the beginning of December 2015 to the beginning of June 2016 states 'the findings do not suggest that NE has consumed chronic excessive levels of alcohol in the approximate time period from the beginning of December 2015 to the beginning of June 2016'. It is noteworthy that on the mother's own admission, she was drinking alcohol to excess during this period. The report also confirmed the mother's drug use pre-proceedings, but that is not in issue. She accepted that.

64. A further report dated 27 September 2016 from Lextox is said to cover the period from the beginning of June 2016 to the beginning of September 2016. The report says that the time periods are calculated with an assumption that average growth of human hair is 1cm per month and comes to a conclusion from the author of the report, 'In my opinion it is more likely that the mother has consumed chronic excess of levels of alcohol'. FAEE was detected in that sample, EtG was not.

65. In a report dated 30 December 2016, Cansford Laboratories say that the hair strand they had was sufficient length to prepare six sections for analysis and six hair sections measuring 1cm each was analysed separately and said to represent the approximate time period from 25 June 2016 to 22 September 2016. They have assumed a growth rate of 1cm per month. EtG, the alcohol marker was detected at a level consistent with the use of alcohol but not at a chronic excessive level. FAEE was not detected, therefore the overall result for EtG and FAEE is not

suggestive of chronic excessive alcohol consumption.

66. The September 2016 and the December 2016 reports purported to show that the mother had been using alcohol since the proceedings were issued in June 2016. The mother denied that strongly and she pointed in her evidence and through counsel's position statements, to other positive engagement which I have already set out. Her case being that she stopped drinking completely from 12 June 2016.

67. In both the Lextox and the Cansford reports, the authors provide what is referred to as 'caveats' about the growth of hair. Both of them refer to the fact that the average rate of growth for the population is 1cm per month, but the window that Lextox refer to is 0.6 to 1.4cm per month and Cansford refer to 0.7 to 1.5cm per month. i.e. their assumption is that the growth is 1cm per month but that this can vary between different individuals in the window of 0.7 to 1.5cm per month.

68. Ms Desrosiers industriously analysed the potential differences in dates in respect of the mother depending on whether the growth of her hair is average or at either end of the variation window. I approved questions to be put to Lextox and Cansford in respect of growth rate and how that might affect the time period specified for testing.

69. Lextox produced a letter dated 10 January 2017 referring to the test carried out in September 2016.

> Based on <u>average</u> hair growth rate of 1cm per month, the sections analysed by Lextox covered 'the following approximate time periods, beginning of June to beginning of September 2016
>
> Based on <u>slower than average</u> growth rate of 0.6cm per month', 'the following approximate time periods beginning of April to beginning of September 2016, and
>
> Based on <u>faster than average</u> hair growth rate, the following approximate time periods beginning of July to beginning of September 2016'.

70. Cansford replied on 5 January to the mother's solicitors. They say in their letter 'We supply an average growth rate of 1cm per month, but this can vary between individuals…..In the table below it is possible to see the potential time periods that the sample could cover should an individual's hair grow at varying rates'. They set out in a table, over a six-centimetre section, three different date periods; 1cm per month being 25 June to 22 December 2016; 0.7cm per month being 8 April to 22 December 2016; 1.5cm per month being 24 August to 22 December 2016.

71. Therefore, it can be seen in the table that they set out, if someone's hair growth was at 0.7cm per month, the period covered by the sample taken could have begun as early as 8 April, which is in fact in the period of time when the mother accepted she was drinking to excess.

72. Cansford proposed in their letter of 5 January, a proposal I accepted during the January hearing, that there could be a further test covering a period of three months in order to eliminate the period before 12 June 2016 from the period tested.

73. That resulted in the report from Cansford dated 18 January which came in the middle of the week of the listed January hearing. It states 'The test of head hair for both EtG and FAEE was

requested over a period of three months, consisting of three sections, each covering approximately one month…….The calculation of the section assumed the growth rate of 1cm per month, but head hair and non-head hair grow at a reasonably constant rate of 1cm per month, but between different individuals it can vary from 0.7-1.5cm per month'. There was a sufficient length to prepare three sections for analysis, three hair sections measuring 1cm each in length were cut from the root end of the hair sample. The period covered from 12 October 2016 to 10 January 2017 and neither EtG nor FAEE were detected, so there was no suggestion of alcohol consumption (from the EtG result) or excessive alcohol consumption (from the FAEE result).

74. Cansford were instructed to prepare another report so that that would be available shortly before the Local Authority had filed its' final evidence, that is found at E403. It covers the period from 3 February until 4 May 2017 and nothing abnormal is detected.

75. Lextox and Cansford were invited to consider the written submissions that had been set out by the mother and the Guardian and to intervene if they wished to do so. Lextox have chosen to write twice to the court on 12 May and 9 June, and Mr John Wickes, managing director of Cansford attended the hearing.

76. The first letter from Lextox is dated 12 May 2017; they have set out that in the reports which they produce, there is reference to an assumption of growth rate of 1cm per month and that growth rate can vary as they say, between 0.6-1.4cm per month. Their position is that if an expert report was to include a date range for the extreme growth rates of 0.6-1.4cm per month and the average growth rate of 1cm per month, this could cause confusion as three separate approximate time periods would be detailed in the expert report.

77. Further, on 9 June, in a second letter, Lextox reiterate 'it is detailed in all Expert reports issued by Lextox that the actual time periods detailed can be different to those quoted and also the reasons why. Lextox believe that quoting a maximum and minimum time in the expert reports would not provide additional information as there is no way to determine the exact hair growth rate of a collective hair sample once it has been removed from the scalp and therefore the actual time period is still unknown. In addition, the maximum and minimum hair growth rates quoted by Lextox whilst are extreme and unlikely, can be extended further i.e. there is scientific literature to state that it is possible in some cases for donors to even fall outside of the ranges quoted'.

78. Cansford provided a letter headed 'Skeleton Argument on Behalf of Cansford' from Mr John Wickes, managing director of Cansford who attended court. He says, 'The intention of our testing and reports is to provide useful information to our clients including family courts. It appears in this case we have failed in this intention and we are keen to improve the reports'.

79. He says:

> 'As I understand the matter, the principal concern is around the reporting of dates covered by the testing. We have been testing hair for drugs and alcohol for many years and our statements regarding hair growth and dates assigned to the testing have not been an issue previously. I understand the mother seeks the following'.
>
> > (1) [measure actual hair growth. In fact, the mother accepted that this is a matter for a trichologist]

> (2) [the company to] properly set out that range of dates in their report sufficiently explained for both the court and the parties to understand and/or
>
> (3) to place a clear warning on the face of the report that the dates provided are an estimate and should not be read exactly'.

80. He emphasises, as did Lextox, 'We cannot measure hair growth rates in individual donors, that requires a trichologist'

81. Cansford go on to say:

> 'In our reports, we do state that the dates assigned to the individual lengths of hair are approximate and based on the population average growth of 1cm per month. We also state that the growth rates in an individual may vary from 0.7-1.5cm per month. However, we can readily supply extra detail to show the extremes of growth rates possible ……. and we can readily provide an extra warning on the face of report that the dates assigned to the individual lengths of hair are approximate and should not be read exactly'.

82. I found Mr Wickes and his observations most helpful. I can conclude that hair strand tests should not be determinative or conclusive. They should form part of the evidence to be considered by the professionals, the parties and then the decision-making judge or magistrates. In this case, the Local Authority in their final evidence for the hearing in January 2017 were relying on the results that were then available from Lextox (dated 27 September 2016 covering a period beginning June to beginning September 2016) to conclude that the mother had consumed alcohol during the proceedings and because of that and other matters, she had made insufficient changes to parent J.

83. Each of these two testing companies set out in their reports that they have assumed a growth rate of 1cm, which appears to be the normal assumption in accordance with guidance provided by the Society of Hair testing. Cansford say that can vary in individuals from 0.7-1.5cm and Lextox say the variation is 0.6-1.4cm.

84. Cansford have informed the court that they can readily provide an extra warning on the face of the report that the dates assigned are approximate and should not be read exactly. They also say they can readily supply extra detail to show the extremes of growth rates possible sufficiently explained so that the court and the parties can understand. If that can be provided, in my judgment it would be helpful. I consider that it would be helpful if the amendments proposed by Cansford were adopted. I have no doubt that any testing company would wish to emphasise that the accepted average growth rate is 1cm, indeed that that was accepted by the testers who provided evidence before Jackson LJ. If this additional information however, can be provided as Cansford say it can, and so readily, in my judgment that would assist the parties and court and ensure that the court is in possession of the best available evidence.

85. That concludes my judgment in relation to toxicology. I propose to send this Judgment to the President of the Family Division for his attention regarding the toxicology issue as it is not my role as a Circuit Judge to provide guidance to toxicology companies generally.

Costs:

86. I heard submissions on 5 September in relation to the Guardian's and the mother's applications for costs against the Local Authority. Each of the three respondents are publicly funded by the Legal Aid Agency. The Local Authority accepts that it has behaved unreasonably at certain times during the care proceedings, particularly at the end of October 2016 when preparing the final evidence and again during the final hearing in January 2017.

87. It is agreed that I should make an award of costs against the Local Authority in favour of the mother, the father and the Guardian. The father has accepted the Local Authority's offer of £20,000; £5,000 for solicitors, £15,000 for counsel. The mother and Guardian have declined that offer. Since the hearing on 5 September, in an email to this court copied into the other advocates Mr Momtaz QC indicated that the Local Authority were prepared to increase that offer to £30,000.

88. I understand, from a position statement sent by Ms Desrosiers this morning, that that offer was made firstly to the advocates and not to solicitors. I hope by now it has been made to solicitors. The issue for me is whether I should make any greater award for costs to the mother and to J as contended by the mother and the Guardian.

89. Part of the reason for the Official Solicitor seeking to be represented through counsel at the hearing on 5 September is because of the question of costs. Mr Bunting said in his position statement, 'That an order that the Local Authority pay all of J's costs would be appropriate and just……J had no say in whether the proceedings were brought, no control over how long they took, and she has ended up back where she started, in the care of her parents. It would be unfair and damaging to her', he submits, 'if she were required to bear her own costs in these circumstances'. He goes on, 'If J's costs in these proceedings are not awarded to her in full, any outstanding costs will be set off against any damages in the civil claim through the application of the statutory charge, leaving J with no damages at all'. He expanded upon the submission in his oral submissions.

90. As at the time I heard submissions on 5 September, there was no Human Rights Act claim issued by either the Official Solicitor or the mother although both say they plan to do so, nor at that stage had there been, as I understand it, any letters before action. A moratorium had been agreed to 13 September in respect of limitation.

91. If the mother's and/or J's costs of the Children Act proceedings are not awarded to be paid by the Local Authority in full by me today, it is highly likely, it is submitted by the mother, Guardian and Official Solicitor, that any outstanding costs will be offset by any damages in the proposed civil claim through application of the statutory charge under section 25 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, possibly leaving either or both without any damages at all. The Legal Aid Agency has refused to waive the operation of the statutory charge as the Official Solicitor has invited them to do.

92. In preparation for the hearing on 5 September, I had directed the parties to file and serve schedules of costs. I outline them now. The mother produced one which is in the bundle headed, 'Solicitors Wasted Costs Schedule in Relation to the Procedural Fairness Hearing 16 January to 18 May 2017' and provides, at that point, for counsel's fees according to an attached schedule £27,468 and solicitors of £5,310, a total of £32,778.

93. In a position statement filed on the morning of the hearing of 5 September Ms Desrosiers submitted that there should be costs paid at commercial rates attaching a schedule covering the

period from June 2016 to June 2017 with a total of £63,316. Further, Ms Desrosiers submitted that the court should consider awarding costs on an indemnity basis or at market rates.

94. Since the 5th September hearing, the mother's solicitors have produced with my permission, an additional schedule at commercial rates. It is set out in four parts, broken down into different dates from 25 October to date and includes disbursements and totals £132,000.

95. Before I move to the Guardian's position, the Official Solicitor submitted that J's costs should be paid from the commencement of the care proceedings on a standard basis. Part of his submission being that if I did not order them from the commencement of the proceedings in June 2016, but only ordered them from October 2016, the difference is approximately £10,000 and any financial award to J may be eaten up in costs. He placed reliance in his submission on a number of costs judgments in relation to claims brought under the Human Rights Act.

96. The Guardian has filed a document headed, 'Statement of Costs, Summary Assessment' dated 4 August 2017 and providing a total for solicitor and counsel of £56,099 from January 2017. In her oral submissions Miss Youll added to that the sum of £3,480 submitting that the costs should start as at the advocates' meeting at the end of October 2016 and not as her solicitor's schedule had provided, from the beginning of the hearing in January 2017. Ms Youll was relying on the fact that the Local Authority had made a concession about their unreasonable behaviour from October 2016 and so that should have been added to the schedule which her solicitor prepared.

97. Since the 5 September hearing as permitted by me, the Guardian's solicitor has provided an additional schedule which provides for *inter partes* costs, a total of just over £70,000 and at legal aid rates, £45,000.

98. The Local Authority concedes that it should pay some costs to each respondent. As I have already said, it has agreed a sum of £20,000 with the father and it has increased an offer to the mother and to the Guardian which has not, as I understand it, yet been formally made.

The Law:

99. Pursuant to Rule 28.1 of the Family Procedure Rules 2010, the court may at any time make such order as to costs as it thinks just. This is a wide discretion provided to a judge sitting in my position.

100. I have to have regard to the Civil Procedure Rules, Rule 44, and have regard to all the circumstances including the conduct of the parties when considering what just costs order to make. The leading case is the Supreme Court decision, *Re T (Children)* [2012] UKSC 36 and in the leading judgment Lord Phillips said at paragraph 13, 'the CPR 44.3 (5) is as relevant in care cases as it is in other kinds of family proceedings. Where a Local Authority has caused costs to be incurred by acting in a way which was unreasonable, justice may well require that the Local Authority pay the costs in question'.

101. At paragraph 41, 'When considering whether it is just to make an award of costs against a Local Authority in circumstances such as those in his present case, it is legitimate to have regard to the repeating demands on the limited funds of the Local Authority'.

102. At paragraph 44, 'The general practice of not awarding costs against a party,

including a Local Authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the aims of justice'.

103. The question of costs was again considered by the Supreme Court in the case of *Re S (A Child)* [2015] UKSC 20, the leading judgment being given by Baroness Hale in which she said this at paragraph 24:

> 'Nor can it be ignored that if local authorities are faced with having to pay the parents' costs as well as their own, there will be less in their budgets for looking after the children in their care, providing services for children in need, and protecting other children who are or may be at risk of harm'.

104. At paragraph 26:

> 'All the reasons which make it inappropriate as a general rule to make costs orders in children's cases apply with equal force in care proceedings between parents and Local Authority as they do in private law proceedings between parents and other family members. They lead to the conclusion that costs orders should only be made in unusual circumstances'.

105. Lady Hale refers to the decision of Wilson J as he then was, in *Sutton London Borough Council v Davis (No 2)* [1994] 1 WLR 1317, where Wilson J said, 'Where for example, the conduct of a party has been reprehensible, or the party's stance has been beyond the band of what is reasonable' referring to *Havering London Borough Council v S* [1986] 1 FLR 489 and *Gojkovic v Gojkovic* [1992] Fam 40'.

106. Lady Hale continued at paragraph 31 in *Re S*:

> 'I do not understand that Lord Phillips, giving the judgment of the court in *Re T*, was necessarily intending to rule out the possibility that there might be other circumstances in which an award of costs in care proceedings might be appropriate and just. That would be to ascribe to paragraph 44 of the judgment, the force of a statutory provision'.

107. I have also considered the decision of Cobb J in a case known as *Re CZ (Human Rights Claim: Costs)* [2017] EWFC 11. He says, at paragraph 61, 'I am of the view that the costs incurred in the Children Act proceedings must be determined by reference to Family Proceedings Rules 2010, whereas the costs incurred in the Human Rights Act 1998 proceedings must be decided under CPR 1998'. He says at paragraph 63, 'In family proceedings the relevant rule governing the award of costs is Rule 28.1 of the Family Procedure Rules which provides a wide discretion. The court may at any time make sure orders to costs as it thinks just'.

108. He states at paragraph 65 that the principles which apply when the court exercises its costs discretion in family proceedings under the 1989 Act has been reviewed in a number of recent cases and he draws the essential which he sets out at paragraph 65 onwards:

(i)It is relatively rare to make an order for costs in children cases.

(ii)Local authorities have a duty to investigate allegations of child harm and should be protected from orders on costs if on investigation the allegations prove to be without foundation.

(iii)Every party has their part to play in assisting the court to reach the right conclusion in the interests of the child.

(iv)There is a public policy element to this approach.

(v)Where a Local Authority has caused costs to be incurred by acting in a way which is unreasonable or reprehensible, justice may well require that the Local Authority pay the costs in question.

(vi)There is no fixed or defined category of case within which costs could or should be awarded.

(vii)If the family proceedings had been essentially adversarial, costs may well follow the event.

(viii)If real hardship would be caused to a party in achieving an outcome in the best interests of the child, that may provide a proper basis for a costs order.

109. In the case of *CZ*, Cobb J made an award for damages pursuant to the Human Rights Act claim, ordering the Local Authority to pay the claimant certain sums and he expressed it as, 'regrettable' that the claimants were unlikely to receive those sums as a result of the costs order he proposed to make.

Discussion:

110. I have the benefit in this case of having case-managed this case for over a year now and being able to stand back from the hearings I conducted. I consider it gives me particular benefit in considering what costs order is the just order to make.

111. The Local Authority accepts that it behaved unreasonably at certain times, in particular at the end of October 2016 during preparation of the final evidence and again during the final hearing in January. I have already in this judgment and in a number of case management orders set out the concerns which I had in January about how the evidence was unfolding, about what I was not being told and an adjournment of a hearing was simply inevitable in January. This caused months of delay until a final order was made in June.

112. Since the January hearing, I have had to conduct a number of hearings attempting to investigate as to why that hearing could not go ahead. That, as I have already said, has taken up the large majority of the court's and the advocates' time. The court orders detail how much effort was put into obtaining evidence from the Local Authority, sometimes having to be ordered and re-ordered. The first concessions document was received in mid-May, some four months after the adjourned January hearing, after encouragement from the advocates and underlined by me. That concessions document was amended quite substantially and dated 22 May. I have already ready out the detail.

113. As an aside, the submissions that I have received in relation to toxicology have not arisen as a result of the Local Authority actions and I do not consider that the Local Authority should fund the preparation of those submissions. They are important, and I am content to deal with them, but they have not arisen as a result of the delay.

114. The January hearing was listed as a final one. The addendum instruction of the

experts has arisen due to that adjournment. The errors of the Local Authority, as set out in their concession document, have had costs implications, as Mr Momtaz accepts.

115. In paragraph three of the concessions document that Mr Momtaz prepared on behalf of his client on 24 May, 'The Local Authority accepts that these errors will have costs implications and invites the parties to provide a schedule of their costs for the final hearing in January [2017] and all subsequent hearings'.

116. I have had to consider what is the appropriate period of time for which the Local Authority should pay any costs of the respondents. Should I carry out a costs assessment myself and/or should the costs be on a standard basis or on an indemnity basis?

Decision:

117. Mr Bunting had made submissions that I should take into account a prospective claim on behalf of J and what might or might not be ordered in her favour by way of damages. His submission is that I should take account when making orders for costs in these family proceedings, I should take account of an award that she may be in receipt of in any Human Rights Act claim.

118. I take the view that I am making a decision about costs in the Children Act proceedings. There is no Human Rights Act claim before me, nor in fact by the time that I heard these submissions is one issued. I cannot see how I can legitimately take into account, when considering the exercise of my wide costs discretion, what order for damages, if any, might be made in Human Rights Act proceedings not yet even issued.

119. It is important to record that the Local Authority have made concessions about their behaviour. They accept that their errors have costs implications. That concession document did take four months from the final hearing to be produced and then another two weeks to be revised, but the Local Authority did accept the court's indication that they needed to look at that concessions document again. The Local Authority did accept the court's indication that they should fund an independent review, and did so. The Local Authority have also in fact made offers for costs.

120. I have to stand back and look at the conduct of the Local Authority within the litigation itself because I am invited to award costs on an indemnity basis.

121. The Local Authority concedes that its actions mean that this is a family case where very unusually costs should be awarded against them. Mr Momtaz said as long ago as 22 May that there were costs implications. The slow extraction of information and concessions from the Local Authority, as I have set out in my judgment, means that the appropriate time period is from 24 October 2016 until today's date.

122. I do not consider, as submitted by the Official Solicitor, that it is appropriate to award costs from the commencement of these proceedings in June 2016. The Local Authority were right to commence care proceedings in June 2016, they were right in the circumstances at that point to seek J's removal into foster care and I cannot see that it would be just to order them to pay costs from June to October 2016. However, I do consider it is just to order them to pay costs from 24 October 2016 until today's date.

123. The Court of Appeal has refused in civil cases to define the circumstances in which a court could or should make an order for costs on the indemnity basis. I have not through my own researches found any children cases, nor have I been referred by Counsel to any children cases relating to costs on an indemnity basis. Indemnity carries a stigma. It is penal in nature and there must be some conduct that takes the case out of the norm.

124. Arguably, this case has been out of the norm, but it is unusual in itself to have a costs order in a family case and I mark that by ruling that this case warrants an order for costs. Indeed, the Local Authority concede that there should be an order for costs.

125. I am not satisfied that the appropriate basis is an indemnity basis. I have not been persuaded about that at all.

126. I declined the suggestion that I should assess costs myself, given the costs schedules which are variously set out above. In my judgment it would be right to assess the costs on a standard basis if not agreed.

127. In summary, as the Local Authority concede, they have been unreasonable in their conduct, so in my judgment it is appropriate to order costs to be paid from 24 October 2016 when the final evidence was prepared. The Local Authority's errors and failures began then. Obtaining an account of why the January hearing could not go ahead and how the Local Authority obtains and treats evidence has been a frustrating and slow process which has required numerous court hearings and the repetition of some directions.

128. The Local Authority did not initially accept my indication that an independent review would be the way forward. It took some time to consider it and it is positive that in fact they did eventually accept that proposal which came originally from the Guardian and endorsed by the court, and funded an independent review.

129. For the avoidance of any doubt, it is obvious to the court that the costs of the ineffective hearing in January should be included. I do not understand any submission by the Local Authority which suggests that it should not be included, nor, it seems, did Mr Momtaz QC when preparing his concessions document of 24 May when he invited the parties to provide a schedule of costs for the 'final hearing in January and all the subsequent hearings'.

130. I approve the agreement for costs which the father has reached with the Local Authority. The Local Authority shall pay a contribution to the father's costs as agreed.

131. The Local Authority should pay the costs of the Guardian and the mother from 24 October 2016 to today's date on a standard basis to be assessed if not agreed. I exclude the costs in relation to legal argument as to toxicology. Costs were reasonably incurred by those who had to prepare submissions upon the toxicology issue, but these should not be paid by the Local Authority.

End of Judgment

[following further submissions]

1. The only additional matter of any substance which I propose to add to my welfare judgment is to record that as part of her conclusions, Ms Bazley QC concluded that there was, 'procedural irregularity in relation to the E case'. The Local Authority have accepted this, as they have done all her conclusions and recommendations. I will add that to the transcript when it arrives.

2. I decline the offer to summarise the evidence of A and/or B. I consider it unnecessary for the purposes of this judgment. I have set out that I had grave concerns about the evidence which I heard that week in January 2017 and as to the reliability and provenance of part of the Local Authority's evidence. In relation to publication of the review and this three-part judgment, I do think it appropriate that they be sent to the Safeguarding Children's Board. I will hear from Ms Youll whether she is suggesting the Guardian's solicitor ensures that they go or whether the local authority will provide them to the Safeguarding Children's Board.

3. In relation to Ofsted, there is not actually an application that the review and/or this judgment be sent to Ofsted. If there were, I would rule on it, but I do not consider that I should, of my own motion, release the review and judgment for Ofsted. Should Ofsted request to see those documents and/or should there be any enquiry by Ofsted of Hillingdon in relation to this case, then those documents can be disclosed to Ofsted. The Official Solicitor appears to have asked through his representative who is not here this afternoon, and through Ms Desrosiers, for permission to release the review and, I believe, the judgment to the Health Care Professional Council, and I give permission for that.

4. I give permission for those sections of the Bazley report which relate to the respective social workers and witnesses, to be released to them by the Local Authority.

5. I will ensure that a copy of the review is provided to Her Honour Rowe QC the Designated Family Judge at this court. I also will ensure that the DFJ and Theis J receive copies of my judgment. I consider it appropriate for the judgment, all three sections of it, to be placed on BAILII, once the transcript is available in a properly anonymised form.

6. I am not attracted by the suggestion that it could go onto BAILII in different sections, there are three parts to the judgment and it should all go together. The Local Authority will be responsible for obtaining the transcript and anonymising. The anonymization needs to be agreed between counsel, though, before sending to me. I will send it to the President of the Family Division before placing it on BAILII.

End of Judgment

Transcript from a recording by Ubiqus
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