Neutral Citation Number: [2019] EWCA Civ 898

Case No: B4/2019/0658

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LANCASTER COUNTY COURT AND FAMILY COURT
HHJ BANCROFT
PR18C00277

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2019

Before:

LORD JUSTICE BEAN
LADY JUSTICE KING
and
LORD JUSTICE SINGH

- -

Between:

I (CHILDREN)	**Appellant**
- and -	
	Respondent

- -
- -

Rex Howling QC and Margaret Parr (instructed by **Msb Solicitors**) for the **Appellant**
Samantha Jane Bowcock and Stephanie Perplus (instructed by **Legal and Democratic Services**) for the **Local Authority 1st Respondent**

Hearing date: 21st May 2019

- -

Approved Judgment

Lady Justice King:

1. On 22 February 2019, following a finding of fact hearing, Her Honour Judge Bancroft handed down her judgment. The case was of the utmost seriousness, centring around two unexplained skull fractures sustained by a baby ("A"), still only 15 weeks old, when taken to hospital with the second of the two fractures.

2. The Local Authority had, by their threshold document, sought specific findings, namely that each of the injuries were inflicted by LH, the baby's mother ("the mother"). At the centre of the appeal is the judge's finding in relation to the second, right-hand side, fracture. The judge held:

> "133. In my judgment all this set the context for a sudden loss of control resulting in an injury to A inflicted or caused by an anxious, stressed mother. Alternatively, and there is some evidence for this from M herself in her police interview and in the children's reported conversations in the car [that] she left A unattended and was downstairs at the time."

3. No additional light is thrown upon this finding (paragraph 133) by reference to the judge's findings in respect of the earlier left-sided fracture. So far as that fracture is concerned, the judge found (at paragraph 136) that the left-sided fracture was an older injury, was not a birth injury and which, on the balance of probabilities, occurred whilst A was in the mother's care. The judge said that, "after much anxious consideration I have concluded that beyond that I will be entering into the realms of speculation as to what happened".

4. In the light of her findings at paragraph 133 in relation to the right-sided fracture, the judge felt it unnecessary to go further in respect of the left-hand side fracture in order either to satisfy the threshold criteria, or to assist in any further risk and welfare assessments.

5. Those representing the mother filed six grounds of appeal. Permission to appeal was refused in relation to a number of those grounds, and two further grounds have not been pursued by the mother. The court was left therefore with one ground, Ground 1(iv), which says;

> "In reaching the conclusion that there are two potential explanations for the injury the learned judge has failed to make a determination of facts."

6. This ground of appeal relates directly to paragraph 133. The mother, the Local Authority and the Guardian are all agreed that the appeal in relation to that ground, notwithstanding some helpful clarification by the judge, must be allowed by consent. The issue for this Court has been to consider the proper order to make upon the appeal being allowed, consideration of which has necessarily involved an examination of events following the conclusion of the trial and the handing down of the judgment.

The Parties' Positions

7. Mr Howling QC, on behalf of the mother, submits that the matter can be dealt with quite simply. There is, he says, a clear way to read into the judgment a phrase which was, he says, omitted. He proposes that paragraph 133 should be amended to add the following words at the end of the paragraph:

> "Consequently, I am unable to reach a clear finding as to what caused the right-hand fracture and it remains unexplained."

8. His proposed wording, he accepts, would have the effect of any risk assessment of the mother having to proceed on the basis that each of the two fractures sustained by her baby whilst in her sole care are "unexplained".

9. Miss Bowcock, on behalf of the Local Authority, supported by the Children's Guardian, submits that, upon the appeal being allowed, there should be a re-hearing before a different judge to determine how A's right-sided injuries were caused. Determination of that issue is, she submits, essential in order to lead to a fair and comprehensive assessment of the mother as a future carer for the children.

Events Surrounding the Handing Down of the Judgment

10. In order to understand the events surrounding the handing down of the judgment, it is also necessary to understand the way the mother had put and now puts, her case. Throughout the care proceedings, and at trial, the mother's case had been that, on 27 May 2018, A had fallen off the bed whilst she, the mother, was in the room. On 30 May 2018, the mother took A to hospital with a swelling to the right-side of his head and subsequent investigations identified the two skull fractures. The Court had before it a statement from a Ms Melissa Emmerson, a social worker, who gave oral evidence. Her evidence described a conversation which took place between A's sister and half-brother, B and C, when only a matter of days after A's admission to hospital, she (the social worker) was taking them to school following contact,. B, the younger child, had described her mother as being in the room at the time of the incident when A sustained his second injury. C, her elder brother, said that he had not seen him fall and their mother had actually been downstairs when it had happened. The social workers evidence was that C had said that B was to "stop lying".

11. This piece of evidence, it would seem, is what the judge referred to in paragraph 133 when she spoke of "the children's reported conversation in the car".

12. It is accepted that nowhere in the judge's judgment does she set out, or analyse, either this evidence or indeed the evidence to which she refers in paragraph 133 as being "from M herself in her police interview".

13. Subsequently, following the conclusion of the trial on 11 February 2019, C apparently told an adult at school that he himself had been in the room when A fell and that he feared that he had hurt A. This Court has not seen the statement in relation to this which is apparently in existence. On 20 February 2019, the mother filed an unsolicited statement in which she completely changed the account which she had given hitherto. In that statement, the mother said that she had been lying when she had said that A had fallen off the bed in her presence and that the truth was that, on 27

May 2018, she had left A and C alone in the bedroom while she went downstairs to make A's bottle. Whilst down there, the statement says, she heard a "loud bang" and ran upstairs to the rescue.

14. Turning then to how these developments fit with the care proceedings which were ongoing; the judge had heard evidence between 7 and10 January 2018, written submissions being filed at a later date. On 14 February, a draft judgment was sent out in the usual way to those representing the various parties. At that stage, the court is told, paragraph 133 (then paragraph 132) read somewhat differently:

> "132. In my judgment all this set the context for a sudden loss of control resulting in an injury to A inflicted or caused by an anxious, stressed mother, s*uch as an intemperate throw or a drop rather than a cruelly inflicted injury.* Alternatively, and there is some evidence for this from M herself in her police interview and in the children's reported conversation in the car, [that] she left A unattended and was downstairs at the time."
> **(My emphasis added)**

15. In an email dated 15 February 2019 Mr Howling dealt with some minor typographical errors and an error of attribution before raising what he called "the following additional points":-

> "2. With regard to paragraph 128 and 129 can you please explain in greater detail why it is unnecessary to engage with mechanism when it is for the Local Authority to prove how the head injury was sustained and mechanism is a fundamental aspect of causation. The only case put to mother by the LA was an ill-tempered throwing to the ground. This point is inconsistent with the conclusion which you have reached in paragraph 128. [Now paragraph 133].
>
> 3. With regard to paragraph 132 can you please explain how you reached the conclusion that there may have been 'an intemperate throw' when this was specifically discounted by Dr Croft in paragraphs 59 and 60 of his report at E279. These points were not put to him in cross-examination. Again, the mechanism of a drop was never put to mother for a plausible explanation for the injury. It is fundamental and key to any care case that the local authority needs to put its alleged case to the perpetrators. Can you please also explain, therefore, how based on the medical evidence, you reached the alternative conclusion about a drop, particularly as Peter Richards was very clear at E263 that both injuries remained unexplained.
>
> 4. With regard to paragraph 133 [now paragraph 134], can you please explain how your conclusion that "[mother] is not being frank, honest and open with the court" establishes the local

> authority's case? As currently drafted, the paragraph seems to suggest that there has been a reversal of the burden of proof.
>
> As matters currently stand I am instructed to seek leave to appeal on Friday.
>
> As far as the additional evidence, I need to take instructions."

16. This request for "clarification" was followed, on 20 February 2019, by the statement of the mother already referred to which, it would seem, the judge received on the morning of 22 February before she handed down her judgment.

17. At a hearing on 22 February 2019, which had been designed to hand down the judgment and to make consequential orders, Mr Howling made an application to the judge that the judgment should not be handed down so that further evidence could be called in the light of, what were described as, C's "disclosures" at school as set out in the mother's new statement. The application was refused; there is no appeal against this case management decision.

18. The judge accordingly handed down her judgment in which paragraph 133 (paragraph 132 in the original judgment) had been amended in response to Mr Howling's request for clarification paragraph 3, by the deletion of the words "such as an intemperate throw or drop, rather than a cruelly inflicted injury".

19. That left then the two apparently inconsistent findings; on the one hand that the fracture had been inflicted by the mother following a sudden loss of control or, alternatively, that something had happened when the mother had left A unattended, the evidence in relation to the latter possibility not having been set out nor analysed in the judgment.

20. On 18 April 2019, Moylan LJ granted permission to appeal. Having granted permission, he gave a direction that the parties should invite the judge to provide clarification of the findings as they now stood in paragraph 133. The judge provided the requested clarification on 29 April 2019 as follows:

> "1. In Paragraph 137 of the judgment I summarised the findings I made by reference to the LA threshold document fully set out at paragraph 6A of the judgment. This includes finding vi, namely *'The injuries are inflicted injuries. The injuries were caused by the mother, LH'*. This finding applies to the right sided skull fracture. As is made clear in paragraph 137, by reference to paragraph 136, I made only a limited finding in respect of the left-sided fracture.
>
> 2. M's case, as put to me in evidence, was that the right sided skull fracture had occurred whilst she was present in the bedroom and when A had fallen as described in Paragraphs 109-113 and 117. She denied to me in evidence that it had occurred when she was downstairs. She did not suggest anyone else had caused the injury.

> 3. On reflection, it might have been better to say 'In fact' then 'Whatever happened' at the beginning of Paragraph 134 when I referred to the mother's lack of credibility as I had considered the 'alternative scenario' i.e. an accident unwitnessed by the mother but rejected that as an explanation for the injury for the reasons set out in Paragraph 134. When I said in Paragraph 134 that I was satisfied that M's behaviour was not consistent with a simple accident or negligence and that what had happened was not 'a minor accident', I was referring to the possibility that the child had fallen off the bed whilst unattended i.e. in an event not witnessed by the mother. If that was the case, there is no reason why she would not have told me that or why she would not have immediately sought medical attention when she first saw a swelling to her 15 week old baby's head. Bearing in mind how quickly M had previously sought medical attention for her children when they had sustained an accidental injury and she having failed to seek prompt medical attention, I concluded that what had happened was not a simple accident and that the M herself had been dishonest, knew what had happened and that it was her fault.
>
> 4. Having accepted the opinions of the medical experts I was driven, by the totality of the evidence presented, to conclude that the right-sided head injury had been inflicted by the mother.
>
> 5. Therefore, to clarify, Paragraph 133 must be read in the context of the whole judgment and, in particular, with paragraphs 135 onwards."

21. Critically therefore, the judge now said unequivocally, that the right-sided head injury had been inflicted by the mother. The purpose of Moylan LJ's direction had been to see if further clarification might resolve the seeming ambiguity in paragraph 133. Whilst on the face of it it did just that, it still leaves unresolved the fact that, on the face of it, there is now fresh, untested evidence, ostensibly in support of the original, alternative, explanation suggested by the judge in paragraph 133, namely of the fracture resulting indirectly from a negligent action on the part of the mother as a consequence of having left A unsupervised with C whilst she went downstairs to make up a bottle.

The Appeal

22. Miss Bowcock submits, on behalf of the Local Authority, that determination of how A's right-sided head injury is caused is necessary to lead to a "fair and comprehensive assessment of the mother as a future carer for the children". Miss Bowcock further submits that, from the point that the mother admitted that she had concealed the truth as to what had occurred on 27 May 2018, a re-hearing was necessary and inevitable. The mother's new explanation, Miss Bowcock says, does not permit substituted findings of "unexplained" to be made. The mother's new account needs to be tested in the conventional way in the interest of justice to all the parties.

23. I agree with Miss Bowcock. It seems to me that, notwithstanding the very substantial delay that there has now been, and will be, in determining the future for A, who is now 15 months old, a complete re-hearing before a different judge is inevitable.

24. This appeal has thrown up two further areas of concern:

    a) The extent of clarification of the judgment requested on behalf of the mother;

    b) The filing of the mother's statement between receipt of the draft judgment and handing down of the judgment.

Clarification

25. The jurisprudence in relation to clarification of a judge's judgment dates back to *English v Emery Reimbold and Strick Ltd* [2002] EWCA Civ 605. The Master of the Rolls, Lord Phillips, said:

> "25. Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial Judge, the Judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial Judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings."

26. Five years later, in *Egan -v- Motor Services (Bath) Limited Note* [2007] EWCA Civ 1002, the Court of Appeal identified the parameters for such requests. In particular, Smith LJ said:

> "50. The purpose of the judge providing a draft of the judgment before hand down is to enable the parties to spot typographical, spelling and minor factual errors which have escaped the judge's eye…Circulation of the draft is not intended to provide counsel with an opportunity to re-argue the issues in the case.
>
> 51. Only in the most exceptional circumstances is it appropriate to ask the judge to reconsider a point of substance… Letters such as the one sent in this case, which sought to reopen the argument on a wide variety of points, should not be sent."

27. *Egan -v- Motor Services* was in turn followed by a Practice Note relating to family proceedings in *Re A and another (Children) (Judgment: Adequacy of Reasoning)* [2012] 1 WLR 595 ("the Practice Note"). In the Practice Note, Munby LJ (as he then was) set out, by reference to *English v Emery Reimbold,* the procedure to be adopted in cases where there is a concern about the adequacy of the judge's reasoning Munby LJ emphasised that the practice set out in *English v Emery Reimbold* applies as much to family cases as "ordinary, simple appeals". He referred in particular to, what he described as: "the robust observations" of Wall LJ In *Re M* [2009] 1 FLR 117 para 36-39. In *Re M*, Wall LJ (at [36]) had said that it was "high time the family bar woke up" to *English v Emery* and the fact that it applies to family cases.

28. Munby LJ went on to emphasise two points:

> "16. First, it is the responsibility of the advocate, whether or not invited to do so by the judge, to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process.
>
> 17. Second, and whether or not the advocates have raised the point with the judge, where permission is sought from the trial judge to appeal on the ground of lack of reasons, the judge should consider whether his judgment is defective for lack of reasons and, if he concludes that it is, he should set out to remedy the defect by the provision of additional reasons."

29. More recently in the important case of *R (Mohamed) v Foreign Secretary* (No 2)(CA) [2010] 3 WLR 554 (*Mohamed*), Lord Judge CJ, when discussing draft judgments, said:

> "5. The primary purpose of this practice is to enable any typographical or similar errors in the judgments to be notified to the court. The circulation of the draft judgment in this way is not intended to provide an opportunity to any party (and in particular the unsuccessful party) to reopen or reargue the case, or to repeat submissions made at the hearing, or to deploy fresh ones. However on rare occasions, and in exceptional circumstances, the court may properly be invited to reconsider part of the terms of its draft… As we emphasise, an invitation to go beyond the correction of typographical errors and the like, is always exceptional, and when such a course is proposed it is a fundamental requirement that the other party or parties should immediately be informed, so as to enable them to make objections to the proposal if there are any."

30. Finally, in relation to contact with the judge regarding his or her draft judgment, in *Re C (Placement Order: Appeal)* [2014] EWCA Civ 70, [2014] 2 FLR 1327, Macur LJ deprecated in the strongest of terms (paragraph 11) the actions of Counsel for the Local Authority in having sent an email direct to the District Judge in order to "clear

misunderstandings" as to the thrust of her closing submissions which had apparently not been accepted.

31. The Family Procedure Rules 2010 PD30A para 4.6, deals with "material omissions" from a judgment of the lower court:

> "4.6 Where a party's advocate considers that there is a material omission from a judgment of the lower court or, where the decision is made by a lay justice or justices, the written reasons for the decision of the lower court (including inadequate reasoning for the lower court's decision), the advocate should before the drawing of the order give the lower court which made the decision the opportunity of considering whether there is an omission and should not immediately use the omissions as grounds for an application to appeal."

32. Paragraphs 4.7, 4.8 and 4.9 deal with the duty of the decision-making court and the appellate court each to consider whether there is a material omission which can be dealt with by way of additions to the judgment.

33. In my view, the exhortations as to the limitations on counsel in seeking amplification of a draft judgment over and above correction of typographical and factual errors, is a principle which applies equally to all areas of civil procedure, including family cases. The Practice Note in *Re A,* saying in terms at [16] that it is the responsibility of the advocate to raise with the judge "any material omission in the judgment, any genuine query or ambiguity which arises on the judgment and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process" is not, in my view, inconsistent with Lord Judge's observations in *Mohamed.*

34. The question, rather, is as to where one draws the line between a reasonable and appropriate request for amplification of the type identified by Munby LJ in the Practice Note, which request will properly be an example of the rare occasions where it is appropriate to go beyond typographical and factual errors in order to clarify issues in a judgment, as against a request which goes beyond the Practice Note and seeks to reargue the case. Unhappily, to my knowledge, such requests can, on occasion, be frankly confrontational and disrespectful in tone.

35. Judgments in care cases are often given by a judge under immense time pressure whether extemporary or reserved. It is right that issues of the type identified in the Practice Note should be raised with the judge if appropriate and, in so doing, avoid the necessity of an appeal and therefore further delay for the child the subject of care proceedings.

36. Mr Howling however confirmed the perception of this Court that requests for extensive clarification, going well beyond the perimeters identified in the authorities, have become commonplace in both children and financial remedy cases in the Family Court. It has become, as we understand it, almost routine for a draft judgment to be followed up with extensive requests for 'clarification' which in many cases can be regarded as nothing other than an attempt to reargue the case or, as here, water down the judge's judgment; successfully in this case by the removal of the words "such as

an intemperate throw or a drop rather than a crudely inflicted injury" from the critical paragraph 133.

37. With respect to Mr Howling, who has been helpful and pragmatic in all his submissions, while the request for clarification submitted by him is by no means the most excessive the Court has seen, it is, in my judgment, on the wrong side of the line.

38. The family court is overwhelmed with care cases. Judges at all levels often move seamlessly from one trial to the next without judgment writing time between them. Routine requests for clarification running to a number of pages are not only ordinarily inappropriate, but hugely burdensome on the judges who have, weeks later, to revisit the evidence and their judgment when their thoughts and concerns have long since moved onto other cases. This is not conducive to the interests of justice.

39. That excessive demands for clarification are not limited to care cases is evidenced by the observation by Mostyn J in *WM v HM* [2017] EWFD 25, when he said:

> "39. Finally, I would observe that the demands by [Counsel] for correction and amplification of the draft judgment went far beyond what is permissible, and amounted to blatant attempts to reargue points which I had already rejected. This practice is becoming commonplace and should be stopped in its tracks in the interests of efficiency and the conservation of the resources of the court. Suggested corrections should be confined to typographical or plain numerical errors, or to obvious mistakes of fact. Requests for amplification should be strictly confined to claimed "material omissions" within the terms of FPR PD 30A para 4.6."

40. Provided that the term "material omission" found in paragraph 4.6 is taken to embrace the totality of the matters included in paragraph 16 of Munby LJ's Practice Note, in *Re A,* I would agree and endorse the observations of Mostyn J.

41. It is neither necessary nor appropriate for this court to seek to identify any bright line or to provide guidelines as to the limits of the appropriate nature or extent of clarification which may properly be sought in either children or financial remedy cases. I would merely remind practitioners that receiving a judge's draft judgment is not an "invitation to treat", nor is it an opportunity to critique the judgment or to enter into negotiations with the judge as to the outcome or to reargue the case in an attempt to water down unpalatable findings. Requests for clarification should not be routine and should only be made in accordance with the Practice Note which I repeat is: "*to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process*."

The Mother's Statement

42. It is undoubtedly the case that, from time to time, new evidence will emerge following the conclusion of a trial and prior to judgment being handed down. The issue is as to what the proper approach is when such evidence emerges. One thing is clear, namely

that such 'fresh evidence' should never be confused with nor regarded as part of the clarification process discussed above.

43. Immediately fresh, and potentially relevant, evidence is brought to the attention of a party, it is their duty to inform and provide the evidence to all the other parties in the case. Any statements subsequently drafted and upon which a party wishes to rely must be served on all the parties and absent express consent in writing, should not be sent to the judge.

44. In the event that a party wishes to make an application that the judge should delay the handing down of judgment in order to consider whether, and if so to what extent, there should be further evidence in the case, proper notice should be given to both the judge and the parties in order to enable the judge to have a directions hearing and to hear submissions from all sides.

45. It is for the judge then to determine, using his or her case management powers what, if any, steps should be taken to consider the fresh evidence. The unusual nature of the present case has meant that this court, having considered the judgment as it stands, has determined that there must be a retrial. Such an outcome is by no means inevitable, and indeed might be regarded as unlikely, where an alleged perpetrating parent files a statement by which they completely change their story between receipt of a draft judgment and the handing down of the same judgment. Mr Howling, rightly, did not seek to appeal the judge's refusal to delay handing down her judgment in the present case.

Conclusion

46. For the reasons set out above, the appeal will be allowed by consent and the matter remitted for a retrial, which trial I am told will be heard by the Family Division Liaison Judge for the Northern Circuit in a few weeks' time.

Lord Justice Singh :

47. I agree.

Lord Justice Bean:

48. I also agree