Case No: CO/4575/2013

Neutral Citation Number: [2014] EWHC 3932 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Rolls Building, Fetter Lane
EC4A 1NL

Date: Friday 28th November 2014

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

The Queen on the application of CO (by her litigation friend SGF)	**Claimant**
- and -	
Surrey County Council	**Defendant**

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(Transcript of the Handed Down Judgment of
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Hilton Harrop-Griffiths (instructed by **Ridley & Hall**) for the **Claimant**
Fiona Scolding (instructed by **Surrey County Council**) for the **Defendant**

Hearing dates: 19 November 2014

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Judgment

The Hon. Mr Justice Popplewell :

Introduction

1. The Claimant ("C") was born on 2 July 1999. At the material time, in the autumn of 2009, she was aged 10. She has a diagnosis of Asperger's Syndrome, Severe Anxiety, ADHD and Oppositional Defiant Disorder.

2. The principal issue in this case is whether it is correctly contended on her behalf that when she went to live with her maternal grandmother in November 2009, that amounted to the Defendant local authority ("the LA") providing accommodation for her as a "looked after" child under s.20 and s.23(2) of the Children Act 1989. The LA contends that it was exercising its duties under s. 17 of the Children Act 1989 and merely facilitating a family arrangement which was not the fulfilment of a duty under s. 20 and/or was a placement pursuant to s.23(6).

3. C is the middle child of three siblings who were living with their mother ("M"). C and her older sister ("G") were born to the same father, from whom M separated and who plays no part in this case. C's younger sibling ("H") is a step-brother born to a different father ("RM"). M had separated from RM at the relevant time but he plays a part in the relevant events as H's father. M's mother, C's maternal grandmother ("GM"), was in a stable long term relationship with M's stepfather, C's step grandfather, ("SGF").

The Law

4. Under s. 17 of the Children Act 1989 a local authority has a general duty to safeguard and promote the welfare of children within its area who are in need. It is common ground that C was a child in need as defined by ss. 17(10) and (11). Section 17(6) permits the general duty to be fulfilled by providing accommodation, assistance in kind or, in exceptional circumstances, in cash. Section 17(3) permits the provision of the services to any member of the family of a child in need if provided with a view to safeguarding or promoting the child's welfare.

5. The relevant parts of sections 20, 22 and 23 of the Act in force in 2009 provided as follows:

> "LOCAL AUTHORITY SUPPORT FOR CHILDREN AND FAMILIES
>
> 20 **Provision of accommodation for children: general.**
>
> (1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
>
> (a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned: or

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

…

22 **General duty of local authority in relation to children looked after by them.**

(1) In this Act, any. reference to a child who is looked after by a local authority is a reference to a child who is—

(a) in their care; or

(b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which [are social services functions within the meaning of]the Local Authority Social Services Act 1970 [apart from functions under sections [17 23B and 24B].

(2) In subsection (1) "accommodation" means accommodation which is provided for a continuous period of more than 24 hours.

…

23 **Provision of accommodation and maintenance by local authority for children whom they are looking after**

(1) It shall be the duty of any local authority looking after a child—

(a) when he is in their care, to provide accommodation for him; and

(b) to maintain him in other respects apart from providing accommodation for him.

(2) A local authority shall provide accommodation and maintenance for any child whom they are looking after by—

(a) placing him (subject to subsection (5) and any regulations made by the Secretary of State) with—

(i) a family;

(ii) a relative of his; or

(iii) any other suitable person,

on such terms as to payment by the authority and otherwise as the authority may determine;

(b) maintaining him in a community home;

(c) maintaining him in a voluntary home;

(d) maintaining him in a registered children's home;

(e) maintaining him in a home provided by the Secretary of State under section 82(5) on such terms as the Secretary of State may from time to time determine; or

(f) making such other arrangements as—

(i) seem appropriate to them; and

(ii) comply with any regulations made by the Secretary of State.

(3) Any person with whom a child has been placed under subsection (2)(a) is referred to in this act as a local authority foster parent unless he falls within subsection (4).

(4) A person falls within this subsection if he is—

(a) a parent of the child;

(b) a person who is not a parent of the child but who has parental responsibility for him; or

(c) where the child is in care and there was a residence order in force with respect to him immediately before the care order was made, a person in whose favour the residence order was made.

(5) Where a child is in the care of a local authority, the authority may only allow him to live with a person who falls within subsection (4) in accordance with regulations made by the Secretary of State.

(6) Subject to any regulations made by the Secretary of State for the purposes of this subsection, any local authority looking after a child shall make arrangements to enable him to live with—

(a) a person falling within subsection (4); or

(b) a relative, friend or other person connected with him, unless that would not be reasonably practicable or consistent with his welfare."

6. Section 20(1)(c) is to be interpreted widely to ensure that children are not to suffer from the shortcomings of their parents or carers: ***R (G) v London Borough of Barnet*** [2004] 2 AC 208 at per Lord Hope at [100]; ***R (G) v London Borough of Southwark*** [2009] 1 WLR 1299 per Baroness Hale at [28]. It does not matter why the care or accommodation which is being provided ceases to be suitable for the welfare of the child, whether through external events, changing family dynamics, the failings or even deliberate choice of the parent/carer, or any other cause. It is inherent in the nature of children's welfare that the point at which existing care or accommodation becomes unsuitable may be reached incrementally. Moreover the concept of suitability is inherently imprecise, just as is the concept of "needs" in section 17 (see Lord Nicholls in ***R (G) v Barnet*** at [30]).

7. There is a divergence in the authorities as to whether a child can become a looked after child under s.22 unless and until the child has been accommodated by the local authority for 24 hours, as apparently required by the definition in s. 22(1)(b) and 22(2). In ***R (D) v London Borough of Southwark*** [2007] FLR 2181 it was said that as soon as the local authority comes under a duty to provide accommodation under s.20, the child *ipso facto* becomes a looked after child as defined in s.22(1)(b), notwithstanding what appears to be the qualifying condition in that section that the child is provided by the local authority in exercise of its functions under section 23 with "accommodation", which is defined in subsection (2) as being for a continuous period of more than 24 hours.: see per Janet Smith LJ at [52] to [55], described as a deft sidestep in ***R (SA) v Kent County Council*** [2012] PTSR 912 by Rimer LJ at [46]. In the recent decision of ***R (GE) v Secretary of State for the Home Department and Bedford Borough Council*** [2014] EWCA Civ 1490, the Court of Appeal rejected this approach and treated the dicta of Janet Smith LJ as obiter; it held that although under s.20 the duty fell on the local authority to provide accommodation as soon as it appeared to the local authority that one of the qualifying conditions applied, the child did not fulfil the definition of being a looked after child unless and until the local authority had provided accommodation for a continuous period of 24 hours: see per Christopher Clarke LJ at [38] – [44]. The controversy does not matter for the purposes of resolving the dispute in this case.

8. When section 20 is engaged, the local authority may fulfil its duty to provide accommodation pursuant to s.23(2) or pursuant to s.23(6). These are two separate routes available to the local authority. Although the practical effect of the accommodation arrangements for the child and carer may be the same in each case, there is an important difference in the legal consequences. Where accommodation is provided pursuant to s.23(2) the local authority has a continuing duty to the child as a looked after child, and is obliged to maintain the child in respects other than providing accommodation under s.23(1)(b), which in practice involves financial assistance in the form of foster care payments. If, on the other hand, the local authority makes arrangements for the child to live with a friend, relative or connected person under s.23(6), the child is not a looked after child within the meaning of s.22 and the local authority is under no obligation to provide any financial support. This construction of the statutory framework was authoritatively established in ***In re H*** [2004] Fam 89, ***R (D) v Southwark*** and ***R (SA) v Kent***, despite the views expressed in the last case by Black J, as she then was ([2010] EWHC 848) and a unanimous Court of Appeal that they would have

reached a different conclusion if not bound by authority. The Act has subsequently been amended to change what I would regard, in respectful agreement with all four judges in ***R (SA) v Kent***, as an anomalous interpretation, but the events in issue in these proceedings occurred before that amendment came into force and I am bound to apply the interpretation laid down in those three Court of Appeal authorities.

9. Local authorities may be involved in private arrangements by which a child in need is accommodated with a friend or relative without the s.20 duty arising or the child becoming a looked after child. Arrangements between family members for a child to live with a relative who does not have parental responsibility are common, and need not involve the local authority at all. Where the local authority is involved, the circumstances may be such that the local authority is fulfilling its duty to promote and safeguard the welfare of the child under s. 17 by encouraging or facilitating such arrangements before a stage has been reached when it would come under a duty to accommodate the child itself under s.20. Therefore a private arrangement for a relative to foster a child may become available in such a way as to permit a local authority, which is on the verge of having to provide accommodation to the child, to "side-step" the duty by helping to make a such a private arrangement: see ***R (D) v Southwark*** at [49].

10. Whether a local authority has done so will be a question of fact in any particular case. Two factors are of particular importance. First, where the local authority plays a central or major role in making the arrangements, it is more likely to be concluded that it is doing so in the exercise of its duties as a public authority pursuant to sections 20 and 23: see (***R (D) v Southwark*** at [49] and ***R (SA) v Kent*** at [32]. Secondly, where the local authority is seeking to facilitate a private fostering arrangement, it must make the nature of the arrangement plain to those involved, and in particular that the foster parent will have to look to the person with parental responsibility for financial support. A clear explanation of that financial consequence is essential because in its absence the foster parent can not be regarded as giving informed consent to the placement being a private arrangement; if the matter is left unclear, there is a danger that the foster parent will conclude that the local authority is acting in fulfilment of its statutory duties under s.20: see ***R (D) v Southwark*** at [49].

11. In cases like the present, it is therefore appropriate for the Court to apply a two stage analysis to determine whether accommodation was provided to the child as a looked after child. The first question is whether under s.20 it appeared to the local authority that the child in need required accommodation as a result of one of the prescribed circumstances. If the answer to that question is yes, and a s.20(1) duty to provide accommodation arose, the second question is whether one should characterise what the local authority in fact did to comply with that duty as making an arrangement for the child as an arrangement under s.23(6) or as providing the accommodation itself pursuant to s.23(2): see ***R (SA)v Kent*** per Black J at [29] and Ward LJ at [36].

12. In answering the second question it is also relevant to consider whether the local authority has given a clear explanation of the financial and other consequences of it being a private fostering arrangement. If the local authority wishes to shed the burden of its duty to provide accommodation and arrange for a private individual

to shoulder that burden, it must give a clear, full and proper explanation that that is the effect of the arrangement it is making. If the foster parent is left in any uncertainty about the nature of the arrangement and the financial consequences, the placement will be treated as being a fulfilment of the local authority's duty to accommodate the child itself under s.23(2) rather than a fulfilment of its duty under section 20 through the alternative route of a private arrangement under s. 23(6): see ***R (D) v Southwark*** at [59] and ***R (SA) v Kent*** at [32].

The facts

13. At various times from 2007 the LA provided social care support to M and her family. C had a troubled relationship with her mother and was receiving counselling from the Child and Adolescent Mental Health Service ("CAMHS"). M was struggling to cope in bringing up the family. In September 2009 C's behaviour was extremely difficult to manage. She was threatening suicide, threatening to kill her siblings and school friends, and self-harming.

14. On 8 September 2009 Alexandra Fowler ("AF"), a social worker employed by the LA, told M that the LA were proposing to put into place an intensive support plan over the following few weeks to help her get back on track as the family had been living in chaos for some time. She explained that this was to help M to protect her children and to empower her to do so.

15. On 14 September 2009 AF had a meeting with M and the children. The discussion revealed that the chaotic nature of the home environment, C's behaviour, and M's response were all causes for concern. Amongst other things M said that she had been told by GM that GM would not look after the children anymore and did not want to see them; and that she (M) had had an argument with GM and that they were not speaking to each other. M said this was because she was upset about an incident when C had been at GM's house. In her witness statement GM gave a different reason for not being on speaking terms with M: GM says that this was because social services had suggested to M that she could put C into foster care to allow M to spend more time with the other children and she (GM) was dismayed at the thought that M was planning on putting her own daughter into foster care; GM's account was that she told M that if M was planning to put C into care she would not have anything more to do with M. Whatever the true reason for the breakdown in relations between M and GM, it appears that GM and M were not on speaking terms and this remained the case throughout the period with which I am concerned. They appear to have started talking to each other again only in early 2010.

16. During the course of that meeting on 14 September, at which the three children were present together with M and AF, C repeatedly said that she wanted to go to "her nan" (i.e. GM). It is not clear from the note whether this was a reference merely to visiting or to residence.

17. On 15 September 2009 AF had a phone call from GM. GM said that M had texted GM to say that she could not cope. GM also said that she had been told by M that C wouldn't be in the home much longer as she would be in foster care. GM stated that C was happy when with her.

18. On the same day AF had a call from RM who was concerned about his son H and about C's state of mind. RM said that if the situation got any worse he would insist that H or C were removed from the house.

19. The social worker AF and her manager Maralyn Cherrett ("MC"), the assistant team manager of the 12 Plus Team, prepared a formal Child Supervision Record that same day recording their view that the situation could not continue. They envisaged that intensive support would be provided to M and the children by the LA, and by contact with the extended family; and that a review and decision would take place after 4 weeks as to whether there was a safeguarding issue on the ground of neglect of the children.

20. On 17 September 2009 AF visited GM at home and spoke to GM and SGF. The latter said that they were very worried about M and all the children, but particularly C, and did not feel that M could cope with three children. They told AF that they were both willing to have C live with them full time if that would help M and C. This is the first recorded occasion on which the possibility of C going to live with GM and SGF was broached. It is not clear whether the idea was raised by AF or GM/SGF.

21. On 17 September 2009 AF also received a call from the head teacher at C's school, who told her that C was distraught because she had been told that she was going into care. The records do not reveal who had told her that, but it is reasonable to infer that M had told GM (as recorded by AF on 15 September) and GM had told C when she had picked her up from school the previous afternoon.

22. On 5 October 2009 RM phoned another social worker, Michelle Loveday ("ML") to express his continuing concern and that something needed to be done to help the children and M cope. RM was concerned that H was suffering as a result of C's behaviour.

23. On 6 October 2009 there was a meeting at the family home with M, RM and the three children. The social workers were ML and MC. The latter's presence suggests an increased level of concern, which was justified by what they learned in the course of the meeting. Amongst other things M described her relationship with C as very difficult, but said that C was very different when with GM. M also made allegations that when she was between 5 and 11 she had been sexually abused by SGF. There was a discussion as to whether there should be a child protection conference, but the LA team wanted to put in place an intensive support plan to try to effect the changes needed.

24. On 9 October 2009 Sonia Hamilton (SH) of the LA's Family Group Conference Unit ("FGC") spoke to AF. It was what was described as a baseline meeting which was intended to identify what the LA would be seeking to achieve by having a formal FGC. The note records the family history as being that C had massive anger problems and was very challenging. The note recorded that it was contemplated that new care arrangements might be put in place but that whoever was put forward as potential carers would have to be prepared to undertake assessments and CRB checks. The questions identified included who in the family could offer respite for the children on a regular basis and when and where; and who within the family would be able to care for the children either in the short

or the long term should difficulties continue within the family. Over the following weeks SH and AF communicated to finalise the baseline document for a FGC.

25. Meanwhile on Monday 12 October 2009 the intensive support programme started. It involved, amongst other things, H going to stay with his father, RM, for 2 weeks, during which time there were 5 days of intensive support at the family home. The programme did not appear to have a significant beneficial effect on the home environment. On the same day as day 5 of the programme, RM telephoned AF to say that C had been threatening the family with a knife and that M could not control C's anger. He said that M had told him that M did not think anything had changed as a result of the intensive support programme. RM expressed the view that if C were not living in the home, social services would not be involved because M would then be able to manage the other two children.

26. RM again phoned AF on Tuesday 27 October 2009 after H had gone back to the family home. He expressed concern that C would cause serious physical harm to H. He said that C should not be in the home and that was what M felt too. He was concerned that his son H was copying C's behaviour and that his hard work over the previous two weeks was being undone. During that call AF told RM that the LA would need to look at what needed to happen next and in the future if the intensive support package had not worked, including looking at whether any of the children should live outside the family home and who they should live with.

27. On 29 October 2009 there was a meeting of the family which included M, the three children, RM and MC and AF. During the meeting C said she liked it at GM's house and did not want to live at home. M said that she felt that C should live with GM although she did not want that to have to happen.

28. Following the meeting AF had a discussion with her team manager MC. MC requested AF to contact GM to see if she could look after C until the following Monday morning (the 29th being a Thursday) when C would go back to school. AF phoned GM to make this request, to which GM agreed. During the discussion which AF had with MC, MC also asked for a meeting to be arranged with GM in the following week.

29. Pursuant to that request, on Wednesday 4 November 2009 AF contacted GM to arrange to meet the following day at 3pm at GM's house. On the same day, 4 November, GM told AF that C was still living with her (although she had been due to go back to the family home after school on Monday 2 November). GM said that C would need to go back to the family home at the end of the week as GM and SGF were going away for a long weekend. AF agreed to contact M and ensure that she was aware of the arrangement for M to pick up C after school on the Thursday (5 November).

30. On the same day 4 November 2009, ML went to the family home to see how M was coping. M said that she felt like a new person and that everyone seemed happier with C out of the house. M said that C would be better off being at GM's house and that she would rather have two children who were willing to change than one who was not. M said that C had told M that C did not want to live with M and wanted to live with GM. It would have been apparent to the social workers that that was C's view as well as M's. M told ML that she didn't know that C was

going to be staying with GM for the week but that she (M) had been told by C that social services had given the go ahead. It appears that this was not true. This must have reinforced the impression in the minds of the social workers that C wanted to be out of the family home and to live with GM. ML's note records that GM and SGF were coming to the LA's social services offices on the afternoon of 5 November to see MC and AF with a view to establishing the long and short term plan for C.

31. On 5 November 2009 AF and MC met GM and SGF at the LA's offices. What happened is in dispute and is of importance to the issue I have to determine. Certain aspects are common ground:

    (1) The social workers had wanted M to attend but GM refused to attend if M was to be present because they were still not on speaking terms.

    (2) At the meeting the social workers asked whether GM and SGF would take C to come and live with them, and made clear that if so it would have to be a long term commitment until C was 18.

    (3) GM and SGF did not make a decision at the meeting but went away to think about it. Their agreement was communicated at a further meeting the following week at which they said they would take C on a permanent basis.

32. Beyond that there is a significant dispute as to what was said at the meeting. LA has disclosed no record of the meeting. The explanation offered is that AF made notes throughout the meeting "for her own reference", but these were unfortunately not recorded on the electronic case note database and were subsequently destroyed. It is surprising that the notes of such an important meeting should not have been entered on the database, and it is unclear why AF should have regarded her notes as solely for her own reference. There is a reference in another of the LA's disclosed documents which suggests that a record of the meeting may have been contained in a hard copy file, but if so it has not been disclosed if it survives. There was disclosed an email from AF to SH on 9 November 2009 describing it as a "very positive" meeting.

33. In the absence of a contemporaneous record, the principal evidence of what was said comes in a witness statement served by each side. GM gives an account in a witness statement signed on 3 April 2012. AF gives an account in part of a witness statement of a colleague prepared for the purposes of these proceedings and signed on 3 October 2014; the evidence comes in a statement from a colleague rather than her because although the relevant section was prepared by her, she was off work unwell at the time the statement was signed.

34. GM's evidence in her statement made some 2 ½ years later is as follows:

    (1) MC stated that C could not continue to live with M because they believed she had been mentally and psychologically abused when M had been looking after her. MC stated "categorically" that if GM would not look after C, C would go into foster care.

(2) GM asked what sort of support she could expect given C's special needs and the financial situation. She was provided that day with a leaflet entitled Kinship Care and was told to look at the internet. The Kinship Care leaflet describes arrangements for a looked after child and uses that expression prominently in the document.

(3) The social workers said that there was an "elephant in the room" which they explained meant the allegations of childhood sexual abuse made by M against SGF. They said that there would have to be a further meeting with SGF to interview him about them.

35. AF's account in the statement made almost 4 years later is to the following effect:

(1) The meeting was convened because the LA intended to facilitate a conversation between M and GM for them to agree their own family arrangements. Because they were not on speaking terms, it was agreed that the meeting should take place without M's presence but with the social workers communicating her views.

(2) She does not recall MC "categorically" stating that C would be placed in foster care if GM and SGF did not take her. This passage in the statement is ambiguously worded and does not make clear whether AF is saying that MC did not mention that consequence at all, or that she mentioned it but not "categorically".

(3) They advised GM that the LA was acting as a go between and this would be an arrangement between them as family members. They advised GM and SGF that this was not considered a fostering arrangement and they would not be assessed as carers due to the allegations of childhood sexual abuse made by M against SGF.

(4) They advised GM and SGF that they needed to consider whether they would care for C if they received no support, including no financial support from LA, as the matter was not considered a local authority placement. AF accepts that GM was provided by LA with the Kinship Care leaflet. She says that she did so because MC told her to, but describes it as an "error". She does not explain what the error was and there is no evidence from MC as to her reasons for telling AF to provide it.

(5) If GM and SGF were unable to take C, she would not have been placed in local authority care. An FGC would have been convened to discuss any alternate care arrangements potentially needed in respect of all three children and to discuss what general support the family and friend network could provide.

36. GM and SGF then went off for the planned long weekend. On the following Wednesday 11 November 2009, AF telephoned GM to follow up on the meeting. During that conversation GM advised that she and SGF would accept C coming to live with them permanently. AF's case notes record GM as stating that "there was no question that [C] would not stay with them as she would not want [C] to live

anywhere else". AF said that she and MC would meet M to discuss and confirm arrangements.

37. My conclusions on the disputed aspects of what happened at the meeting on 5 November 2009 are as follows:

(1) At the meeting MC said that C could not continue to live with M and at least intimated, if not going so far as to state categorically, that if GM did not look after C she would go into foster care. This is supported by the case note entry for 11 November 2009 which shows that this was GM's perception of the position at the time, as does GM's continuing refusal to speak to M which I accept was due to M's preparedness to put C into care. It is also likely to have reflected the view reached by AF and MC by then. On 15 September they had recognised, as reflected in the Child Supervision Record, that unless intensive support from the LA and the extended family improved things, a decision would have to be made after four weeks on safeguarding issues. By 27 October 2009 the LA staff was actively considering the possibility of whether any of the children should live outside the family home and who they should live with if the intensive support programme didn't improve things. By 5 November 2009 it was clear that the intensive support programme had not brought a significant improvement. The perception must have been that things could not continue as they were. The only solutions which had been canvassed as possibilities were the removal of one of C or H from the family home. Of these, the removal of C was obviously preferable. M had made clear that her preference was for C to move out. By contrast, the case notes reflect that it would have been regarded as detrimental to H to remove him from the family home. The LA's evidence did not take issue with GM's statement that "by around September" social services had told M that she could put one of the children into foster care which would allow her more time to spend with the other children. Moreover it would have been in the interests of the LA, as well as C, for GM to be left with the impression that the alternative was for C to go into care, in order to encourage GM to agree to take on caring responsibilities for C, which both AF and MC must have regarded as the best solution for C. It may be that in the absence of GM agreeing to take C, the LA's formal processes would have involved convening a FGC before removing C from the family home, but that would not have been likely to result in any other solution, and that must have been AF and MC's perception as at 5 November.

(2) AF and MC did not expressly advise GM that LA were acting as go betweens or that this would be an arrangement between them as family members. Nor did AF and MC give any clear explanation to GM and SGF that there would be no financial support from LA if they took on permanent caring responsibilities for C. Such statements are inconsistent with providing the Kinship Care leaflet, and there is no explanation for that being "an error" on MC's part. They are also inconsistent with a subsequent entry in the case notes for 25 November 2009 in which AF approached a colleague to carry out a Kinship Care Assessment. Moreover when responding to the complaint made by GM in November 2011 and thereafter, one of the LA social workers not involved at the time set out in a letter dated 18 May 2011 an account of AF

and MC's recollection of the meeting on the basis of having spoken to them about it at that stage. That account does not suggest that there was any express or clear statement by either of them that this was a private family arrangement or that no financial support would be available from the LA. The first and only relevant reference in the case notes to advice in relation to financial arrangements comes on 2 December 2009, when AF advised GM to look into Child Benefit and Working Tax Credit now that C was living with her. This would not have been necessary if there had been a full and clear explanation of the financial consequences of the arrangement on 5 November 2009.

38. On 11 November 2009, after GM had confirmed that they would take C, AF advised that she and MC would be meeting M later in the week to discuss and confirm arrangements, including contact arrangements. GM said she wanted to make sure that the contact arrangements included contact with G and H both for herself and for C.

39. On 23 November 2009, there is an entry in the case notes made by Sonia Hamilton, the FGC Coordinator, recording that the possibility of an FGC was closed because C was being moved to live with her grandmother.

40. On 25 November 2009 AF had contact with the Adoption and Permanency Team at the LA. She spoke to the referral and information officer in order to organise a Kinship Care Assessment. She was told that the A and P Team only undertook Kinship Care Assessments when care proceedings had been taken; and that in other cases the team holding the case were responsible for making the assessment.

41. On 30 November 2009 AF and MC met M in order to tell C about the permanent plans and to agree contact arrangements. Detailed contact arrangements were discussed. There were a number of further meetings and communications between the LA and the family in relation to contact arrangements. The case note entries for 30 November, 2 December, 14 December and 16 December 2009 suggest that the LA social services were instrumental in the contact arrangements that were put into place for the various members of the family, including C.

42. On 3 February 2010 AF had a call from GM to discuss C's attendance at CAMHS appointments. GM and C herself were against her attending. GM wanted to use a private psychologist if the LA would pay. GM was advised that the LA would not pay. There was subsequent communication between GM and LA in relation to C's attendance on CAMHS, the upshot of which was that on 31 March 2010 there was a lengthy discussion resulting in an agreement that C would not attend although both AF and the relevant CAMHS worker felt that she ought to.

43. On 12 May 2010 the LA closed C's case on the basis that her improvement was such that social services were no longer required.

Analysis and conclusions

44. Ms Scolding's main argument was that at the time of the placement the LA had not yet come under a s.20 duty, but that if they had, the arrangements for GM to look after C were made pursuant to s. 23(6) rather than s.23(2). She also took a threshold point that s.20(1)(c) could not have been engaged because GM, rather

than M, was the "person who has been caring for" C at the relevant time. This was based on the fact that C had gone to stay with GM for the weekend before Wednesday 5 November 2009 and had overstayed for the following week. The threshold point fails for a number of reasons. First, the reference in s.20 to "the person who has been caring for" the relevant child is, or at least includes, the person who has been exercising the primary responsibility for providing accommodation. Where the child has been spending temporary periods with another, with the consent of the primary carer, that does not make the latter the sole accommodation carer for these purposes. M remained the carer with parental responsibility who was providing accommodation to C in the family home, notwithstanding that C regularly had temporary visits to GM, of which this last occasion was one. Secondly, the placement of C with GM as permanent carer was not made until, at the earliest, the moment when GM and SGF agreed to it on 11 November 2009. At this time C was with M in the family home. Thirdly and in any event, if the time of the meeting at or after 3 pm on 5 November 2009 was the moment critique (which it was not), C was at that time either at school or back with M in the family home after school, pursuant to the agreement that GM would not be responsible for her beyond dropping her at school that morning, from where M would pick her up. C was therefore within M's accommodation care throughout the day as well as when she returned home with M at the end of the school day.

45. So far as the main arguments are concerned, I have reached a clear conclusion that by 5 November 2009 the LA was not merely on the verge of coming under a s.20 duty to accommodate C outside the family home, but had done so. At the meeting ML said that C could not continue to live with M and at least intimated, if not going so far as to state categorically, that if GM did not look after C she would go into foster care, because that reflected the view AF and MC had reached by then.

46. That conclusion is reinforced by their role in persuading GM to look after C on a permanent basis. The LA played a central role and was responsible for initiating the proposal to GM and SGF on 5 November 2009. Although GM had previously intimated a willingness to consider taking on C permanently (whether at her own suggestion or in response to an inquiry or proposal from the LA is unclear), the proposal on 5 November 2009 came from the LA as a planned intervention. On 29 October 2009 MC had not only initiated a request to be made for GM to take C over the long weekend, but had also asked for a meeting to be set up between the LA and GM for the following week. This must have been with a view to requesting that GM take C on a permanent or long term basis, which is what happened at the meeting when it took place. The LA's role cannot be categorised as simply facilitating a private family arrangement in circumstances where M and GM were not speaking. The formal proposal arose because of the social workers' own concerns for C in her current family circumstances. They had formed the view that M was not providing suitable accommodation for C, and were exercising local authority responsibilities as a public body exercising its public law duties in safeguarding C.

47. There was no full and clear explanation to GM that this was a private family arrangement which was merely being brokered by the LA. Nor was there any full and clear explanation of the financial consequences if it were to be such an

arrangement. AF and MC did not suggest that GM would have to look to M for financial support or would be unable to seek any from the LA; on the contrary, the Kinship Care leaflet gave the impression that C was to be treated as a looked after child. This is inconsistent with GM giving informed consent to a private arrangement.

48. These considerations also point to the conclusion that this was an exercise of the duty to accommodate C under s.23(2), not the arranging of a private family fostering under s.23(6). This conclusion is further reinforced by the fact that AF considered there should be a Kinship Care Assessment, and by the nature and degree of involvement by the LA in determining the contact arrangements.

49. Ms Scolding advanced two other considerations as pointing to a different conclusion. The first was that there would always have had to be an assessment of SGF in relation to the allegations of childhood sexual abuse made by M, and the fact that this did not take place indicated that the LA had never reached the stage of exercising a s.20 function; and had it sought to do so, the placement might not have gone ahead. I attach little weight to this point. AF clearly did think that an assessment was to be made as her discussion with the A & P Team indicates, and no doubt an assessment would have been made whether or not C was a looked after child if there were real safeguarding concerns. That there were no such concerns is suggested by the fact that no assessment took place and that when a Core Assessment of C was undertaken in 2011, in the light of changed circumstances which are not here material, the allegations were treated as unsubstantiated and of no concern. The second point was that had the LA considered C to be a looked after child they could and would have insisted in February 2010 that C attend CAMHS appointments. It is right that they could have done so, but whether they would have done so in the face of GM's opposition is a matter of speculation. Neither of these points, individually or cumulatively, is sufficient to outweigh the other considerations I have identified as supporting my conclusion on the main issue.

Remedy

50. Ms Scolding submitted that the Claimant should have been GM rather than C, on the grounds that the real reason for bringing the challenge was to obtain foster care payments which would be paid to the carer. I see no merit in this technical point. C clearly has a sufficient interest in challenging whether the LA were correctly treating her status as not being a looked after child. Any financial relief sought is for her benefit (retrospectively) as much as for that of her foster carer.

51. Ms Scolding also submitted that I should not grant any relief because C's circumstances would have to be reassessed by the LA following GM's recent death. In my judgment that is no reason for declining to grant a declaration to reflect the historical position and grant such financial relief as is appropriate.

52. As to financial relief, Mr Harrop-Griffiths sought payment of the amounts appropriate to a foster carer for C from November 2010. November 2010 was when GM first claimed to the LA that C was a looked after child and sought financial assistance on that basis. There was a delay in bringing these proceedings because a claim was pursued, diligently but ultimately unsuccessfully, before the

Local Government Ombudsman, whose Final Report was not promulgated until August 2012.

53. Ms Scolding, with conspicuous fairness and good sense, does not criticise the delay caused by pursuing a remedy from the Ombudsmen. She relies on four factors as counting against ordering financial relief over the period since November 2010:

    (1) C's circumstances have changed over time (for example the LA has now arranged a place for her at a weekly residential boarding school) and her future will need to be reassessed following GM's recent death.

    (2) There is prejudice in the LA having to pay, from limited resources which are heavily stretched, a lump sum in this financial year for which it will not have budgeted. The effect will be to restrict the services the LA can provide to other needy beneficiaries and impede its ability to perform its statutory obligations in safeguarding and promoting the welfare of children or in the exercise of its other important public duties. In ***R (SA) v Kent*** Black J treated this as an important consideration (see at para [81]) which led her to award financial relief for a period commencing three months prior to the commencement of proceedings.

    (3) There was undue delay in commencing the proceedings following publication of the Ombudsman's report.

    (4) C's pleaded claim, in the Amended Grounds, is only for relief from three months prior to commencement of the proceedings.

54. I accept that some criticism can be made of the delay caused by not pursuing the claim more expeditiously after the Ombudsman's decision, although the delay is not as lengthy or culpable in this case as it was in ***R (SA) v Kent***. What I regard as of particular significance in the exercise of my discretion is that what is sought are backdated payments which cannot now affect C's welfare over the relevant historical period, and which are to come from limited resources which will be commensurately unavailable to meet the needs of other vulnerable and deserving recipients. In those circumstances I decline to award more than the amount for which there is a pleaded claim. The period will commence three months prior to the commencement of proceedings.

55.