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.

CASE NO: ZE15C00592

IN THE EAST LONDON FAMILY COURT

IN THE MATTER OF THE CHILDREN ACT 1989

AND IN THE MATTER OF EF (a child)

Before:

Vanessa Meachin

- -

B E T W E E N:

London Borough of Newham

Applicant

- and –

AB

1st Respondent

- and –

CD

2nd Respondent

- and –

EF

(By her Guardian Matthew Jeary)

3rd Respondent

- -

- -

Ms May for the **Applicant Local Authority.**

Mr Leslie Samuels QC and Mr John Ker-Reid for the **Mother instructed by Desor & Co Solicitors**

Mr Nicholas Goodwin QC and Mr Matthew Stott for the Father instructed by Duncan Lewis Solicitors

Mr James Shaw for the child instructed by TV Edwards solicitors

Ms Eleanor Wheeler for the Metropolitan Police Service

Hearing dates: 11th & 14th July 2016

Judgment handed down on 14th July 2016

- -

JUDGMENT

ANONYMISED JUDGMENT OF RECORDER MEACHIN

Judgment

1. The court is concerned with the welfare needs of EF, born in 2015. She is the daughter of AB and CD. She was not a child that was known to the local authority of Newham where she resided with her parents until she was presented by her parents to hospital on 8 November 2015. Her parents had noticed that she was not moving her leg.

2. Thinking back the parents wondered whether it could be linked to her involvement in an accident that had occurred the day before. EF was lying in her baby bouncer, inside straps (unbuckled) when her father lifted the baby bouncer by what he perceived to be a handle to move it out of the way. It was not a handle and was in fact a bar with toys along the arch. The father was later to describe that the arm came away and the baby bouncer and EF fell to the floor. He believed that she bounced up and back down again. Her presentation afterwards as described by her parents would be in keeping with a child who had sustained injury.

3. The skeletal survey carried out upon EF was to reveal a fractured femur, possible fracture to her shoulder and possible fractures to her 7th and 8th ribs.

4. Her parents were interviewed by the police, her mother voluntarily and her father under caution. No record seemingly now exists in relation to the mother's interview. Late in these proceedings the existence of the father's interview came to light, within which he was asked to carry out a demonstration with the baby bouncer, without his daughter in it. The demonstration was requested by the interviewing officer and the father did so without hesitation. The demonstration was short and somewhat curtailed as when the father tried to step forward with the baby bouncer he was requested to remain where he was due to the position of the cameras. I was able to view the extract of the demonstration on Monday 11 July 2016 and formed the view that it was incomplete. The police have also produced photographs and an instruction manual for the baby bouncer.

5. The baby bouncer/ chair was seemingly seized by the police and not subjected to examination.

6. EF was subjected to a further skeletal survey on 7 December 2015. The results must have been somewhat bewildering to her parents. They were different to what had been apparently possibly been revealed before. Whilst the fracture of the femur was confirmed, she had no fracture of her shoulder or of her 7th and 8th ribs rather it was indicated that she had healing fractures of her 6th and 7th ribs (anterior), suggesting a similar age to the leg fracture.

7. It is right to indicate that there was emerging a difference in opinion between those treating EF as to whether her injuries were indicative of non -accidental injury or accidental injury as explained by her father.

8. The local authority issued care proceedings, which have been case managed through this court. Experts have been instructed, identified and on joint instruction. They are:

    i) DS consultant paediatric endocrinologist, reported on 2 February 2016 and amended on 24 March 2016;
    ii) DJ, consultant radiologist placed a different complexion upon the timing of the fractures, reliant on a CT scan on 4 December 2015. He considered that the angle and way the x rays had been taken on the 10 and 24 November 2015 meant that an absolute comparison between them was not possible. He also reported for the family court;
    iii) PD, consultant paediatrician reported on the 11 April 2016

9. All participated in an expert's meeting on 26 April 2016.

10. All were ready to give evidence this week in what was listed as a five day fact finding before me.

11. The expert opinion would have been subjected to cross examination and thoroughly tested. However, for reasons which became obvious to all of the advocates it has not been possible to proceed to fact finding. EF must have some repeat tests. Her level of alkaline phosphatase in her blood sample was raised in June. This may very well have a bearing on the expert opinions hitherto expressed. Certainly DS has recommended that further investigation is necessary as may affect his opinion.

12. This fact finding hearing is of the utmost importance to the parents and their daughter, presently they remain apart, the mother and daughter in a mother and baby foster placement and the father living separately.

13. The parents face serious allegations as set out at A29 to A31 of the bundle in summary that the father has fractured EF's femur, allowing for it to be reckless and that both could have been responsible for deliberately injuring her, causing her ribs to fracture.

14. These type of findings against either parents are likely to mean that they are permanently unable to care for their daughter.

15. These allegations are vehemently denied by the parents. Their responses are contained in the bundle, mother's at A32 to A36 and father's at A37 to A41.

16. The parents have no burden to discharge, the burden and standard of proof remains for the applicant local authority to discharge. However, they have anxiously considered what could have caused the fractures, both consider that the femur was fractured in the accident described by the father, both consider that the rib fractures may have their origin either at birth or in the accident described and indeed both consider that she might have some underlying problems affecting her bones.

17. Whilst the family court has been progressing matters to a fact finding hearing, now to be adjourned to the Autumn, it is difficult to gain a sense of what if anything has been happening in the police investigation. The police have not instructed any experts. This was not a case where the criminal investigations was ongoing such that the family court could have if it wished utilised any police appointed experts. No investigation has been completed such as would mean that an advice file would be sent by the police to the CPS. Thus 8 months after the incident neither parent have been charged with any offence.

18. There has been some disclosure by the police into these proceedings under the protocol arrangements. The disclosure does not seem to have been complete, certainly the mother's interview is said to be lost although further enquiries are to be made by the police as to whether this is indeed the case.

<u>The application by the Police</u>

19. By application dated 30 June 2016, the commissioner of the Metropolitan police (elsewhere referred to as MPS) has applied for disclosure. The respondents to the free standing C2 application are the parents, the local authority and erroneously the guardian, it should of course be the child, represented by the guardian.

20. The details of the application contained at para 6 (B110) in the fact finding bundle gave details as follows

    "MPS is investigating injuries to EF in accordance with FPR 2010 12. 73 (b) and the principles of EC (disclosure of material) (1996) 2 FLR 725, MPS seeks an order for the local authority to disclose the documents highlighted in the attached index of documents in the care proceedings, together with permission to disclose the above to the CPS for the purpose of making charging decisions and prosecution. MPS is under a duty to obtain all relevant information that it supports or undermines any allegation of criminal conduct under the Code of Practice under part 11 Criminal procedure and investigations act 1986 and the Attorney General's guidelines on Disclosure 2013. These documents are required for the CPS to use in making a charging decision and potentially the preparation and conduct of criminal proceedings subject to the restrictions of section 98(2) Children Act 1989".

21. Whilst my copy of the index did not show the highlighted documents sought that was corrected by the helpful skeleton argument that I received on Monday 11 July 2016 from Miss Wheeler on behalf of MPS. In essence those documents are as set out in paragraph 2 (a) to (k) falling into the category of parents' statements and medical reports both of

treating doctors and court instructed experts. This has subsequently been expanded upon to involve the results of a CT scan and subsequent discussions between the experts by email.

22. I explained when this matter came before me on Monday 11 July 2016 before the case was listed, to accommodate another court commitment of Miss Wheeler that I was not in a position to deal with her application on that day given that I was supposed to be completing my reading for the fact finding hearing. I had yet to hear the advocates in the fact finding case as to the father's request for an adjournment supported by the mother, and the guardian on behalf of the child but was at that stage opposed by the local authority. I gave Miss Wheeler options in relation to the application including the choice of returning to court this week to deal with her application although I raised my preliminary view that the application seemed premature. I enquired of Miss Wheeler in relation to the second application namely a request by the applicant local authority for the police to produce the baby bouncer to court could be accommodated. I was referred to an email response in opposition at B129 and the statement of PW in essence indicating that the baby bouncer/ chair could not be produced "the exhibit cannot be released for the purpose (of allowing CD to carry out a demonstration) because it may be damaged or somehow altered that might negatively impact upon the criminal investigation. Independent experts for the police investigation are still pending".

23. Miss Wheeler pressed these points upon me and when I asked as to what tests and whether the exhibit could be protected, Miss Wheeler was to later inform me that no further tests were envisaged and that the opposition centred on the concern that the father would tamper with the exhibit.

24. I will address the second application in more detail later in this judgment.

25. In light of the need to resolve both these issues and to set a revised timetable in the now adjourned period, the case was listed again in front of me today 14 July 2016.

26. As directed Miss Wheeler provided a further skeleton argument and I received skeletons in reply from Mr Goodwin QC and his junior Mr Stott on behalf of the father, from Mr Ker-Reid on behalf of the mother and one from Mr Shaw. I excused Miss May the necessity of providing a skeleton argument as she supported the position of the police in relation to their disclosure application. However I received a position statement late last night in which she set out the local authority's support for the police application.

27. I am grateful to all of the advocates for their written and oral submissions to me.

28. The skeleton argument on behalf of MPS repeated the previous requests for disclosure and added to it in that having become aware of the existence of other material and also seeking an order for disclosure of the fact finding judgment which has of course not yet taken place.

29. The position of the parties thus in relation to this application is that the local authority is not opposing the Commissioner's application and sees some merit in disclosure of the expert reports. The Guardian is neutral. The First and Second Respondents oppose the application.

30. The father submits that the application is adjourned until the end of the fact finding hearing and that the application by MPS for immediate disclosure is dismissed and the mother submits that the application should be dismissed. They are quite right to point out to me that I can grant the application in whole or in part, adjourn the application or dismiss the application.

31. In oral submissions Miss Wheeler developed a different request namely that I should give prospective permission for documents to be disclosed once other material has been completed in this case, in other words perhaps 7 days after the receipt of the end of the expert enquiries in this case and any additional statements from the parents.

32. Mr Goodwin QC leading Mr Stott for the father and Mr Ker-Reid for the mother quite properly draw my attention to the submission that considerations of disclosure are inextricably linked to timing. They ask how can the court give permission for documents not yet in existence to be disclosed when I have to consider them as part of the EC test?

33. They make a compelling submission.

34. Miss Wheeler also confirmed that she accepted that the police need no permission to obtain the judgment but of course the parents do have the opportunity to oppose it being sent.

The legal framework

35. I adopt for this judgment the legal analysis as set out in Miss Wheeler's skeleton argument dated 12 July 2016 as set out at paragraphs 2 to 12 which I will refer to below. I also remind myself as helpfully submitted by Mr Goodwin QC and Mr Stott that:

> *The police have no automatic right to the disclosure of material filed within family proceedings. As set out by Baker J. in Re X and Y [2015] 1 FLR 1218, the communication of information from care proceedings falls, under FPR 2010 into three categories:*
>
> *(a) Communications under r.12.73(1)(a) which may be made as a matter of right to certain defined persons;*

(b) *Communications under r.12.73(1)(c) and Practice Direction 12G paragraphs 1 and 2, which may be made, but are subject to any direction by the court, including, in appropriate circumstances, a direction that they should not be made;*
(c) *Other communications which under r.12.73(1)(b) may only be made with the court's permission;*

The police application falls within (c) above, permission therefore being required. Accordingly per Baker J. "the onus…lies on the party seeking permission to communicate". There is no presumption in favour of disclosure to the police.

36. And from Miss Wheeler's document she reminded me:

The Commissioner's application is brought pursuant to r12.73(1)(b) of the Family Procedure Rules 2010 ("FPR 2010") which gives the court a discretion to permit communication to third parties of information relating to children proceedings. Doing so would otherwise be a contempt of court under s.12(1)(a) of the Administration of Justice Act 1960.

Rule 12.73(1)(b) of the FPR 2010 represents a relaxation of the previous regime enshrined in rule 4.23(1) of the FPR 1991.

The principles governing whether disclosure should be made from family proceedings for the purpose of a criminal investigation are set out by Swinton-Thomas LJ in Re EC (Disclosure of Material) [1996] 2 FLR 725 CA ("Re EC"). They are:

(1) The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, that will be a very important factor.

(2) The welfare and interests of other children generally.

(3) The maintenance of confidentiality in children cases.

(4) The importance of encouraging frankness in children's cases. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which s.98 (2) applies. The underlying purpose of s.98 is to encourage people to

tell the truth in cases concerning children, and the incentive is that any admission will not be admissible in evidence in a criminal trial. Consequently, it is important in this case. However, the added incentive of guaranteed confidentiality is not given by the words of the section and cannot be given.

(5) *The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice.*

(6) *The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be an important factor.*

(7) *The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order.*

(8) *The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, school etc. This is particularly important in cases concerning children.*

(9) *In a case to which s.98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.*

(10) *Any other material disclosure which has already taken place.*

37. Miss Wheeler urges that recent case law has placed greater emphasis on transparency in children proceedings. For example, Baker J in *Re X and Y (Children: Disclosure of Judgment to Police)* [2014] EWHC 278 (Fam) stated at paragraph 36:

> *'As the Court of Appeal acknowledged in Re H, however, the relative importance of the ten factors has inevitably changed over the seventeen years since Re EC was decided. In particular, the cloak of confidentiality surrounding care proceedings has been significantly lifted by the successive relaxation of the rules. There are now moves towards much greater transparency in care proceedings, for the reasons explained by the President on a number of occasions, most recently in Re P (A Child) [2013] EWHC 4048 (Fam)'.*

38. This is a submission that in response Mr Ker-Reid on behalf of the mother struck a note of caution, reminding me of the need to apply the EC factors.

39. Pursuant to section 98 of the Children Act 1989 ("CA 1989") no person is excused from giving evidence on any matter or answering any question put to them in the course of giving evidence in an application for an order under Parts IV or V of the CA 1989 on the ground that doing so might incriminate them or their spouse. Section 98(2) CA 1989 provides that a statement or admission made in such proceedings is not admissible in evidence against that person or their spouse in proceedings for an offence other than perjury.

40. It is, however, clear that the protection afforded by section 98(2) does not extend to putting inconsistent statements to a witness in order to challenge their evidence or attack their credibility, see Booth J in *Re K and Others (Minors) (Disclosure)* [1994] 1 FLR 377 as restated by Munby J in *Re X (Children)* [2008] 1 FLR 589, FD and Johnson J in *Re L (Care: Confidentiality)* [1999] 1 FLR 165 at 167.

41. Further, section 98(2) protection, while applying to court proceedings, does not extend to a police inquiry into the commission of the offence, see Swinton Thomas LJ in *Re EC* at 733.

42. Section 98(2) cannot fetter the court's discretion. The judge retains the power to order any part of the proceedings in appropriate circumstances, including material covered by that section, see *Re EC* at 732.

43. Mr Goodwin QC and Mr Stott remind me of the father's article 6 rights and direct my attention to the potential breach of those rights. They submit as follows:

> *Father's Article 6 rights are plainly engaged. It is submitted that s.98 CA 1989 provides no counterweight to the potential breach of those rights if disclosure is ordered now. First, s.98 only prohibits the use of a statement made in family proceedings "in evidence", thus such statements may be used in a police inquiry into the commission of an offence. Second, the statutory protection afforded the family litigant by s.98 is in practice substantially eroded by the potential for the Crown to employ s.119 Criminal Justice Act 2003 in criminal proceedings – to admit previous inconsistent statements – see Munby J. (as he then was) in Re X (Children) [2008] 1 FLR 589 "it is to be noted that putting inconsistent statements to a witness in order to challenge his evidence or attack his credibility does not amount to using those statements 'against' him within the meaning of the section".*

They continue:

> *In the absence therefore of protection under s.98, disclosure of material from family proceedings at this stage risks breach of Father's Article 6 rights. The police seek disclosure both of the parties' lay statements and the joint experts' reports. Neither the lay evidence nor the expert evidence is however complete. The prejudice to F principally lies in the disclosure of material that is still evolving.*

They remind me:

> *As to the lay material, neither parent has been cross-examined and the court has yet to form any view about credibility. The court will be aware of the strong social work and independent social work evidence in favour of the parents yet the police do not seek disclosure of that. The parental portrait viewed by the police, if the application succeeds, would therefore be incomplete and, therefore, potentially inaccurate. That is no fair basis either for an investigation or for a prosecution.*
>
> *The point has particular force as far as the expert evidence is concerned. All parties will be inviting the court to permit addendum reports in light of the recent test results. DS himself states that "these results do impact on my conclusions". Not only is the endocrine analysis therefore incomplete but, given the other experts' reliance on DS specialism, their views are too. It would be plainly unfair to disclose partially formed expert views to the police.*

44. Finally I am aware from Mr Ker –Reid's skeleton of the following additional point, he too has reminded me of the parents' article 6 rights:

Reliance is placed by the Police on X v Y, a case where Baker j refused all applications for disclosure by the Police up until Judgment not least the self-evident basis that contemporaneous disclosure on evolving and incomplete evidence perhaps later to be discarded, discredited or traversed is obviously unfair. It is of note that the Police do not seek to adduce authority to rebut that proposition and practice.

The application of the factors in this case under EC

45. The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way that will be a very important factor.

46. Miss Wheeler submitted that:

It is in EF's best interests to order the disclosure sought. It will allow the Commissioner to investigate the alleged offence(s) promptly and thoroughly, thereby minimising disruption to her life and maximising the chance of a just outcome being reached. Children involved in these types of proceedings themselves have an interest in there being proper disclosure, as per Munby J in Re X (Children) [2008] 1 FLR 589 (FD) at para 37.

47. I pause to note that there has been nothing to prevent the police investigating matters for EF to date and yet very little has been done in the police investigation.

48. From Mr Goodwin QC and Mr Stott, they submitted:

EF's welfare does not require the disclosure of partially formed material to the police. An investigation pursued on the basis of such material risks unsettling both parents and therefore, potentially, her. M remains her primary carer. Whilst she may have an interest in "proper disclosure" (per MPS skeleton argument), this cannot be achieved at the present time given the evidence in the family case is still evolving. F rejects the suggestion that disclosure now would allow the police "to investigate the alleged offence(s) promptly and thoroughly" (per MPS skeleton). The police investigation could hardly be brought to an end at this stage, nor could its conclusions be thorough.

49. This analysis is supported by Mr Ker-Reid.

50. I share the concerns as to the impact on EF and her family of partially formed material at this stage to the police. The family fact finding investigation has not been completed and has still much to complete. EF's welfare would only be served by a formulated application by the police once my decision in the fact finding hearing is known and they have had sight of my judgment if requested. That would then allow a proper and informed request for the disclosure of appropriate documents.

51. I prefer the analysis on behalf of the parents which echoes my own.

The welfare and interests of other children generally.

52. Miss Wheeler has not pressed this factor upon me in her written submissions bur raised in her oral submission a note of caution as to the suggestion that the father doesn't pose a risk to other children. It has not yet been established.

53. Mr Ker –Reid reminded me that:

A submission like that should be reserved for cases where there is ground for suggesting that the possible offender may be a continuing, present or actual danger to children in general. This is obviously not the situation in the circumstances and history of this case.

54. For my part, whilst I note that the father has previous convictions of violence, he has nothing in relation to violence against children. I should guard against suggestions of propensity when the father is entitled both in the criminal court and family court to a presumption of innocence.

55. I agree with Mr Ker- Reid's analysis that it is difficult to see how the welfare and interests of other children generally are engaged.

56. The maintenance of confidentiality in children cases.

    Miss Wheeler does not press this point upon me although it was developed in oral submissions.

57. The importance of encouraging frankness in children's cases.

Nor does Miss Wheeler press this as a factor in supporting disclosure

In contrast the parents' advocates urge upon me

It is submitted that both 3 and 4 above carry great weight (against disclosure) where the family proceedings have yet to reach the fact-finding stage.

I agree that for this court engaged in trying to work out happened so as to cause EF's injuries that the disclosure of this stage to the police will not assist the fact finding exercise that I am engaged upon.

58. The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice.

Miss Wheeler's submissions:

The police and the Local Authority working towards the safeguarding of children should be working together at the earliest opportunity. This principle underpins the 2013 Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings ("the 2013 Protocol"). The MPS has already disclosed a large amount of information to the Local Authority; it is only fair that the same spirit of co-operation pervades now.

59. She reminded me that:

The Commissioner has a legal duty to pursue all reasonable lines of enquiry in relation to material that may be held by third parties, and if it appears that there is material which might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused, to take reasonable steps to obtain it pursuant to the Criminal Procedure and Investigations Act 1986, the Code of Practice under Part II, and the Attorney General's Guidelines on Disclosure December 2013.

60. On behalf of the father it was argued:

Whilst this may be a forceful submission once the family court has heard the case and the process of gathering and hearing evidence complete, its merits run the other way if analysed now. No public interest can be served by the provision of incomplete material and the police proceeding half-informed;

This was a position supported by the mother

The parents argued:

> *Exactly the same may be said for the public interest in the prosecution of serious crime. There is an obvious public interest in the proper prosecution of serious crime but an obvious public interest against an inadequate investigation;*
>
> *It is conceded that co-operation between the police and children's services is desirable, all other things being equal. By adjourning the application, the court would not be impeding that co-operation, merely ruling that the weight to be attached to it is better evaluated at a later date;*

I prefer the analysis urged upon me by the parents.

61. I consider that the process of investigation will be hampered by incomplete and partial disclosure either now or prospectively.

62. The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be an important factor.

Miss Wheeler's point:

> *The alleged offence(s) is/are extremely serious and it is overwhelmingly in the public interest that the Commissioner/the CPS have all relevant material in order to investigate the offences thoroughly to allow the CPS to make a charging decision. This principle was affirmed in Re X at para 35: there is a 'powerful public interest in ensuring the proper administration of criminal justice […] without unnecessary let or hindrance by the family court' para 35.*

And on behalf of the parents:

> *It is conceded that the alleged offence is grave. It is difficult to conceive of a police disclosure application from family proceedings in anything other than grave circumstances. Gravity however does not counterbalance the risks of disclosure on incomplete facts. Rather it compounds them*;

I prefer the analysis adopted by the parents

63. The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order.

Miss Wheeler's submissions:

> *EF's injuries are serious and complex and the expert medical evidence will be fundamental to determining how and when they were caused. The criminal investigation cannot proceed without medical evidence. If the Commissioner is required to obtain separate evidence that investigation will be delayed. It is not a reasonable or proportionate use of public funds to duplicate* the expert evidence.

And on behalf of the parents:

> *The court is also invited to reflect on the practicalities of disclosure at this stage. The police appear to argue that costs would be saved if they were to use the experts appointed by the family court. This presents real difficulties for the process of family justice here. If the police contact the jointly instructed experts, each may express further relevant opinions. Those in turn would not have been given either under oath or under the express duties referred to in their letters of instruction. They would have to be disclosed into the family proceedings. The family court would have no control over them. This is particularly risky in the context of an evolving medical analysis.*
>
> *There is nothing to prevent the police instructing its own experts, if indeed it considers it cannot wait to renew its disclosure application in Autumn 2016. Thus far it has waited 8 months to raise the issue of experts at all. It fails to identify from where the great urgency now arises.*

I agree with the analysis on behalf of the parents

64. The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical

practitioners, health visitors, school etc. This is particularly important in cases concerning children.

Miss Wheeler's submissions:

This factor is linked to (5) and again underpins the 2013 Protocol. The importance of co-operation between agencies dealing with the welfare of children is, 'crucial in maximising the protection given to children', per Baker J in Re X and Y at 46.

The parents' response:

It is conceded that co-operation between the police and children's services is desirable, all other things being equal. By adjourning the application the court would not be impeding that co-operation, merely ruling that the weight to be attached to it is better evaluated at a later date;

I accept the parents' analysis.

65. In a case to which s.98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.

This is not a factor that Miss Wheeler has pressed upon me

The parents however remind me that:

The police raise other arguments in their recent skeleton which are addressed briefly here. First, the police are wrong to speculate about the relevance of s.98 to the present case. That section refers to "a statement or admission made in such proceedings" and therefore covers all the parents' evidence filed to date.

Second the argument that "the MPS, the CPS and the criminal courts themselves are under legal duties to evaluate the evidence and decide what weight to attach to it" is misconceived. Whilst the criminal justice system will undoubtedly evaluate evidence itself, the point has no force where the material, being incomplete, is incapable of final evaluation.

Third, and above all else, the police application fails to set out why the passage of two more months would prejudice its application. The court is invited to take judicial note of the fact that most police disclosure applications follow judgment (or at least are, by consent,

determined after judgment). What takes this case outside the normal sequence? Despite two police skeletons being filed, counsel cannot identify any imperative. The police simply say that a refusal "seriously threatens to derail the criminal investigation. If a charging decision is made promptly it can inform the family judge in the fact-finding exercise". The "serious threat" is not spelt out. A charging decision would be ambitious with the evidence in its current state of flux. The subsequent reference to a "growing trend towards early disclosure" is neither evidenced nor principled. There is no substitute for the application of the Re EC test.

I agree

66. Any other material disclosure which has already taken place.

    This is not a factor that has featured much in this case.

    Mr Ker-Reid has reminded me that:

    The Police already have disclosure of the hospital X-rays and scans and Dr L (G82). They are able to obtain the hospital records.

67. It follows from my analysis of the Re EC principles that I do not grant the police's request for disclosure at this stage or the suggestion that I should do so prospectively.

68. They are at course at liberty to seek to renew their application once the fact finding has completed and the outcome is known. I sound some caution in that this issue has taken some time and if before another a judge is likely to require a time estimate of 1 day.

69. I understand from my discussions with Miss Wheeler that further enquiries will be made of the police to ascertain whether the mother's interview tape has indeed been erased or whether a master copy exists. If it does then it will need to be transcribed and the interview disclosed to the applicant local authority for onward transmission to the other parties in this case.

70. For the avoidance of doubt the idea of the agreed summary is one that I also reject based on my EC considerations.

The application by the local authority for the production and inspection of the baby chair/ bouncer

71. This is an application pragmatically made by the applicant as it was conscious to ensure that the fact finding was effective and was mindful that the father sought to be able to use the baby bouncer/ chair for demonstration purposes.

72. The application is dated 6 July 2016. B126 para 6 set out the basis for it.

73. Having viewed the father's partial reconstruction that he was able to give in his police interview I had no doubt that the family court would be assisted by the production of the baby bouncer.

74. In my opinion applying the overriding objective in order to deal with the fact finding fairly and proportionately the item was required.

75. I struggled to understand the argument that the father from the witness box in front of me would seek to deliberately corrupt a police exhibit.

76. However I am informed that a formal ruling from me is not required in this matter in light again of the pragmatic approach taken by the local authority namely that their enquiries have revealed that Argos continues to stock and sell the item, just under £30 and the applicant will purchase one.

77. At the suggestion of Mr Ker-Reid the purchased item is to be taken to the exhibit store and placed alongside the retained baby bouncer/ chair in order to check that it is indeed the identical item.

78. Miss Wheler has assured me that the officer in the case will facilitate this happening in liaison with the local authority. This should be recorded on the face of the order. I envisage that this should also extend to the taking of photographs of the exhibit alongside the newly purchased item so that those that are not present can be satisfied that the items match.

Vanessa Meachin

14.7.2016

ANONYMISED VERSION APPROVED ON 14.11.2016