Case No: B4/2013/1942 & 1984

Neutral Citation Number: [2013] EWCA Civ 1374

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM LUTON COUNTY COURT
HER HONOUR JUDGE DAVIES
LU13C03205

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2013

Before :

LADY JUSTICE ARDEN
LADY JUSTICE BLACK
and
LORD JUSTICE DAVIS

- -

RE W (FACT FINDING: HEARSAY EVIDENCE)

- -
- -

Ms Jane Cross QC & Ms Georgina Clark (instructed by **Adams Moore Family Law**) for the **1st Appellant**
Mr Alex Verdan QC & Ms Beverley Roberts (instructed by **Solomon Levy Solicitors**) for the **2nd Appellant**
Miss Frances Heaton QC & Giles Bains (instructed by **Luton Borough Council Legal Services)** for the **1st Respondent**

Hearing dates: 23rd October 2013

- - - - - - - - - - - - - - - - - - - -

Judgment

Black LJ:

1. This appeal concerns findings of fact made by Her Honour Judge Davies on 21 June 2013 in care proceedings in relation to five children. The appellants are the parents of those children; I will refer to them as the father (F) and the mother (M). The respondents to the appeal are the local authority, four of the children by their guardian, and the remaining child who is separately represented. The guardian contributed to the appeal process in writing but was excused from attending. We also received a position statement on behalf of the child who is separately represented of which we have taken note even though it arrived at a late stage. All the other parties were represented before us by counsel, to whom we owe much gratitude for their very clear and focussed argument.

2. At the end of the appeal hearing, we announced that the appeal was allowed for reasons that would be given later in writing. I now set out the reasons that led me to my decision.

3. M has 9 children of whom F is the father of all but the eldest, T, who is 28 years old. The children who are the subject of the care proceedings range in age from 15 years (twins who are girls) down to 3 years. I will not set out the details of any of the children except in so far as it is necessary in order to explain our decision in relation to the appeal. For that purpose, one needs to know that one of the twins is called C, and that amongst the older children, there is a brother who is in his early twenties to whom I will refer as B.

4. The hearing before Judge Davies lasted for five days. In addition to reading the trial bundles, which we are told extended to four lever arch files, she heard oral evidence, including from three social services witnesses, a jointly instructed psychologist, the parents and the maternal grandmother. At the conclusion of the hearing she found that F had sexually abused T on more than one occasion, beginning when she was a child, that F had also sexually abused C over a number of years, starting when she was 6 years old, and that M knew of the abuse of T and had failed to protect the children. The parents' appeal was directed to these findings and certain findings ancillary to them which the judge also made; I will refer to these challenged findings globally as "the sexual abuse findings". The judge made other findings which are not challenged and which, in summary, were as follows: that F had physically abused C causing her emotional harm and that M knew of the physical abuse; that the children had suffered significant emotional harm as a result of being drawn into the details of the case by their parents; and that M had acted in breach of a written agreement with the local authority in taking the youngest child to the home of the paternal grandparents.

5. It was agreed that although M was the first appellant, F's counsel would bear the burden of advancing the appeal because it largely revolved around findings about his conduct. M supported what was said on F's behalf.

6. A number of grounds of appeal were advanced by F but I think it is fair to say that the principal complaint was about the way in which the judge approached the hearsay evidence adduced by the local authority. I will concentrate upon this issue because it is sufficient to determine the appeal and, as there is to be a rehearing of the factual issues, it is important that I say as little as possible about the evidence so that the judge who deals with this matter is free to evaluate it as he or she thinks proper.

Nothing that I say in this judgment should be taken as indicative of any view as to the weight (or lack of weight) of particular pieces of evidence. Making findings of fact is a complex process which depends upon the judge's evaluation of the whole of the evidence presented and of the witnesses who appear before him or her. It is only when the whole jigsaw is assembled that the weight of an individual piece of evidence can reliably be determined.

7. This case gave rise to no general arguments of principle. There is a great deal of authority on the subject of hearsay evidence in cases concerning children. I will list below the authorities that were cited to us as of particular relevance to the issue but we were not asked to revisit them or to venture any general guidance, the appeal being approached with commendable practicality on the basis that the judge erred in the way in which she treated the evidence in this particular case. The authorities were: Official Solicitor v K [1965] AC 201; Re W (Minors)(Wardship: Evidence) [1990] 1 FLR 203; R v B County Council, ex parte P [1991] 1 FLR 470; Re N (Child Abuse: Evidence) [1996] 2 FLR 214; Re D (Sexual Abuse Allegations: Evidence of Adult Victim) [2002] 1 FLR 723; Re B (Allegation of Sexual Abuse: Child's Evidence) [2006] EWCA Civ 773; H v L [2006] EWHC 3099 (Fam); B v Torbay Council [2007] 1 FLR 203; W (a child) [2007] EWCA Civ 1255; JFM v Neath Port Talbot Borough Council [2008] EWCA Civ 3; Enfield LBC v SA (By her Litigation Friend, The Official Solicitor) [2010] EWHC 196 (Admin); Re W (Children)(Abuse: Oral Evidence) [2010] UKSC 12 [2010] 1 FLR 1485; Surrey County Council v M, F and E [2013] EWHC 2400 (Fam).

8. We were also referred to the Children (Admissibility of Hearsay Evidence) Order 1993, the Civil Evidence Act 1995 and Articles 6 and 8 ECHR.

9. Much of the local authority's evidence in relation to the sexual abuse findings was hearsay. The principal source of evidence about what happened to T was obviously T herself. She had spoken to social workers about her experience in late 2012/early 2013 and they reported to the court what she had said. However, Judge Davies (who very properly attended to the case management of this case throughout) was quite rightly intent on ensuring that her evidence should be received by the court in a more direct form and made an order on 20 March 2013 that if the local authority were relying on her evidence, they were to file a statement from her. A date was given for the filing of the statement and when that was not complied with, an extension was given. However, still no statement was forthcoming.

10. T's position was discussed at a directions hearing on 6 June 2013. There is a difference of recollection as to the extent to which any reason was given for the absence of a statement from her but it may be that the local authority explained to the judge that T was not co-operating with the process, as Miss Heaton QC explained to us on their behalf during the appeal hearing. No orders were sought from Judge Davies or made by her with a view to resolving such problems as there were.

11. By the time that the final fact finding hearing commenced on 17 June 2003, nothing had changed. T had not made a statement and she did not attend to give evidence. It seems that the hearing proceeded without any discussion of why this was or what should be done about it.

12. T is a vulnerable adult who has suffered from depression and she has learning difficulties, although no one suggested that they were such as to prevent her from giving evidence. Social services are involved in relation to her children, of whom there are four, the youngest having been born at the end of April 2013. In her statement of 3 May 2013, Ms McMenemy (one of the social workers who gave evidence to Judge Davies) spoke of reports that T was under a great deal of pressure from her family to write a statement supporting them and said that T was not now willing to provide a statement confirming what she had said about abuse (B62/3). However, it appears that there was no up to date evidence about T's position offered to the court either at the directions hearing on 6 June 2013 or at the fact finding hearing. The judge should at least have been told, for example, what efforts had been made to obtain a statement from T and/or to secure her attendance at court and why these had foundered, and she should have been fully informed about any continuing personal difficulties on T's part which it appeared were getting in the way of the process.

13. It may not be entirely surprising, in the circumstances, that the judgment contained no reference at all to the reasons why direct evidence from T was not available. The judge said only this about T's absence:

> "On behalf of F, I am reminded that he has Article 6 rights to a fair trial. I must bear in mind that he has a right to cross examine witnesses and, if witnesses have not been called to give evidence, I must consider what weight should be given to their evidence." (§7)
>
> "T has not been called to give evidence, either by the local authority or by the parents; and I must remind myself it is for the local authority to prove the case, it is not for the parents to disprove it." (§8)
>
> "I have to bear in mind that T has not attended court to be cross examined…" (§22)

14. Whilst not arguing that hearsay evidence of T's complaint was inadmissible, Miss Cross QC for F submitted that the judge had to determine what weight that evidence would bear and, in all the circumstances of this case, she was wrong to rely on it. Properly evaluated, Miss Cross said, what T was reported to have said about sexual abuse had no weight at all and could play no part in the judge's findings.

15. What T said should divided into two distinct categories, it seems to me. There is the recent material, comprising what T said to social workers in 2012/13, and the older material which relates to what T said and did when she was a young child.

16. The evidence of what T said and did as a young child was in the form of a social worker's note made in 2003 of a telephone call from a health visitor (E188). The health visitor appears to have been reporting something that happened 13 years before (therefore in approximately 1990) which involved the maternal grandmother taking T to the GP with bruises. The note reads "In addition Leah was masturbating and saying 'dad did it to me'". It seems to have been agreed that the reference to Leah could in fact be construed as a reference to T but the maternal grandmother, who was the only

participant in the alleged events who gave evidence on the subject at the fact finding hearing, denied that anything like that occurred.

17. By the time it reached the court in 2013, the account of events in 1990 had passed through a number of hands. In the first place, it does not seem likely that the health visitor was a first-hand witness of what she reported. Secondly, I do not think that the social worker to whom she reported it, 13 years later, was one of the social workers who gave evidence before the judge. It follows that the material must have been relayed by another social worker to the court or the judge must have been asked simply to rely on the 2003 social work record. That record provides no supporting details. The GP records might have assisted and would at least have had the benefit of being contemporaneous with the event. They were not available because T was not the subject of the care proceedings and her consent to their disclosure had not been secured, nor had any steps been taken to get round the difficulties that that posed. A statement from the health visitor might also have been helpful but there was none.

18. Dealing with this older material in her judgment, the judge said:

> "In about 1987, when T was three or four, T was taken to the GP by her grandmother. T was masturbating. T said 'Dad does this'. There is no evidence as to whether that was followed up or not. The health visitor's notes call T 'Leah', but the parents accept that that note actually refers to the girl now referred to as T, but who was called Leanne at the time. I accept that the Health Visitor's note is an accurate record as to what T said at the time." (§19)

19. It was agreed that the judge's reference to 1987 was a mistake as the date must have been approximately 1990. I think the judge's reference to "the health visitor's notes" must also have been a mistake as the note in question was in fact a social services record. However, the real problem with the judge's approach is the lack of critical scrutiny of the material which, it is tolerably clear from the judgment, the judge went on to use in evaluating the allegations in relation to T.

20. The content of the note had been put squarely in issue by the grandmother's denial. The judge was not impressed by the grandmother's evidence for reasons she set out in §16 of the judgment and thought the grandmother was not open or honest when she said that she did not have any recollection of any matter that had involved her and T when T was a child. But it seems to me that as well as considering the reliability of the grandmother as a witness, the judge needed to address the deficiencies of the note as evidence. It may be that she had all the relevant circumstances firmly in mind but they are unfortunately not articulated in the judgment. In particular, there is no recognition that the material was multiple hearsay or that, far from being a contemporaneous record, the note related to events which were already 13 years old by then, or that the absence of details and context complicated the interpretation of the event described. There were obvious questions that arose. For example, was the health visitor recounting something that the grandmother had told the GP about T or did T say something to the GP? What was it that T was saying dad did her? Did it relate to the bruises or to the masturbation or to something else altogether? One possible indicator of the significance or otherwise of this material would have been whether it was followed up by the authorities either in 1990 or in 2003. The judge recorded that

there was no evidence as to whether it was or not, so one might infer that she had in mind the relevance of that consideration, but it would have been desirable for her to spell that out. As it was, she accepted that the note was an accurate record of what T said and left it at that without further evaluation. Given the limitations of the material, more was needed.

21. I turn to what T is reported to have said in 2012/2013. This was the lynchpin of local authority's case in relation to the finding of sexual abuse of T that they sought. It was also of importance in relation to any finding of sexual abuse of C because the evidence in relation to the two girls is to an extent intertwined, as we can see, for example, from the judge's conclusion that "something seriously inappropriate has happened to C and I find it was her father who has done this thing …[and] I find it was the same thing that had happened to T" (§25).

22. Where an adult's evidence is so central to a finding or findings sought, I would normally expect that adult to give evidence, although there can, of course, be situations in which that is not possible. Judge Davies herself made clear by her order of 20 March 2013 that she expected that T would furnish direct evidence. She was never asked to revoke that order, although equally she was not asked to direct that the local authority could not rely on the hearsay material as to what T had said.

23. Where it is said to be impossible to obtain a statement from a witness or to secure a witness's attendance at court, the court needs to know the reasons why so that that can be considered when, to use the phraseology of section 4 Civil Evidence Act 1995, "estimating the weight (if any) to be given to hearsay evidence".

24. There are ways in which witnesses can be assisted to overcome difficulties in engaging in court proceedings and the various options should always be considered when there are problems in getting evidence from a central witness. They include special measures such as screens in the court room or a video link. Alternatively, a witness summons may be appropriate. None of these options seem to have been considered in this case. We were told that T has recently given a statement to the police by way of an ABE video interview. Had that course been taken before the fact finding hearing, the video interview would at least have covered the ground that would have been covered by a statement. The question of cross examination could then have been addressed as a supplementary issue in the knowledge of what T had said in the ABE interview.

25. Assuming that none of the available measures secures direct evidence from the witness, the judge has to have regard to the reasons for this in weighing the hearsay evidence on which reliance is placed instead. A judge may be less uncomfortable in giving weight to such evidence where there is a good reason for the witness's non-engagement (such as the sort of profound psychological difficulties from which C is suffering or a protracted physical illness) than where the reason is hard to divine or the non-engagement appears to be a matter of deliberate choice on the part of the witness.

26. The estimation of the weight to be given to T's recent complaints was complicated by the fact that she had retracted what she said. She did so in the form of two letters. She has problems with literacy and they were written by her brother B and signed by her. The first is dated 6 February 2013 (E105). It alleges that social services are trying to

"manipulate and intimidate me into making a statement" and says that she is not willing to make a statement about F molesting her as it would be a false statement. The second letter (E253) is undated but I think it was received by social services towards the end of April 2013. It says that social services had blackmailed her by saying they would pay for a deposit for a house move if she made a statement about F but that she would not do so as it would be false.

27. The judge referred to the two letters in §§20 and 21 of her judgment but went on to make her findings about T's complaints in §22 without setting out how she had approached them in her evaluation. She had earlier rejected the suggestion that the social workers had put pressure on family members to make untrue allegations (see §10) and found the social workers to be very careful in their evidence and accurate in their note-taking and recollection. This was, of course, material to her approach to the retraction letters in which improper conduct on the part of social services was suggested. She also stated in a different section of the judgment later on (§31) that she found that pressure had been put on T by B and by both parents to withdraw her allegations but this was a bald statement without any supporting analysis or details and without specific reference to the letters.

28. The retraction of a complaint normally requires careful and specific consideration and this case was no exception. Obviously the fact that a complaint is subsequently retracted does not prevent a judge from accepting that it is in fact true but it gives rise to questions which must be addressed sufficiently fully and directly in the judge's reasons so that one can be confident that the fact of the retraction has been given proper weight in the judge's conclusions about the subject matter of the retracted allegation. Where, as here, the only evidence before the court about the complaint is hearsay, it seems to me that this is particularly so and the judgment was insufficiently specific in my view.

29. Miss Heaton relied on the fact that the judge had managed the case throughout, had heard evidence at an interim care order hearing and had an excellent vantage point from which to make her findings of fact. She submitted that it was clear from what the judge did say in the judgment that she was well aware that because T was not present, she had to be careful about the weight she gave to her evidence. She also submitted that the judge's conclusions were founded on the evidence as a whole and could be supported.

30. Miss Heaton invited our attention to portions of the evidence in order to make good her submission that the judge's findings had a solid foundation, putting together matters such as T's consistency in what she had said, her demeanour when making her recent allegations, C's comments about what she had seen of what happened to T, T's distress on learning that C had a memory of what happened to T, the family's attempts to get T to withdraw what she had said, and so on. Whilst potentially very relevant, the difficulty was that many of these factors were not reflected in the judgment, which dealt fairly briefly with the evidential material and did not put together the jigsaw from all the available pieces. It was therefore not possible to say that the judge had in fact relied upon these matters in making her findings and that it was this overall picture that had outweighed the difficulties attending the evidence, such as the lack of any direct evidence from T or C (although perfectly understandably in the latter's case) and T's retraction.

31. Miss Heaton submitted, quite rightly, that it is impossible for a judgment to set out all the nuances arising in the hearing or to deal with every aspect of the evidence that the judge has weighed in the balance in arriving at conclusions. This has been underlined by higher authority than me and I have made every allowance for it. However, it does have to be apparent from the judgment that the judge has taken into account all the central features that are relevant to the decision that he or she is making, both the positive and the negative. What that meant here was, in my view, that the judgment had to show first, which features of the evidence the judge considered to be significant in pointing towards there having been abuse, secondly that these features had been considered critically in the light of the features that undermined that hypothesis or pointed away from it, and thirdly, why it was, having weighed all of this up, the judge found the local authority's case established.

32. It may well be that Judge Davies did go through this process in arriving at her conclusions but unfortunately it is not possible to be confident from the judgment that the evidence was weighed correctly, warts and all. I therefore concluded that the finding made by Judge Davies in relation to T would have to be overturned.

33. It is not necessary for me to go on to deal with the arguments advanced in relation to the finding relating to C and it would be unhelpful to do so when a rehearing is to take place. It is enough to say that the finding in relation to C must be overturned as well because it either was, or may have been, influenced by the judge's finding in relation to T. Similarly, the finding concerning M's knowledge of the abuse of T and her resulting failure to protect the children is dependent on the finding in relation to T and cannot stand. It was also not disputed that the judge's finding that the parents failed to understand the need to protect the children from members of the extended family and that they put pressure on T and B to withdraw their allegations should be set aside.

34. In considering this appeal, I have had very much in mind the pressures that there are on family judges and that there will have been on Judge Davies. She contemplated that T would give evidence and gave directions to ensure that that happened but matters did not turn out as anticipated. In these sorts of circumstances, knowing how damaging delay can be for children and their families, family judges are always acutely aware of the passage of time and that if they do not get on with trying the case in front of them, notwithstanding its evidential deficiencies, there will probably be significant further delay before it can be relisted. Sometimes they are not at all confident that an adjournment will do much to solve the evidential problems. It is not always easy to know what to do for the best in such circumstances. To add to the pressures, there is often little time for the preparation of a judgment which may have to synthesise a formidable amount of material, as was the case here, into a document of manageable proportions which often has to deal with myriad issues.

35. Counsel for the parents did not resist an order that there should be a rehearing of the local authority's case in relation to the findings of fact that have been overturned and nor could they, given the material that exists. Miss Cross was anxious to make it clear that she was not actually resisting the return of the case to Judge Davies but we felt that that would potentially be very difficult for all concerned and that it would be better for a fresh start to be made in front of another judge.

36. It was for all these reasons that I concluded that the appeal would have to be allowed in relation to the findings that I have identified and remitted for a rehearing in this

respect. Counsel were to make the appropriate arrangements with the county court for that to take place.

Davis LJ:

37. I agree.

Arden LJ:

38. I also agree.