Case No: B4/2017/3178

Neutral Citation Number: [2018] EWCA Civ 386

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
HHJ Tolson

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2018

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

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Re DAM (Children)

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- -

Mark Twomey QC and David Boyd (instructed by **Duncan Lewis Solicitors**) for the **Mother**
Alison Ball QC and Nerys Wyn Rees (instructed by **Legal Department**) for the **Local Authority**
Catherine Piskolti (instructed by **Matwala Vyas LLP**) for the **Father of M**
Michael Bailey(instructed by **Myra Pieri & Co Solicitors**) for the **Children's Guardian**

Hearing date: 22 February 2018

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Judgment

Lord Justice Peter Jackson:

Introduction

1. This is an appeal from orders made by HHJ Tolson on 3 November 2017 at the Central Family Court in relation to three children: D (a boy aged 12), A (a girl aged 9) and M (a girl aged 5). The appellant is the children's mother. The other parties, who oppose the appeal, are the local authority, the father of M, and the Children's Guardian.

2. In M's case, the order was a child arrangements order for her to live with her father, together with a supervision order. On the eve of the hearing, the mother decided not to pursue an appeal from that order, and that appeal will be dismissed by consent. The outcome for M however remains of some relevance to the position of D and A.

3. The orders in relation to D and A were care orders on the basis of a plan for them to remain in foster care with fortnightly maternal and sibling contact. The mother maintains her appeal in relation to these children. On her behalf, Mr Mark Twomey QC and Mr David Boyd make fundamental criticisms of the judge's approach. They argue that he was wrong to find that the threshold for intervention had been crossed, that he did not carry out a proper welfare assessment, and that had he done so he could not (or at least should not) have concluded that care orders were appropriate. They seek to make good these arguments by referring to the way in which the judgment is structured. They rely on both limbs of CPR 52.11(3), submitting that the decision was wrong and that it was unjust because of a serious procedural irregularity.

4. On 21 December 2017, Lord Justice Moylan granted permission to appeal, saying: *"I have decided to grant permission to appeal because the structure of the judgment and the absence of any statement from the local Authority (or the Guardian) in response (pursuant to PD52C paragraph 19) mean that I consider that I am regrettably unable at present properly to assess the prospects of the proposed appeal succeeding."*

The decision-making process

5. Judges hearing care cases in the Family Court are engaged in one of the most difficult of all judicial tasks. The decisions are of huge significance for children and their families. The evidence is often difficult and distressing, and the level of emotion high. Achieving good case management and timely decision-making, not just for the children in the individual case but for all the children who are awaiting decisions, is a demanding challenge for the specialist judges who undertake this work.

6. In every care case, the Children Act 1989 and the Human Rights Act 1998 require the court to address a series of questions. What are the facts? Has the threshold been crossed? If so, what order is in the child's best interests? Is that outcome necessary and proportionate to the problem? There is much authority from the appeal courts about each of these questions but at its simplest every valid decision will answer them.

7. It is in the judgment that the judge's reasoning is found. There is no one correct form of judgment. Every judge has his or her own means of expression. Different cases may call for different types of judgment. Some judgments will be given at the time

and others will be reserved. What is necessary in every case is that the judgment should be adequately reasoned: *Re B-S* [2013] EWCA Civ 1146 at [46]. That is a matter of substance, not of structure or form: *Re R* [2014] EWCA Civ 1625 at [18]. The judgment must enable the reader, and above all the family itself, to know that the judge asked and answered the right questions.

8. This is not to say that the structure of a judgment is irrelevant. A judgment that lacks structure or is structured in a confusing way makes the judge's reasoning harder to follow and may raise the possibility that the process by which the decision was reached was faulty. Inevitably, that increases the possibility of an appeal.

9. Against that background I come to the facts of the case, the judgment, and the grounds of appeal.

The facts

10. The mother, now aged 40, had an unsettled childhood. She was adopted as a baby and was herself the subject of care proceedings at the age of 13. She has had six children, the first born when she was 17 and the second the following year. She experienced mental health difficulties and was using drugs. When she was aged 22, she had a third child and at that point all three children were removed from her care. The older two were adopted and the third placed with his father.

11. By 2006, when D was born, the mother's position had somewhat improved. The local authority remained concerned about her mental health and issues of domestic abuse, but intervention seemed to have worked and a residence order was made in her favour. D's father, whose identity is not clear, has had no involvement in his life.

12. In 2008, A was born. Her father is a Brazilian, now living in Brazil. He was represented at the hearing before the judge, but has not been involved in the proceedings since.

13. In 2010, the health visiting service made a referral to social services. They were concerned that A had never been seen by health visitors and that D had not been seen by professionals since late 2008. The children had not been immunised. An initial assessment was closed incomplete because the mother would not participate. The concerns of the health visiting service continued into 2011.

14. In 2012, M was born. At the time, the mother was living with M's father (to whom I will from now on refer as the father), but they separated in 2014, with the father continuing to see M when the mother allowed it.

15. After the birth of M, the mother continued to decline health visiting and assessment but no further action was taken.

16. In January 2014, the mother withdrew D (8) and A (5) from school, and for the next 3½ years they remained out of school, only returning when they moved to foster care.

17. In March 2014, a referral was made by a children's hospital who were worried that the children may have inherited HIV or another a blood-borne condition from the mother. She was unwilling for the children to be tested and again declined to take part in a social services assessment.

18. In July 2016, the education department referred the children's absence from school to social services. Again, the mother refused to accept a home visit or an assessment.

19. Matters came to a head as a result of the mother preventing the father from seeing M (then 4), leading to him issuing an application for a child arrangements order in December 2016. The Cafcass safeguarding report flagged up the problematic history, and the court directed a welfare report under s.7. Again, the mother refused to cooperate with the assessment and she failed to attend court on 9 February 2017 or on 17 April or 27 April. There were also issues arising from an episode in February 2017 when she was alleged to have been drunk.

20. On 17 April 2017, M's case came before Judge Tolson for the first time, having been escalated to him because of the mother's non-attendance. He ordered weekly contact and made a direction for the local authority to report under s.37. From that point on, he maintained judicial continuity across a series of hearings.

21. On 3 May, the mother attended court for the first time, not in relation to the existing proceedings, but in person in an attempt to get an injunction against the father. That matter was transferred to the judge, but withdrawn as lacking evidence in support.

22. The next day, the mother attended these proceedings for the first time, represented. The judge made a child assessment order, but the mother's cooperation was poor. In particular, she refused to allow the children to have blood tests. As a result, the local authority applied on 10 May for care orders in relation to all three children, and on 11 May the judge made an order placing M with her father under an interim supervision order. He also made interim care orders in respect of D and A, as a result of which they were placed in foster care, initially together but later separately. Both children have had subsequent changes of foster placement. In June, the mother applied to discharge the interim care orders and in July that application was refused.

23. Throughout the summer, there was considerable forensic activity, the case being described by the judge as one of the most difficult that he had ever case-managed. Among the features were these:

    (a) Contention about the choice of experts: – The local authority proposed a child psychiatrist (Dr Blincow) and an educational psychologist (Dr Maggs). The mother proposed a different psychiatrist and a different educational psychologist (Dr Rothermel). The judge selected Dr Blincow and, anxious to retain the mother's engagement, Dr Rothermel.

    (b) Dr Rothermel: – She filed an interim report on 9 June. She contacted the local authority to raise child protection concerns about the children's foster mother. She also recommended the immediate return of children to their mother. The judge did not criticise her for the first of these positions, but was clear that she was going far beyond her limited instructions (assessment of the children's educational attainments) in relation to the second. On 12 July, the judge approved the instruction of another educational psychologist, Dr Maggs, but did not remove instructions from Dr Rothermel, who then filed a report in July running to 92 pages.

(c) Statements made by the children: – The foster carers reported statements made by D and by S that they had regularly been hit by the mother, and reported that they showed unusual knowledge of street drugs. The father reported that M showed sexual knowledge beyond her years.

(d) The local authority's changing stance: – In August, the local authority purported to decide to return all three children to the mother. This was opposed by the Guardian and by the father and within a fortnight the local authority reverted to its original position. Then, in September, a social worker provided a negative assessment of the father, only for the report to be countermanded by the service manager.

(e) The mother's refusal to cooperate – The local authority attempted to assess the mother, but she almost immediately withdrew from the process. She also refused to take part in Dr Blincow's assessment, despite a direct request from the judge that she should do so.

(f) Dr Rothermel's approach: – The judge described this as the most bizarre aspect of the matter. Having filed her lengthy report, she was directed on 18 July to provide copies of her notes and correspondence. She said that would take six hours and sought payment for it, having already exceeded her budget. She was then directed to bring the documents to court on the first day of the hearing. They amounted to more than a hundred pages of, in particular, email exchanges with the mother. The other parties made extensive criticisms of Dr Rothermel, and the judge summarised the material as revealing her to be an expert who had strayed far beyond her limited brief, advising the mother on the presentation of her case, gathering evidence for her and, when giving evidence, being an advocate for home education and for the mother. She disposed of the key elements of her instruction in what the judge described as a few bland lines.

24. No complaint of any kind is made about the judge's case management or his conduct of the trial. The case was anything but straightforward to prepare, but in the end the judge gained a deep knowledge of the family situation over a period of six months and a broad range of evidence to assess, some complete, some incomplete, and some suspect. During the course of a hearing stretching across five days, he heard from ten witnesses, including all those named above, and he received detailed submissions.

25. The judge reserved his judgment, delivering it in writing some three weeks later on 3 November.

The factual issues

26. These were set out in the local authority's final threshold document, which alleged that the children had been harmed or been at risk of harm because:

- the mother had failed to meet their health care needs
- the mother had failed to meet their educational needs,
- they had suffered a degree of social isolation

- they had been exposed to adult information and behaviour
- they had insecure patterns of attachment, requiring a degree of corrective parenting
- the mother had failed to engage with professional support and assessment
- the mother had failed to engage with the proceedings brought by the father

27. The mother disputed all these allegations, except for the last, which she said did not amount to harm. She denied that the threshold had been crossed: the court was not concerned with her behaviour, personality or reclusive nature unless it caused significant harm to the children. Her lack of cooperation had no child protection implications. Her home schooling satisfied the law. There had been nothing wrong with her parenting. Nonetheless, she assured the court that if the children were returned, they would be registered at school and with a GP and that she would ensure that they had regular medical check-ups and could be monitored by social services. Their future in foster care would be poor.

The judgment

28. The judgment runs to 14 dense and detailed pages and is divided into 78 paragraphs. I will extract its contents by reference to paragraph numbers, separating out the judge's findings of fact and his conclusions in relation to threshold, welfare and proportionality.

29. The judge made these findings of fact:

- The father made a good impression as witness and as a father. The picture he painted of the mother as a woman behaving in a self-centred way, depending upon her mood of the moment, fitted well with her behaviour during the proceedings. [11]
- D and A have knowledge of street drugs well beyond their years. This derives from their mother, but it is not possible to establish the extent of their exposure to drugs or the context in which their knowledge was gained. [26]
- The children describe an unboundaried lifestyle in the care of their mother, with late or no bedtime, a poor diet, and freedom to do as they pleased, including viewing inappropriate television programmes. This was their experience of daily life. The pattern was consistent and their descriptions are all of a piece with everything that is known of the mother. [27]
- The case management phase has demonstrated the depth of the problem and the difficulty that will lie in effecting change. [48]
- The mother's level of engagement could not be described as partial; in reality, she had engaged only when she felt it to her advantage (with Dr Rothermel) or where compelled (with the court). [48]

- Accepting the evidence of the first foster mother, the children had extensive gaps in their knowledge: an ability only to read books for much younger children, no knowledge of times tables, an inability to tell the time, and S did not know her birthday. [50]

- On the basis of the evidence of Dr Maggs, the difference between D's verbal score (111) and performance score (82) is because he has not been adequately stretched. (The tests performed by Dr Maggs found D to be over a year behind in his basic reading and 2½ years behind in his reading comprehension and his spelling.) [50]

- Accepting the evidence of Dr Maggs, A is a child of above average abilities whose numeracy skills were age-appropriate, but her literary skills were not (a year to 18 months delayed). She has been diagnosed with dyslexia and will urgently need specialised help, or her educational progress will be stunted. [50]

- The mother did not take a decision to educate the children at home and the children were not being educated at home. They were withdrawn from the world around them, and in particular from the sight of any professional agency, except when it suited the mother otherwise. The situation was the consequence of her personality and its transference onto the children and their lives. [50]

- On the basis of the health records, the mother is HIV positive [53]

- The children, having been tested, have not contracted HIV. [55]

- The children, contrary to the mother's case, were not registered with a GP for significant periods between 2010 and 2017. [55]

- A is far more self-confident than she was before coming into foster care. The Guardian describes her as a child transformed. [57]

- Accepting Dr Blincow's evidence about the mother on the basis of his limited assessment:

  "The conclusion I have reached is that how she has parented the children and related to outside agencies in recent years is most likely to be a function of her personality rather than to do with any specific mental health condition or substance/alcohol misuse. Nevertheless, it would be important to continue to pursue her receiving a psychiatric assessment, as treating a chronic depressive disorder effectively could potentially make a significant difference to how she presents." [58]

- Accepting Dr Blincow's evidence about the children:

  "What is clear from the history and children's presentation is that they have been subject to a degree of neglect, affecting their physical well-being (missed appointments undermining their health, diet, etc.), as well as emotionally (lack of boundaries and the children becoming overly self-directed and self-reliant), socially (through the degree of isolation from peers, including lack of interaction with peers over shared interests) and educationally. In addition, there appear to

have been harsh physical reactions of the mother to A in particular and the language used and behaviour shown by M strongly suggest exposure to adult information and behaviour. The signals are not so strong as to suggest direct sexual abuse, based on what has been reported to date." [58]

- Accepting the evidence of Dr Blincow, the children showed abnormal, insecure patterns of attachment. [59]

- The mother has set her face against interventions, psychological, psychiatric or social. That is not likely to change and it cannot be concluded that any professional could work with her in future. [62]

30. As to the threshold:

- The evidence of Dr Rothermel about the children's educational attainments was worthless. [33]

- The children were placed at risk of harm by the refusal of testing. [54]

- The threshold criteria are made out in every respect pleaded by the local authority. The children have suffered and are likely to suffer significant harm in the form of risk of physical harm, emotional harm, educational harm, neglect and exposure to inappropriate sexualised material. The causes are the mother's deep-rooted personality difficulties and a lifestyle she has now adopted over many years and which is highly unlikely to change. [61]

31. As to the welfare assessment:

- The conundrum at the centre of the case was that the mother was obviously unusually 'difficult', but was her care of the children nonetheless good enough? [7]

- Making allowances for the difficulty in assessing the mother when she had not participated in any assessment except Dr Rothermel's, her history increases the need for the local authority to have insight into her lifestyle and parenting. Her lack of engagement and inconsistent parenting are repeated from the proceedings relating to her first three children. [36]

- A needs sensitive and specialised assistance with education which she would not receive in her mother's care. [50]

- An injunction to send the children to school, or placement at home under a care order, would not remove the problem. The case is not about the mother's conscious decision. If she were forced to place the children at school there would be the constant threat of removal and the distinct chance of frequent absence. The best example of the mother's manipulative behaviour is the children themselves: their lives are built around her personality and needs. [51]

- The mother's refusal to allow the children to be tested is a striking example of her behaviour overriding the welfare interests of the children. It is pathological behaviour that is not confined to medical treatment. [54]

- The risk of the children not receiving necessary medical screening or even treatment is unacceptably high. [55]

- There is no realistic option for D other than a full care order and for him to remain in foster care. [63]

- There is only one realistic option for A, which is to remain in foster care. Her father's offer to care for her could not happen within a realistic time, but the local authority will continue to explore that possibility. [65]

- M's father was an impressive witness who had shown great commitment to her. She is apparently happy and well in his care. The welfare balance in favour of this placement is an obvious one. [66]

- The children's wishes were initially in favour of a return to the mother. More recently, A has changed her mind and D has begun to show ambivalence. Decisive weight cannot be attached to these wishes when set against the real factors in play – needs and harm. [74]

- The children's needs are substantial, real things, such as education and healthcare that they will not receive from their mother. It is not a case that turns on vague concepts of emotional need or harm. [75]

32. As to proportionality, at [7] the judge directed himself correctly on the convention rights of the parties, and the different considerations that applied in relation to the applications concerning D and A on the one hand and M on the other. However, he did not return to this issue.

The grounds of appeal

33. Mr Twomey QC and Mr Boyd start their submissions with an analysis of the way the judge structured his judgment as showing that he had fallen into substantive error. They make these undeniable observations:

    (1) The judge stated that the key to the case lay in the threshold criteria. [48]

    (2) Having found the threshold to be made out [61], he immediately eliminated the mother [62] and announced his conclusion, stating that there was no other realistic option but foster care for D and A [63, 65].

    (3) He did not carry out any welfare assessment, by balancing the advantages and disadvantages of placements at home or in foster care. He did not refer to the welfare checklist until [73], long after he had stated his decisions, and in doing so, he stated*, "I check my conclusions against the welfare checklist."*

    (4) When identifying factors in the welfare checklist, he did not mention (g), the powers of the court, such as an interim or final care order with placement at home, or injunctions or undertakings to ensure schooling and medical care, perhaps as conditions to a supervision order under Schedules 2 or 3.

    (5) He made no proportionality crosscheck.

34. As a matter of law, Mr Twomey submits that the use of the welfare checklist as an afterthought is not compliant with s.1(4), which requires the court to have regard to the matters in s.1(3) when it *"is considering"* whether to make a care order. It must, he argues, be considered before a decision is reached, not afterwards. He also draws attention to the encouragement given by Baroness Hale to judges to address each of the factors in the welfare checklist in any difficult or finely balanced case so as to ensure that no particular feature of the case is given more weight than it should properly bear: *Re G (Children)* [2006] UKHL 43 at [40].

35. In an ambitious submission, Mr Twomey argued that the court was not entitled to make a care order separating the children from their mother without being satisfied that "nothing else will do".

36. The grounds of appeal included the contention that the judge was wrong to reject the evidence of Dr Rothermel as worthless in its entirety, and to conclude that the children had not been educated at home. This argument was not developed by Mr Twomey. In my view, the judge's verdict on Dr Rothermel's contribution was fully justified, and his finding of fact about the children's lack of education at home could not be disturbed in this court.

37. Overall, Mr Twomey argues that the facts found did not permit the court to find the threshold crossed, or to make care orders. He further submits that the judge was clearly wrong to say that placement with the mother was not a realistic option. Nor was it a case that could be said to have been decided by the threshold. The court should not have made care orders without a comparative welfare evaluation of the advantages and disadvantages of placement at home. Care orders were disproportionate in a case where there had been no sexual or physical abuse, and where there had been at least some positive observations of the mother and children together. Also, the judge should not have dismissed the mother's assurance that the children would go to school in future.

38. In response, Ms Ball QC and Ms Wyn Rees for the local authority point out that the judge correctly directed himself on the law and that the findings were of serious harm or risk of harm and a situation unlikely to change. They concede that the structure of the judgment could have been bettered. In particular, it would have been better if the judge had not addressed threshold and welfare together, but they argue that the two matters were interwoven. Nothing is missing from the judgment; it just does not have the most accessible structure. That is a matter of style, not substance. It does not make the decision wrong or amount to a serious procedural error.

39. On behalf of the Guardian, Mr Bailey supports the arguments of the local authority. He refers to the judge's opportunity to consider the mother's presentation during the final hearing and her history of non-cooperation, which was not going to change. The judge was entitled to conclude the case on that basis alone. The care orders were proportionate.

40. The respondents agree that the phrase "nothing else will do" is not applicable to care orders where the plan is not one for adoption.

Conclusion

41. Despite the neat way in which the mother's case has been presented, my clear conclusion is that the judge's findings of fact, set out at paragraph 29 above, amply satisfy the threshold for making public law orders and adequately underpin the welfare decision. Taking full account of the matters that appear below, it has not been shown that the judge was wrong to conclude that the mother's parenting falls so far short of what the children need, and that her approach is so ingrained and unchangeable, that care orders were necessary. He had an excellent opportunity to assess the mother's personality and behaviour during the course of the proceedings. Nor is it irrelevant that there is now no challenge to the judge's decision that M, who had grown up for 4½ years in her mother's care, should remain with her father. The home circumstances that justified that decision were shared by the older children.

42. Dealing specifically with the criticisms of the judge's approach, set out in paragraph 33 above:

(1) It was unwise of the judge to characterise the decision as one that turned on the threshold findings. The threshold is concerned only with harm, while the welfare checklist addresses a much wider range of factors. There are cases involving very serious abuse where the threshold definitively determines the outcome, but this was not one of them. Nonetheless, despite the way the judge expressed himself, his decision did not in fact rest on the threshold alone, but on all the welfare considerations mentioned in the judgment.

(2) The term "realistic options", deriving from cases such as *Re B-S* [2013] EWCA Civ 1146, ensures that time is not wasted on outcomes that are merely theoretical, so that attention can be focused on the genuine possibilities. In this case, the realistic options for D and A were placement at home or placement in foster care. The fact that one was discarded in favour of the other made it a rejected option, not an unrealistic one, and the judgment, read as a whole, shows that this is how the judge in fact proceeded.

(3) In the almost 30 years since it was devised, the 'welfare checklist' has stood the test of time and its value to decision-makers, as described in *Re G,* cannot be overstated. It is obligatory to have regard to its contents when considering what order should be made. That obligation will be discharged if it is evident that in substance all the relevant, significant welfare factors have been taken into account. I do not accept that there is an obligation to articulate a checklist analysis *before* announcing a decision. However, to omit any reference to the substance of the checklist, or to relegate the exercise until after the court has stated its conclusion, carries risks of the kind seen in this appeal.

(4) The absence of a point in the judgment where the judge can be seen to have drawn together the welfare factors for comparative evaluation is an undoubted weakness. However, analysis of the judgment as a whole shows that the judge did evaluate all the significant welfare factors, although not in a methodical order that would have made his reasoning easier to appreciate.

(5) I reject the argument that a court considering whether to make a care order has to be satisfied that "nothing else will do". A care order is a serious order that can only be made where the facts justify it, where it is in the child's interests, and where it is necessary and proportionate. But the aphorism "nothing else

will do" (which, as has been said, is not a substitute for a proper welfare evaluation and proportionality check) applies only to cases involving a plan for adoption. That is clear from the case in which it originated, *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, which concerned an application for a care order with a care plan for adoption. It is clear, where it is not explicit, that all the justices were addressing a situation involving the severance of the parental relationship altogether, and not one involving physical separation under a care order, where the parent retains parental responsibility. That is confirmed by the summary given by the President in *Re B-S*:

> *"22. The language used in Re B is striking. Different words and phrases are used, but the message is clear. Orders contemplating non-consensual adoption –* ***care orders with a plan for adoption, placement orders and adoption orders*** *– are "a very extreme thing, a last resort", only to be made where "nothing else will do", where "no other course [is] possible in [the child's] interests", they are "the most extreme option", a "last resort – when all else fails", to be made "only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do": see Re B paras 74, 76, 77, 82, 104, 130, 135, 145, 198, 215."* [my emphasis]

(6) To continue, I do not accept Mr Twomey's submission that the judge did not consider the powers of the court, as required by checklist factor (g). He dealt with that matter squarely at paragraph 51 (see 31 above).

(7) I accept that the judge did not explicitly return to the issue of proportionality, but he clearly had it in mind from his self-direction and in my view his decision is not undermined by that omission.

43. I therefore conclude that the submission that the judge's decision was wrong must fail.

44. I would also reject the submission that the decision was unjust because the form of the judgment amounted to a serious procedural irregularity. The judge gave a substantial judgment that, on close examination, adequately reasons his decision.

45. However, I am also in no doubt that permission to appeal was rightly granted. Had the judgment proceeded simply and methodically through the stages of the decision-making process, this might have been avoided. It should not be necessary for an appeal court to undertake a laborious explanatory exercise of the kind contained in this judgment. That can only affect the parties' confidence in the decision. In the meantime, this family has been left in a state of uncertainty for a further four months and the costs of the appeal to the public purse have, we were told, amounted to some £37,000.

46. That said, I would dismiss this appeal.

Lady Justice Asplin

47. I agree.

Lord Justice Moylan

48. I also agree