Neutral Citation Number: [2023] EWCA Civ 858

Case No: CA-2023-000810

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM EAST LONDON FAMILY COURT
Her Honour Judge Thain
ZE21C00374

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 July 2023

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE BAKER
and
LORD JUSTICE WILLIAM DAVIS

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E (A Child: Care Proceedings Fact Finding)

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Laura Briggs KC, Julia Gasparro and Rachel Francis (instructed by **Miles and Partners**) for the **Appellant**
Stephanie Hine (instructed by **London Borough of Havering**) for the **Respondent Local Authority**
Sam Momtaz KC, Catherine Piskolti and Katie Williams-Howes (instructed by **Milner Elledge**) for the **Respondent Father**
Deborah Seitler and Baldip Singh (instructed by **Gary Jacobs & Co Ltd**) for the **Respondent Child by their Children's Guardian**
The **Intervenor Paternal Grandmother** appeared in person

Hearing date : 6 July 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 19 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE WILLIAM DAVIS:

Introduction

1. On 28 March 2023 HH Judge Thain ("the judge") handed down a judgment following a lengthy fact finding hearing in care proceedings relating to a child ("E"). The judge found that E's mother was the perpetrator of injuries inflicted on E on 30 July 2021. The issue in this appeal is whether the failure of the local authority to disclose a viability assessment and associated documents in relation to the paternal grandmother ("PGM") meant that the judge's finding in relation to the mother was wrong or unjust.

Factual background

2. E was born on 20 June 2021. The mother was then aged 21. She had met E's father in July 2020 when she was 20 and the father was 30. Within 6 weeks of the commencement of the relationship the mother was pregnant with E. The mother had had a very difficult childhood and adolescence. She had been placed in foster care when she was 9 and she remained a looked after child until she reached her 18th birthday. At that point she was moved to independent accommodation and supported by the local authority Leaving and After Care team. The mother had continuing physical and mental health problems. In the later stages of the pregnancy Children's Services of the local authority became involved after the Leaving Care team referred the mother's case to them. That team was concerned about the effect of those problems on the mother's capacity to cope with the imminent arrival of a baby. There were also concerns about the relationship between the mother and the father. The unborn child was placed under a child protection plan. Pursuant to the plan the mother went to live at the home of PGM. The father also lived there. She moved in in June 2021. E was born 4 days later. The mother continued to live at PGM's home with the father and the new baby.

3. On the evening of 29 July 2021 the mother and father went out for about 90 minutes. They left E in the care of PGM and the father's niece. They remained in the living room. E was asleep for most of that time. She did not require a feed or a change. On their return the mother and father put E into her nightclothes. No mark was seen at this point. Everyone in the house went to bed. At around 3.00 a.m. on 30 July 2021 E needed a feed and a change. The father changed E's nappy and prepared a bottle. PGM gave E the bottle after which E was put back in the cot in the bedroom shared by the mother and the father. The mother played no part in those events. E was given another feed at around 6.00 a.m. by the mother. By now the father had left for work. PGM left for work between 8.00 and 8.30 a.m.

4. E's normal routine was that she was changed and got ready for the day at around 9.00 a.m. The mother was responsible for this routine on the morning of 30 July 2021. At around 9.15 a.m. the mother sent a photograph of E to the father's mobile phone. This photograph showed red marks around E's left shoulder. There followed a series of angry text messages sent by the mother to the father. The mother did not inform any professional of the marks on E until shortly after 10.30 a.m. in a conversation with her social worker. Later that afternoon E was taken to hospital. The unanimous medical opinion was that the red marks were bruising and that, in the absence of any explanation, the bruising was non-accidental.

The course of the proceedings

5. By the conclusion of the evidence called at the hearing the issue in relation to the bruising had crystallised. On the basis that it was non-accidental, had it been caused at around 3.00 a.m. by the father or grandmother or was it caused at around 9.00 a.m. by the mother? The judge dealt with the issue at [96] to [130] of her judgment. First, she analysed the medical evidence. She concluded that, in the absence of any plausible explanation involving accident, this evidence demonstrated that the injuries to E were non-accidental. The judge then turned to her consideration of the evidence relating to the 29 and 30 July. She concluded that the 3.00 a.m. feed and E being got ready for the day at around 9.00 a.m. were the two critical periods. Having reviewed the evidence in no little detail, the judge determined that E had sustained her injuries at the hands of her mother when the mother was in a state of high emotional arousal.

6. On the mother's case the credibility of the father and PGM was very much in issue. She denied doing anything which might have caused the injuries. Thus, the injuries must have been caused by the father and/or PGM. Counsel representing the mother cross-examined PGM. One issue which was pursued vigorously concerned events earlier in July 2021. These were said to show that PGM was willing to protect her son even above protecting E's safety. I assume that the father was cross-examined in similar terms though the voluminous papers served for the purposes of the appeal do not include any transcript of that cross-examination. Counsel for the father cross-examined PGM in the course of which counsel, in the context of local authority involvement with the mother and E in June 2021, asked:

> "And is it fair to say that having never had any social service involvement in your life prior to that, whether in respect of yourself or in respect of your own children, this was all pretty much very new to you. Is that fair?" PGM replied "Yes".

7. On 14 April 2023 there was a hearing before the judge. This was approximately two weeks after judgment had been handed down. The hearing had two purposes: consideration of the mother's application for permission to appeal; consideration of assessments and reports to be obtained prior to a final hearing and directions for future hearings. The hearing began at 10.00 a.m. and lasted for 1 hour 25 minutes. The judge did not announce any part of her decision until the end of the hearing. At a point around midway through the hearing, the local authority e-mailed to the judge and to all parties a viability assessment dated 9 October 2021. This assessment (which I shall refer to as VA1) had been carried out by two social workers from the local authority in relation to PGM. She had been assessed with a view to her becoming a special guardian for E. The assessment was negative. The document had not been disclosed prior to 14 April 2023. It is apparent that it was disclosed at the hearing on that date because the judge wished to consider a special guardianship order in relation to PGM. This was in the context of E's aunt and uncle withdrawing themselves from consideration as special guardians. The negative assessment was provided to the judge to allow her to consider whether a further assessment would be appropriate. In the event the judge ordered the local authority to carry out a full special guardianship assessment in relation to PGM.

8. On 18 April 2023 a second version of the negative viability assessment of PGM was included in the bundle which was served by the local authority within the continuing care proceedings. I shall refer to this version as VA2. It was the same as VA1 but

with amendments as requested by PGM. In October 2021 the local authority had sent VA1 to PGM. On 28 October 2021 she requested amendments. Those amendments were incorporated into the original assessment. They were apparent on the face of the document, the amendments being italicised. They related to PGM's childhood and to the father's childhood. The amendments were by way of additions rather than deletions.

9. On 8 May 2023 PGM requested further amendments. This led to a third version of the negative viability assessment to which I shall refer as VA3. Again the proposed amendments were apparent on the face of the document. Most of the amendments were additions to the document albeit that a small number of deletions was requested. At the same time as PGM submitted VA3 to the local authority social workers, she informed the local authority that she was withdrawing from the special guardianship assessment process. On 18 May 2023 PGM e-mailed the local authority's legal department enclosing VA3. The local authority did not disclose VA3 until 27 June 2023 when they sent it by e-mail to the solicitors acting for all parties to the proceedings.

10. VA1 described PGM's childhood as follows, the history having been gleaned from PGM herself:

> "…from the time she was aged about nine until she was around fifteen, she and her (eight) siblings were looked after children by the local authority….as children she remembers that the sibling group were in and out of care of the local authority. They were mainly cared for in children's homes as they were a big sibling group and could not be found foster placement accommodation together….the children were accepting of the situation and "that's how their life was"….their mother did not care about them and put her own needs above those of her children….their home was always dirty and the children had no clothes to wear and went to school in rags….there was never any food at home and it was cold but the children always wanted to be at home together….her mother's behaviours continued and the children were always returned to their parents and then went back into care…."

The amendment requested and incorporated in VA2 was to state that the social care system was not as advanced then as it is now and that PGM and her siblings were popped into care when the mother felt she needed a break and then given back when she requested.

11. VA1 also set out PGM's account of the father's childhood. When the father was six or seven, he had disclosed that his father had sexually assaulted him. PGM had been in a relationship with that man for about 10 years from 1983. She had required him to move out of the family home in 1993. She said that this was because she had seen him touching his daughter inappropriately. E's father then was aged three or four. He continued to see his father. It was in that context that the sexual assaults had occurred. The italicised amendment set out in VA2 as requested by the PGM consisted of a lengthy passage setting out a detailed history of events around the time of the sexual assaults including the fact that the father had received counselling from CAMHS.

12. VA3 did not involve any significant change from what had been in VA2. PGM stated that there had been no social services involvement with her children and that they did not have social workers. She had been supported by staff at the refuge to which she had gone on leaving her first husband around 1980. She also said that the father had not had a social worker at the time of his complaints of sexual assaults.

Other material relating to PGM and the father

13. On 4 February 2022 Dr April Ward, a clinical psychologist instructed by the local authority, prepared a report which assessed the mother and the father. Dr Ward obtained a history from the father. The father told Dr Ward that his father had left the family when he was very young, he thought when he was aged around six. He did not know why his father had left. He had never asked questions about it. He reported "no social services involvement with his family growing up or any adverse childhood events".

14. By a report dated 28 February 2022 an independent social worker named Dionne Hipkiss undertook a parenting assessment of the father. The father said that he had had a 'normal childhood' and that he had never been exposed to domestic abuse or parental aggression. PGM denied that the father had had a poor childhood that impacted on him now. He was if anything "the spoiled one". Ms Hipkiss assessed that the father was not exposed to any poor parenting that would have an impact in relation to parenting E. The father's relationship with his own father was not good but this was due to abandonment.

The grounds of appeal

15. The original grounds of appeal were dated 25 April 2023. They were threefold. First, it was said that the proceedings were unfair and violated the rights of the mother under Article 6 of the European Convention om Human Rights. The submission was that the judge had failed to make proper adjustments for the vulnerabilities of the mother in the course of the hearing. Second, it was argued that the judge had failed to direct herself correctly when making her findings in respect of the injuries and by whom they had been caused. Moreover, the judge had failed to give proper weight to issues relating to the credibility of the father and PGM. Third, it was said that the judge's findings in relation to domestic abuse were not supported by the evidence.

16. On 19 May 2023 an application was made to amend the grounds of appeal to add additional grounds. It was now said that the failure of the local authority to disclose VA1 in advance of the fact finding hearing rendered the hearing unfair. The mother had been denied the opportunity to rely on the matters contained in VA1 in cross-examination of PGM. Also the local authority had failed to challenge the oral evidence of PGM when she agreed with the proposition put to her by counsel for the father. Moreover, the local authority had relied on the mother's childhood history and fragile mental health yet they had not referred to issues in relation to the father's and/or PGM's early life. Finally, it was argued that the judge's decision was based on a material error of fact as to the relevant background factors of the father and PGM.

17. Lady Justice King granted the mother limited permission to appeal. The complaints in relation to the supposed unfairness of the proceedings and the findings of facts in respect of domestic abuse were not arguable as grounds of appeal. Permission was

granted solely in relation to the judge's finding that the mother caused the injuries, that being parasitic upon the failure of the local authority to disclose VA1. Lady Justice King ordered that fresh grounds of appeal should be served. The intention of the order was to restrict the grounds of appeal to the issue on which she had granted permission.

18. Fresh grounds were served on 20 June 2023. They did not reflect the order made by Lady Justice King. Albeit drafted in a different form, they were the same as the amended grounds of 19 May 2023. Only grounds seven and eight were in accordance with the order. Ground seven asserted that the failure to serve VA1 was a serious material irregularity as was the failure to correct the evidence of PGM. Ground eight said that the material irregularity led to mistakes of fact in relation to the judge's assessment of the father and PGM. As a consequence the finding that the injuries to E had been caused by the mother could not stand.

19. At the start of the hearing of the appeal Ms Briggs KC made two applications. First, she invited the court to receive each iteration of the viability assessment of PGM as fresh evidence. VA2 had not been seen by Lady Justice King even though it had been disclosed by the time she considered the question of permission. The same applied to VA3 though that document had only come into existence in May 2023 and it was not disclosed until the end of June 2023. The court decided to receive VA2 and VA3 de bene esse and to reserve the decision as to the admission of the evidence. I shall deal with the point hereafter. Second, she applied to expand the scope of the appeal to permit a challenge by the mother to the judge's findings in respect of domestic abuse. No written application had been made. There were no submissions in writing as to why it would be appropriate for the court to re-open a ground of appeal for which permission had been refused. The court refused this application. There was no conceivable basis on which the ground could be re-opened. The appeal proceeded solely by reference to grounds seven and eight in the fresh grounds.

The legal framework

20. It is common ground that the local authority were under a duty to disclose VA1 and VA2 as documents with the potential to undermine the case of the father and/or to support the case of the mother. No authority is required for that proposition. The failure to disclose those documents was a material irregularity. A material irregularity will provide the basis for this court to interfere with a finding such as the one made by the judge in this case if the irregularity was serious and the irregularity caused the decision of the judge to be an unjust decision: *Tanfern v Cameron-MacDonald* [2000] EWCA Civ 3023 at [33].

21. VA1 and VA2 potentially included material which affected the credibility of the father and PGM. What was reported in the assessments apparently was inconsistent with what the father had said to Dr Ward and what had been said by the father and PGM to Dionne Hipkiss. Had VA1 and VA2 been available at the hearing, the father and PGM would have been cross-examined on these issues. The judge would then have had to consider the extent to which she should have directed herself in accordance with *Lucas.* The principles are set out in *A,B and C* [2021] EWCA Civ 451 at [54] to [57]:

……how and when is a witness's lack of credibility to be factored into the equation of determining an issue of fact? In my view, the answer is provided by the terms of the entire 'Lucas' direction as given, when necessary, in criminal trials.

55. Chapter 16-3, paragraphs 1 and 2 of the December 2020 Crown Court Compendium, provides a useful legal summary:

> *"1. A defendant's lie, whether made before the trial or in the course of evidence or both, may be probative of guilt. A lie is only capable of supporting other evidence against D if the jury are sure that: (1) it is shown, by other evidence in the case, to be a deliberate untruth; i.e. it did not arise from confusion or mistake; (2) it relates to a significant issue; (3) it was not told for a reason advanced by or on behalf of D, or for some other reason arising from the evidence, which does not point to D's guilt.*
> *2. The direction should be tailored to the circumstances of the case, but the jury must be directed that only if they are sure that these criteria are satisfied can D's lie be used as some support for the prosecution case, but that the lie itself cannot prove guilt. ..."*

56. In Re H-C (Children) [2016] EWCA Civ 136 @ [99], McFarlane LJ, as he then was said:

> *"99 In the Family Court in an appropriate case a judge will not infrequently directly refer to the authority of Lucas in giving a judicial self-direction as to the approach to be taken to an apparent lie. Where the "lie" has a prominent or central relevance to the case such a self-direction is plainly sensible and good practice.*
> *100 ... In my view there should be no distinction between the approach taken by the criminal court on the issue of lies to that adopted in the family court. Judges should therefore take care to ensure that they do not rely upon a conclusion that an individual has lied on a material issue as direct proof of guilt."*

57. To be clear, and as I indicate above, a 'Lucas direction' will not be called for in every family case in which a party or intervenor is challenging the factual case alleged against them and, in my opinion, should not be included in the judgment as a tick box exercise. If the issue for the tribunal to decide is whether to believe X or Y on the central issue/s, and the evidence is clearly one way then there will be no need to address credibility in general. However, if the tribunal looks to find support for their view, it must caution itself against treating what it finds to be an established propensity to dishonesty as determinative of guilt for the reasons the Recorder gave in [40]. Conversely, an established propensity to honesty will not always equate with the witness's reliability of recall on a particular issue.

How those principles would have operated overall had the father and PGM been cross-examined is not possible to say with any certainty. However, any lie cannot be evidence of guilt in and of itself. It can only support other evidence of guilt. In addition, the lie must relate to a significant issue i.e. an issue of significance in the fact finding exercise.

The submissions on the appeal

22. Ms Briggs submitted that the serious material irregularity marred the fact finding hearing. It meant that the judge's finding that the mother was the perpetrator was wrong or unjust. The mother was deprived of the opportunity to advance her case of dishonesty on the part of the father and PGM. Further, she was deprived of ammunition to support her case that the father and PGM colluded to cover up what had happened to E. The result was that the mother was not able to show how the lies told by the father and PGM were probative of guilt in respect of the infliction of injury to E or were probative of collusion.

23. On behalf of the local authority it was accepted that VA1 should have been disclosed. The existence of the assessment was known to all parties because reference was made to it in directions given prior to the fact finding hearing conducted by the judge but it was acknowledged that this did not cure the irregularity. Nonetheless, the irregularity did not materially affect the judge's decision. PGM was cross-examined at length about collateral issues which went to her credibility. VA1 would have added to the cross-examination. It would not have changed the dynamic of the case. The judge's decision would have been the same. On behalf of the guardian, it was argued that the principal point on which there was divergence between VA1 and what was disclosed to Dr Ward and Dionne Hipkiss was in relation to the father's childhood. As to that, it was said that PGM had shown honesty in relation to past events concerning the father when providing information for the special guardianship assessment. The reality was that, in common with many cases of familial sexual abuse, there had been an agreement within this family that this would not be talked about once the proceedings in the 1990s had concluded. If that were right, a *Lucas* direction would have led the judge to disregard dishonesty in respect of familial abuse which had occurred some 25 years earlier.

Discussion

24. A proper assessment of whether the failure to disclose VA1 and VA2 led to injustice requires close analysis of the judgment handed down on 28 March 2023. That analysis is assisted by the conspicuous clarity of the judgment.

25. After a preliminary recitation of the relevant legal principles, the judge set out her assessment of the witnesses. She said that she was troubled by some aspects of the evidence given by each parent. She acknowledged the difficult position of the mother who must have felt that she was battling alone against the paternal side of E's family. The judge also noted the mother's issues with mental and physical health including emotional dysregulation. On the other hand the judge was struck by the mother's completely negative attitude towards the paternal side of E's family. She also was troubled by the mother's reluctance to accept aggressive and abusive behaviour on her part to others even when there was undeniable evidence of such behaviour. As for the father, the judge found him to be a calmer and more measured witness than the mother. She did note that there was a question mark in respect of his honesty. He had resumed his relationship with the mother for some six months since E was injured yet had deliberately concealed this from family, professionals and the court.

26. In relation to PGM, the judge found her evidence clear and considered. She had a good recall of dates and events by reference to her diary. The judge did observe that she had to consider whether any part of PGM's evidence had been influenced by loyalty to her son.

27. The judge then embarked on a review of the background evidence. She reviewed in some detail two specific allegations of abuse made by the mother against the father. The first related to the day E was born. The father took the mother to the hospital in his van. Once it was apparent the mother was in labour but the birth was not imminent, the father left the hospital to collect PGM. The mother alleged that she had been left locked in the van for two hours in the hospital car park before the father let her out, that she had been prevented from holding E for several hours after her birth and that in the hospital the father had struck her with such force to the head as to leave a permanent dent. In the light of the circumstances which must have obtained at the time of the alleged incidents, the judge rejected the mother's account. She found as a fact that the allegation that the father had struck the mother leaving a permanent dent was fabricated by her in an attempt to damage his position in the proceedings.

28. The second episode concerned an incident which occurred about two weeks later. After analysing the evidence, the judge concluded that the mother was seeking to present as damaging and negative picture of the father as possible. She declined to make any finding against the father. However, she noted that neither parent was concentrating on the needs of E during the incident.

29. I already have noted the fact that the father had resumed his relationship with the mother. The judge described the father's lack of candour in this respect as "extremely worrying" i.e. his deceit of PGM and of professionals. Equally, she was satisfied that the father was telling the truth about the resumption of the relationship. His admission was damaging to any parenting assessment. However, the mother also was untruthful since she denied that the relationship had resumed.

30. The judge said this at [89] of her judgment:

> "In my overall analysis of the parent's relationship, I have held in mind relevant background factors such as the parties very different upbringing – the father having had the benefit of a stable childhood surrounded by a robust and supportive family network with enduring relationships with immediate and wider family. The mother's contrasting childhood experiences have left her vulnerable, isolated, lacking in role models and with poor experiences in her upbringing".

What the judge said in this passage did not relate to her findings about the specific incidents where she concluded that the mother was untruthful and, in one instance, lied in an attempt to obtain an advantage in the proceedings. Rather, this passage was a preamble to a general conclusion about the state of the relationship between the mother and the father and about the existence or otherwise of abusive behaviour by the father towards the mother. This is an issue on which permission to appeal has been refused.

31. At [96] to [108] of the judgment, the judge analysed the medical evidence. There is no need for me to rehearse that analysis. The conclusion was that E's injuries were non-accidental. It is not suggested that this conclusion was wrong.

32. At [112] to [130] the judge set out in close detail the events in the 12 hours or so prior to 9.15 a.m. on 30 July 2021 when the mother sent a photograph of marks on E and what happened over the course of that day thereafter up to around 6.00 p.m. The evidence came from the text messages sent and received by the mother and from

social workers who became involved during the day. In particular, a text message was sent at 9.04 a.m. by PGM to the mother which said "…if you want to see your friends I would prefer it if you went to them I don't want people in when I am at work, can you get on to the council about we're your going to live thanks".

33. The judge moved on to explain her findings of fact in relation to the events of 30 July 2021. She decided that there was no evidence that any injury was caused to E during the previous evening when the mother and father were out. Neither observed any injuries on her when they returned. In relation to the feed at around 3.00 a.m. the judge said that she had considered the possibility that either the father or PGM injured E when tired and frustrated with the other covering up out of a sense of loyalty. She found that this scenario was inconsistent with the wider and uncontested evidence in the case about the generally careful handing of E by both the father and PGM. There was no evidence that E was fractious or difficult to handle at the time of the feed. No cries were heard, the mother being in close proximity to E. The judge said that the evidence did not suggest that "the strength of the relationship between the father and PGM was such that either could be confident the other would lie to prioritise them over the welfare of E". The judge also noted that the mother had embellished her evidence late in the day saying that she was in the bathroom with the taps running to bolster the suggestion that the injuries occurred at this time when she could not hear.

34. Passing over the feed at 6.00 a.m. the judge moved to the events just after 9.00 a.m. When the mother was changing E and getting her ready for the day, she received the text message from PGM. The judge was satisfied that the mother saw the message as soon as it was sent. She further concluded that the content of the message caused the mother to have an emotional reaction of the kind to which she was prone. The most likely scenario was that the mother had an extreme and uncontrolled emotional reaction. In a state of high emotional arousal she inflicted the injuries on E. The nature of the messages sent by the mother after this point confirmed her emotional distress. The judge relied on the chronology of events thereafter. The mother said that she had reported the injuries in an initial conversation with social workers. This was contradicted by the evidence of the social workers. The judge preferred the social workers' evidence and determined that the mother had deliberately omitted to mention the bruising to the social workers. At a later point on that day the mother made a conscious decision to leave E with PGM. The judge found that she did so in the knowledge that E would be safe with PGM. Thus, the mother knew that PGM had not caused any injuries. Taking all those matters into account the judge was satisfied that the mother caused the injuries as the result of a momentary loss of control.

35. It is apparent from this analysis of the judgment that the judge derived only limited assistance from her overall assessment of the witnesses when reaching significant findings of fact. In relation to the incidents prior to 30 July 2021 the judge made findings adverse to the mother solely by reference to her analysis of the circumstances surrounding those incidents. The judge did consider the background of the mother and the father when considering the nature of their relationship and whether it was abusive. That is not an issue with which this appeal is concerned. The findings relating to 3.00 a.m. and 9.00 a.m. on 30 July 2021 were founded on the evidence and circumstances pertaining to each of those times. General conclusions about the background of any party, whether mother, father or PGM, played no significant part

in the findings. The only factor that might suggest otherwise was the judge's remark about the strength of the relationship between the father and PGM.

36. If the local authority had disclosed VA1 and VA2, counsel for the mother would have been in a position to cross-examine the father about what he had told Dr Ward and Dionne Hipkiss about his childhood. I shall assume for the purposes of the appeal that the father would have accepted that he had lied to those professionals. I do not consider that those lies would have been regarded as relating to a significant issue. They had nothing to do with the events of 2021. They concerned what happened to him as a child. It is the case that one risk factor associated with abusive injury within the NSPCC Common Assessment Framework is "history of physical or sexual abuse (as a child)". The evidence is that the father was sexually abused. Whether that led to an enhanced risk of physical abuse by the father of his child is not clear on the evidence. Whatever the position I am satisfied that the judge would have concluded that the existence of a risk factor would not have elevated the significance of the lie. The mother's submission on appeal is that this lie would have been probative of guilt in relation to causing E's injuries. I consider that submission to be untenable. The principles in *Lucas* come from the criminal process. Were the father to have been charged with a criminal offence relating to the injuries sustained by E, there is no prospect that his lies about his relationship with his father and what occurred in the mid-1990s would have been considered as having probative value in relation to the criminal offence. The same must apply in the context of the proceedings with which this appeal is concerned.

37. What could be argued is that PGM also concealed from Dionne Hipkiss that the father had been sexually abused as a child. What she was reported as saying was not unambiguous. She said that the father did not have a poor childhood "which impacts on him now". For the purpose of this argument I shall begin with the assumption that the judge would have concluded that this was a lie. The issue then is twofold. First, to what significant issue was the lie relevant? Second, does it provide the mother with support for her case that there has been collusion between PGM and the father? In relation to the evidence of PGM the lie was relevant to no significant issue. It is just arguable that the lie demonstrated a willingness to lie to assist the father i.e. to keep secret that which had happened to him over twenty years ago. That is a far cry from PGM being willing to lie to protect the father in relation to injuries to E. Therefore, even if PGM did lie to Dionne Hipkiss, I have no doubt that this lie would not have assumed any significance in the fact finding exercise being conducted by the judge. In fact, there is a prospect that what PGM said was not a lie at all. *Lucas* requires a deliberate untruth before it can be of any probative force. On the face of it PGM was quite entitled to say that what had happened to the father as a child had no impact on him now.

38. The final matter relied on by the mother is the answer to a single question put to PGM by counsel for the father in the course of her evidence. The question was more of a comment than a genuine question. It was directed at the fact that there was significant social services involvement with the family immediately prior to E's birth which unexpectedly led to E and the mother coming to live with PGM. The conclusion of the comment was that this kind of involvement was very new to PGM with which she agreed. The precise extent of social services involvement with PGM and/or with her children when PGM was a girl or at the time of the sexual abuse of the father is not

clear. At worst, PGM's answer was misleading. Given the context in which the question was put, I do not consider that what PGM said could have served to undermine her credibility to anything other than a wholly marginal degree. The fact that counsel for the local authority did not intervene was due to the fact that counsel was unaware of the content of VA1 or VA2. Even if counsel had been aware so far, they might have been excused from failing to pick up the significance of PGM's answer. The fact that this evidence was given and that it went uncorrected was of no significance to the findings of the judge in relation to the injuries sustained by E.

Conclusion

39. It follows from all of the above that the material irregularity which occurred was of no practical effect. Had VA1 and VA2 been available to those representing the mother, they may have had additional material on which to cross-examine. The effect of such cross-examination even put at its highest would have been negligible. It certainly would not have affected the judge's finding about the identity of the perpetrator of the injuries to E.

40. In light of the conclusions I have reached, I am content that we should admit VA2 as evidence. It was more or less contemporaneous with VA1. But it adds nothing to VA1. For VA3 to be admitted, it would be necessary for it to pass the test in *Ladd v Marshall* [1954] 1 WLR 1489 i.e. that it probably would have had an important influence on the result of the case. It will be apparent from everything I have said thus far that VA3 would have had little or no influence on the outcome and I would therefore not admit it.

41. For all of these reasons I would dismiss this appeal.

LORD JUSTICE BAKER

42. I agree.

LORD JUSTICE PETER JACKSON

43. I also agree.