Neutral Citation Number: [2022] EWFC 61

Case No: FA-2022-000035

IN THE FAMILY DIVISION
ON APPEAL FROM HHJ TOLSON QC SITTING IN THE FAMILY COURT AT PETERBOROUGH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 June 2022

Before:

MR JUSTICE POOLE

- -

Between:

Peterborough City Council	**Appellant**
- and -	
K, L, M, N and P	**First to Fifth Respondents**
A, B, C, and D by their Children's Guardian	**Sixth to Ninth Respondents**

- -

Sarah Duxbury, (instructed by the Appellant's Legal Department) for the **Appellant**
The First and Second Respondents in person
The Third to Fifth Respondents not appearing
Ian Martignetti (instructed by the Children's Guardian) for **the Sixth to Ninth Respondents**

- -

Hearing date: 18 June 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

Mr Justice Poole:

1. This is an appeal against a third party costs order made against Peterborough City Council (the Appellant Local Authority) in ongoing private law proceedings brought by K and L as Applicants, to which the Respondent mother (M), and Respondent fathers (N and P) of the four children concerned were parties, whereby the Judge ordered the Local Authority to pay the "assessed costs of the Applicants to date and the prospective costs of the Applicants and of the Respondent mother, to be assessed at the conclusion of the private law proceedings." The K and L had applied for such an order and M had supported the application. The Judge had given an opportunity to the Appellant Local Authority to make representations in opposition. The Judge heard submissions on 22 December 2021 before handing down a reserved written judgment on 14 January 2022 and then making his order on 28 January 2022.

2. K and L are now the First and Second Respondent to this appeal but for ease I shall refer to them as the Applicants. In this judgment I set out a chronology of events and of the proceedings in the Family Court, the reasons the Judge gave for his costs order, the relevant law, the parties' submissions on appeal, and my decision. The Applicants opposed the appeal and appeared in person. The Children's Guardian was represented at the appeal hearing but took a neutral position. Otherwise there was no appearance at the appeal by or on behalf of the other Respondents notwithstanding that on granting permission to appeal, Morgan J gave them an opportunity to make representations.

3. For the reasons set out below I allow the appeal and set aside the costs order.

Chronology

4. The family concerned in this case comprises the mother, M; her adult daughter and her partner, K and L; the mother's four other children A, B, C, and D, aged between 6 and 14 when the private law proceedings were issued; N, the father of K and the three older children; and JB the father of the youngest child, D. The anonymity of the adults in this case is maintained to preserve the anonymity and protect the welfare of the children.

5. The four children were living with the mother when on 26 February 2021 the eldest child, A, voluntarily moved out and went to live with K and L who alerted the Local Authority to concerns that her mother, M, was abusing alcohol and neglecting the children. In April 2021, the Local Authority decided to treat the children as children in need.

6. On or around 26 May 2021 there was a violent altercation at the mother's home. On 28 May 2021, the three youngest children left M's care. There is a factual dispute as to the circumstances, to which I shall return later in this judgment. On 16 June 2021 there was an initial child protection conference and the three younger children were placed on the child protection plan. On 30 June 2021, the child protection plan was varied to reflect the fact that the children were in the care of K and L, with the consent of the parents at that time.

7. On 2 July 2021, N and K applied for a Child Arrangements Order for the children to live with K. The application states that the three youngest children have been with her

since 28 May 2021 and were at risk of serious harm due to neglect in the care of the mother, M.

8. On 19 July 2021, the Local Authority sent a Public Law Outline (PLO) letter to the children's parents. This is effectively a pre-action letter. It does not commit the Local Authority to issue proceedings but indicates that they are in contemplation. On 30 July 2021, an initial PLO meeting took place comprising, amongst others, M, N, K and L. The Local Authority say that they understood that M, N, K and L had received legal aid for the PLO, but K and L dispute this.

9. On 12 August 2021 the first court hearing of the private law application for a child arrangements order was held before HHJ Tolson QC. He deemed that the applicants were in fact K and L, not K and N, seeking a lives with order in respect of the four children and that the children were currently living with them with the approval of the Local Authority. He made an interim Child Arrangements Order that the children live with K and L. He made an order under s.7 of the Children Act 1989 (CA 1989) requiring the Local Authority to report by 8 October 2021 on future child arrangements, wider welfare needs, and the outcome of the PLO process.

10. I have a transcript of the hearing on 12 August 2021 and note the following exchange between the judge and the team leader social worker who appeared on behalf of the Local Authority,

> JUDGE TOLSON: Thank you. Right, now, Ms Howell, are we likely to end up in public law proceedings or is this a case in which the private law proceedings are more likely to settle the children's future?
>
> MS HOWELL: It's difficult to say. I think that private law proceedings are more likely to settle the children's future as currently the children are with K and her partner and there are no concerns about the children in K and her partner's care.

11. Although there was some lack of clarity as to whether the youngest three children had moved to the Applicants' home directly on 28 May 2021 or via N's home, it was known that they had been living with the Applicants for about two and a half months by the date of the first hearing. The Local Authority had not made any court applications in that time. No concerns about the children's welfare in the care of the Applicants were raised before the judge.

12. The next court hearing was before HHJ Tolson QC on 14 October 2021. The oldest child had by then been placed on a child protection plan on 14 September 2021. The Local Authority had decided not to issue public law proceedings and had so informed the court. The court order recites that at the previous hearing the court "had expected public law proceedings to follow". Under s.37 of the CA 1989 the Judge directed the Local Authority to consider whether they should apply for a care or supervision order or take any other action in respect of the children. As empowered to do so by s.38 of the CA 1989 the judge made an interim supervision order.

13. On 17 November 2021, at a further hearing before HHJ Tolson QC at which the Applicants were now legally represented, the court noted that the Local Authority's response to its s.37 direction had been insufficient. The court "expressed surprise" that the local authority had not issued public law proceedings and recited that the local authority "needed to be involved at least to the level of a supervision order." The mother was now seeking return of the children to her care in the ongoing private law proceedings. The Applicants' solicitor indicated that a costs order would be sought against the Local Authority. A further s.37 direction and a further interim supervision order were made. A short judgement was given and it was ordered that a transcript be obtained and sent to the Head of Legal Services and the Director of Children's Services at the Local Authority.

14. A further hearing before HHJ Tolson QC was held on 14 December 2021. The Local Authority repeated its settled position in its formal response to the further s. 37 direction – it would not be commencing public law proceedings. It gave reasons and set out what further steps it would be taken in relation to the children. At the hearing, the judge ordered that the Local Authority should show cause at a subsequent hearing on 22 December 2021 why they should not pay the prospective and retrospective costs of the Applicants, the prospective costs of the Respondent mother, and the prospective costs of N. An application for those costs orders had by then been made by the Applicants in the private law proceedings.

15. At the hearing on 22 December 2021 HHJ Tolson QC had the benefit of position statements and heard representations on costs from the solicitor for the Applicants, from the Local Authority and from the solicitor for the Children's Guardian. After handing down his written judgment on 14 January 2022 he made the orders for costs referred to at the opening of this judgment. Past costs were not assessed but were to be assessed, alongside all the future costs of the proceedings, at the conclusion of the proceedings. The basis of assessment (standard or indemnity) was not specified.

The Judgment

16. It is pertinent to note that when the decision under appeal was made, the court had received no evidence from witnesses in the proceedings other than a short statement from a social worker, had heard not evidence, and had made no findings. The private law proceedings were far from concluded and it was not known how protracted they would be, whether expert evidence would be required, or how many further hearings would be needed.

17. In his judgment, the judge refers to r.46.2 of the Civil Procedure Rules (applied by the Family Procedure Rules r.28.2) and s.51(3) of the Senior Courts Act 1981 but no other rules and no authorities. He was not referred by Counsel to the full range of authorities to which I have been referred, but the position statements did refer to the decisions of *Re T*, and the judgments of Cobb J, Lieven J and Keehan J in *HB v PB*, *A Local Authority v A Mother* and *Re A, B, C, D, E and F* respectively (all below). He was also referred by the parties to *Re M (Intractable Contact Dispute: Interim Care Order)* [2003] EWHC 1024 (Fam) in which Wall J stated, "I cannot require the Local authority to take proceedings".

18. Section 51(1) and (3) of the Senior Courts Act 1981 provide that:

> (1) Subject to the provisions of this or any other enactment and to rules of the court, the costs of an incidental to all proceedings in
>
> (a) …
>
> (ba) the family court;
>
> ,…
>
> Shall be in the discretion of the court
>
> …
>
> (3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

19. Rule 46.2 of the CPR provides that:

> (1) Where the court is considering whether to exercise its power under section 51 of the Senior Courts Act 1981 (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must –
>
> (a) be added as a party to the proceedings for the purposes of costs only; and
>
> (b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.
>
> (2) This rule does not apply –
>
> (a) where the court is considering whether to –
>
> …
>
> (ii) make a wasted costs order (as defined in rule 46.8) …

20. The judge made plain his view that the Local Authority should have issued public law proceedings. He noted his view of the financial consequences of not doing so, namely that, in this case, the Applicants and the Respondent mother did not qualify for public funding and so had either to pay for representation or go without representation in contested proceedings. He noted that the "children's guardian (represented of course)

is supportive of the position of the applicants: "surely there must be a way to give them some financial support.""

21. In setting out the history of events in his judgment, the judge noted a factual dispute about events on 28 May 2021 when the three youngest children left their mother's care:

> "The older sister and her partner allege that the then social worker expressly asked them to collect the children from school. The local authority's case is that it wished the father of the three older children to exercise his parental responsibility and take the children to his home for the weekend … I have not tried this difference in view, but in my view it does not matter. Whilst the circumstances in which the children came to move to the care of their older sister are in dispute in terms of the local authority's role, there is no doubt but that the local authority was involved, wished the children to move from the care of their mother and would, following events on 28 May, not have permitted the children to remain in the care of their mother without themselves bringing public law proceedings." [5]

22. At paragraph [7] of his judgment the judge recalls the hearing on 12 August 2021,

> "The team manager from the local authority attended and impressed upon me that the public law outline process was being pursued and that care proceedings were highly likely to follow."

23. The judge said that he applied the following principles to the application for costs against the Local authority (a non-party to the proceedings):

> "a) Orders that non-parties should pay the costs of litigation are permissible under section 51(3) of the Senior Courts Act 1981.
>
> b) Such orders are rare and only made in exceptional circumstances.
>
> c) The key consideration is the conduct of the non-party against whom the order is sought.
>
> d) It is not simply a question as to whether the conduct of the non-party can be criticised. A further key question is the effect of that conduct in terms of the impact on legal costs on the parties to the case." [12]

24. At [13] the judge said,

> "In my judgment the local authority, holding the concerns it did and having been instrumental in the 3 younger children moving and remaining away from their mother should have instituted public law proceedings in late May or early June immediately after what it alleges was the violent incident at the mother's home. It was instrumental in then securing the removal of the children from the mother's care. It knew the mother opposed this move. Whether that removal was to the care of the father or the older sister makes no difference. Whether the local authority believed the removal would be temporary or not makes no difference. This is because the local authority was aware within a short period that the children were with the older sister and it is clear that it wished that position to continue in the long-term and not just temporarily. The local authority at that stage believed the threshold criteria were met, and that it would highly probably be instituting care proceedings. It so informed the court."

25. The judge concluded at [16] that the Applicants had been "placed in this position because the local authority no longer wished to see the children in the care of the mother." Of the Respondent mother's position, he said at [17],

> "She has lost the care of her children as a result of local authority – State – intervention. The State must ensure a fair trial for her. She has not obtained and apparently does not qualify for legal aid. I do not see how in current circumstances any trial could be fair to her unless she has an opportunity to be represented – as the system within care proceedings would provide for her."

26. The judge held,

> "In the circumstances, it is my judgment that all relevant considerations point in the same direction. The local authority must pay for the representation of the applicants and the mother." [18]

Grounds of Appeal and Submissions

27. In her well-constructed submissions for the Local Authority, Ms Duxbury, who did not appear below, put forward six grounds of appeal. In short, they were that the judge:

    i) Wrongly based his evaluation of the Local Authority's conduct on a mistaken recollection that at the hearing on 12 August 2021 they had impressed upon him that public law proceedings were "highly likely" to follow.

ii) Failed to consider any evidence in relation to a factual dispute as to the circumstances of the children becoming cared for by the Applicants and yet took those circumstances into account when assessing the Local Authority's conduct.

iii) Wrongly concluded that the conduct of the Local Authority justified the making of the costs order in the absence of any evidence that they had acted improperly, unreasonably or negligently.

iv) Failed to consider why it was just in all the circumstances to make the costs order.

v) Wrongly made a costs order (past and future) without information as to the extent of the costs involved.

vi) Wrongly used the costs order to ensure that the parties' litigation was funded "through the back door".

28. The Applicants acted in person in the appeal. They provided the court with a well written response supporting the costs order under appeal. They submitted that the Local Authority's conduct had been reprehensible in bringing about the removal of the children from M to them and then in not issuing public law proceedings. They had been advised by a social worker to collect the children from their schools on 28th May 2021 and take them to their home and had later been advised by a social worker to issue private law proceedings. They had then effectively been left bearing the costs of looking after the children, including moving to a larger home, and of contested private law proceedings. They told the court that the costs of the "complex and lengthy private law proceedings" were "exceptionally very high." The outcome was financially damaging to them and therefore detrimental to the children they were caring for. It had been brought about by pressure from the Local Authority which constituted unreasonable conduct of the kind that the courts had recognised could justify a costs order in proceedings concerning the welfare of children.

29. For the Children's Guardian, Mr Martignetti, who again did not appear in the court below, did not dispute that the Children's Guardian had supported the application for a non-party costs order at the December hearing before the judge. However, on appeal, the Children's Guardian adopted a neutral position.

The Law

Appeals

30. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for serious procedural irregularity.

31. The court may conclude a decision is wrong or procedurally unjust due to:

i) an error of law;

ii) a conclusion on the facts which was not open to the judge on the evidence: *Royal Bank of Scotland v Carlyle* [2015] UKSC 13, 2015 SC (UKSC) 93.

iii) failure to give due weight to a matter of particular relevance, or undue weight given to some irrelevant matter: *B-v-B (Residence Orders: Reasons for Decision)* [1997] 2 FLR 602.

iv) procedural irregularity rendering the decision unjust: *Re S-W (Care Proceedings: Case Management Hearing)* [2015] 2 FLR 136.

v) exercise of a discretion in way which was outside the parameters within which reasonable disagreement is possible: *G v G (Minors: Custody Appeal)* [1985] FLR 894.

32. The function of the appellate court is to determine whether the judgment below is sustainable. In *Re F (Children)* [2016] EWCA Civ 546 Munby P summarised the approach as follows:

> "Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law.
>
> The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):
>
> > "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

33. The appellate court should be slow to interfere with findings of fact - *Fage UK Ltd & Anor v Chobani UK Ltd & Anor* [2014] EWCA Civ 5.

Costs Orders Against Non-Parties - Generally

34. Cobb J reviewed the principles applicable on an application for a non-party costs order against a Local Authority in *HB v PB, OB and LB of Croydon* [2013] EWHC 1956 (Fam). Cobb J noted the wide discretion afforded by s. 51(3) of the Senior Courts Act 1981 and that Rule 28.1 of the FPR 2010 imports aspects of the CPR to costs in family proceedings. Those include CPR r. 46.2 (above). He then noted the paucity of authority on how the court should exercise its wide discretion in family cases to make orders against non-parties (other than lawyers) but found assistance from the authorities of *Symphony Group Plc v Hodgson* [1993] 4 All ER 143, CA and *Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232.

35. In *Symphony Group Plc* Balcombe LJ, with whom Staughton and Waite LJJ agreed, set out guidance on non-party costs orders. The guidance at pages 192H -194D included,

> "(1) An order for the payment of costs by a non-party will always be exceptional … The judge should treat any application for such an order with considerable caution.
>
> …
>
> (4) An application for payment of costs by a non-party should normally be determined by the trial judge.
>
> (5) The fact that the trial judge may in the course of his judgment in the action have expressed views on the conduct of the non-party constitutes neither bias nor the appearance of bias.
>
> …
>
> (9) The Judge should be alert to the possibility that an application against a non-party is motivated by resentment of an inability to obtain an effective order for costs against a legally aided litigant…"

36. In *Globe Equities Ltd*, Morritt LJ warned against elevating a requirement that the circumstances are "exceptional" into a precondition to the exercise of the power,

> "Ultimately the test is whether in all the circumstances it is just to exercise the power conferred by subsections (1) and (4) of the Supreme Court Act 1981 [as it was then called] to make a non-party pay the costs of the proceedings. Plainly in the ordinary run of cases where the party is pursuing or defending the claim for his own benefit through solicitors acting as such there is not usually any justification for making someone else pay the costs. But there will be cases where either or both these two features are absent. In such cases it will be a matter for judgment and the exercise by the judge of his discretion to decide whether the circumstance relied on are such as to make it just to order some

> non-party to pay the costs. Thus, as it seems to me, the exceptional case is one to be recognised by comparison with the ordinary run of cases not defined in advance by reference to any further characteristic."

37. *Symphony Group Plc v Hodgson* (above) was considered in the more recent case of *Deutsche Bank AG v Sebastian Holdings Inc & Anor* [2016] EWCA Civ 23 when Moore-Bick LJ said at [17 and 18]

> "A number of points emerge from that case. First, we think it is clear that all three members of the court assumed that the procedure to be adopted for deciding whether a third party should bear all or part of the costs of the litigation should be summary in nature, in the sense that the judge would make an order based on the evidence given and the facts found at trial, together with his assessment of the behaviour of those involved in the proceedings. Second, in order to justify the adoption of a summary procedure the third party must have had a close connection of some kind with the proceedings. Staughton and Balcombe L.JJ. both emphasised that the court should not make an order for costs against a third party unless it is just and fair that he should be bound by the evidence given at trial and the judge's findings of fact. Whether that is so in any given case will depend on the nature and degree of his connection with the proceedings.
>
> "Third, we do not think that the court was seeking to do more than provide an indication of the kind of factors that judges should take into account, as appropriate in the particular cases before them, when asked to make an order of this kind. Factors such as failing to join the person concerned as a party to the proceedings or failing to warn him that an application for costs may be made against him may in some cases weigh heavily against adopting a summary procedure, but each case has to be considered on its own merits in order to ascertain whether the third party will suffer an injustice if he is held bound by the evidence and findings at the trial. Decisions made on applications of this kind since Symphony v Hodgson, to many of which we were referred, only serve to illustrate the wide range of circumstances in which orders for costs have been sought and made against third parties."

38. I also have regard to *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and ors (No. 2)(New Zealand)* [2004] UKPC 39 in which the Board assumed that the non party had to have caused the costs to be incurred - see [18] to [20].

Non-Party Costs Orders in Family Cases Concerning the Welfare of Children

39. The appellate authorities already reviewed concerned civil claims of a commercial nature, not private or public proceedings concerning the welfare of children. Ms Duxbury has drawn my attention to three such family cases.

40. In *HB v PB, OB and LB of Croydon* (above) Cobb J made a non-party costs order against the Local Authority having found that it had been guilty of failings of a "systematic nature" in relation to a s. 37 report which had resulted in the abandonment of a three day fact-finding hearing and consequent delay, with financial and emotional cost to the parties. He made the order after the conclusion of the re-listed finding of fact hearing. The costs awarded were not related the decision made by the Local Authority but to inadequacies in the preparation and content of the report that caused wasted costs incurred by the parties. The Local Authority had been made a party to the proceedings on the issue of costs only, as is required by CPR 46.2(1)(a).

41. More recently, in *A Local Authority v Mother & Ors* [2021] EWHC 2794 (Fam), Lieven J considered an application for costs against intermediaries who had been involved in public law proceedings. The application had been made by the Local Authority, parents and Children's Guardian. The intermediaries, whose conduct was alleged to have resulted in the abandonment of a hearing with consequential costs implications for the parties, were joined to the proceedings for the purpose of the costs determination. At [24] of her judgment, Lieven J had regard to the tests relevant to applications for wasted costs orders against legal representatives under s 51(6) of the Senior Courts Act 19891, as set out in *Ridehalgh v Horsefield* [1994] Ch 205, namely, (1) did the legal representative act improperly, unreasonably or negligently; (2) did that conduct cause the applicant unnecessary costs and (3) was it just in all the circumstances to order costs. In *Re A,B,C,D,E, and F* [1019] EWHC 406 (Fam) Keehan J made a non-party costs order against an expert whose "serial failures to comply with court orders" had resulted in costs consequences for the parties.

42. In all three of those family cases in which non-party costs orders were made, there were discrete and identifiable costs consequences of unreasonable conduct in the proceedings by a non-party. Delay in proceedings and avoidable costs had been caused directly by serious failings by the non-parties. Nevertheless, Ms Duxbury on behalf of the Local Authority, accepts, I think rightly, that whilst unreasonable conduct in the proceedings, or reprehensible behaviour, by a non-party might often constitute exceptional circumstances justifying a non-party costs order, there were other possible circumstances that might also do so. Lady Hale said so in *Re S (A Child) (Costs: Care Proceedings)* [2015] UKSC 20 at [30] to [32]. Lady Hale also said that Local Authorities should not be in any worse position than private parties in proceedings in relation to costs just because they may have deeper pockets. I can see no reason why the same principles should not apply to costs orders against non-parties, including Local Authorities.

43. A feature of family cases which requires particular consideration, and which marks them out from most civil claims, is that in the "ordinary run" of cases concerning the welfare of children, successful parties have no expectation of costs orders being made – *Re T Re T (Care Proceedings Costs) (Cafcass Intervening) [2012] UKSC 36* and *Re S* (above). In *Re T*, Lord Phillips, delivering the judgment of the court, held at [44] that,

> "… we have concluded that the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice…."

Costs Orders against Local Authorities

44. There are two other first instance authorities of relevance to the present case. In *Re A, B, C, D, and E* [2018] EWHC 1841 (Fam) Knowles J considered and dismissed an application for costs against a Local Authority that had changed its position in relation to public law proceedings part way through a hearing. She observed at [57],

> "[The Local Authority] would not be the first or the last local authority – or indeed, party - to recognise at a late stage that either its threshold case or other aspects of its case were untenable. To visit costs on a local authority in such circumstances would be akin to saying that any change of mind by a party during the course of children litigation was an admission of past error requiring a punitive response from the court. As a matter of public policy, such a stance by the court would render unreasonable the finely balanced judgments many local authorities have to take both before and during children litigation and undermine the general proposition that an order for costs is unusual in such proceedings. "

45. In *HB v A Local Authority (Wardship Costs Funding Orders)* 2017 EWHC 524, MacDonald J, hearing an application under the court's inherent jurisdiction, refused to make a costs funding order against a local authority requiring it to fund legal advice and representation for a parent in wardship proceedings brought by the local authority where the parent had lawfully been refused legal aid. At [102] MacDonald J held that in addition to contradicting the principle that authority for public expenditure requires clear statutory authority,

> "… I am satisfied that to make the order sought by the mother would contradict the principle that a general power cannot be used to circumvent a clear statutory code. In circumstances where the Legal Aid Agency has taken a lawful decision by reference to a lawful and comprehensive statutory scheme to refuse the mother's application for legal aid, an order under the inherent jurisdiction of the court for public funding from an alternate public authority for the same purpose would plainly constitute an attempt to side-step a clear statutory code using a general power."

Guidance from the Authorities

46. Having regard to the authorities it seems to me that the following guidance applies to non-party costs orders in private family proceedings concerning the welfare of children:

i) The Court has a wide discretion to make costs order including against non-parties but an application for a costs order against a non-party should be treated with caution and such an order will be exceptional by comparison with the ordinary run of cases.

ii) A non-party costs order should only be made if it is just to do so in all the circumstances.

iii) In considering whether a non-party costs order is just, the court should keep in mind that in the ordinary run of family cases concerning the welfare of children, inter-party costs orders are not made.

iv) The circumstances justifying a non-party costs order are not closed but where the conduct of a non-party is relied upon as the basis for making such an order, the non-party must have been guilty of reprehensible behaviour or unreasonable conduct in the proceedings.

v) In considering whether the behaviour of a non-party Local Authority was reprehensible, or its conduct within the proceedings was unreasonable, regard must be had both to the powers entrusted to and the obligations of Local Authorities and the finely balanced judgments that Local Authorities may have to make in exercising those powers and fulfilling those obligations.

vi) The non-party should have a close connection with the proceedings such that it is fair that they are bound by the findings made in the substantive proceedings.

vii) The circumstances which should be taken into account include the financial consequences to the potential costs recipients of the acts or omissions of the non-party. If the potential costs recipients would have incurred the same financial liabilities in any event then it would be unjust to make a non-party costs order. Hence, ordinarily, the court should have regard to the amount of costs sought to be recovered from the non-party and consider whether there is a causal connection between those costs and the non-party's acts or omissions.

viii) A non-party may well suffer injustice if not warned that an application or costs may be made against them.

ix) A non-party should be joined as a party for the purposes of the costs application only and be given a reasonable opportunity to attend a hearing at which the court will consider the matter further – CPR r.46.2(1).

x) The judge who has determined issues in the case (at a finding of fact hearing or a final hearing) should be the judge who determines an application for a non-party costs order.

xi) The procedure for determining the application should be summary in nature in that the judge should base their decision on the evidence given and findings made in the substantive proceedings.

xii) A non-party costs order should not be used as a device to circumvent other rules or provisions concerning the funding of advice or representation.

47. It seems to me that this guidance, taken from the authorities, provides consistency in approach in relation to inter-party costs, wasted costs against legal representatives, and non-party costs orders in private proceedings concerning the welfare of children. The same guidance might also apply to public law proceedings, but this appeal judgment is concerned with private proceedings.

Decision

Procedure

48. The Local Authority was not joined as a party to the proceedings for the issue of the costs of application. They ought to have been joined for the purposes of costs only as required by CPR r.46.2(1)(a). The judge noted that "no-one, so far as I am aware, takes any point that Rule 46.2 … has not complied with." CPR r.46.2(1)(b) was complied with in that the non-party was given an opportunity to attend the costs hearing. As it happens, although not joined as a party, the Local Authority had access to the relevant documents and had attended previous hearings. No prejudice was caused to the Local Authority by not being joined as a party, no point is taken by the Local Authority on appeal, and I shall not determine the appeal on the basis of a procedural irregularity in not joining the Local Authority for the purpose of costs.

49. The guidance from the authorities, summarised above, indicates that decisions about non-party costs orders ought to be made after the court has heard evidence and made findings sufficient to inform it of all the relevant circumstances that might justify making such an order. Usually this will be after a finding of fact hearing or final hearing. In this case the judge made the order, including for prospective costs, before receiving any evidence at all from the parties and having made no determinations on disputed facts. To do so was not contrary to the rules of court and so I do not find it to have been a procedural irregularity sufficient to overturn the decision under appeal, but it did have consequences for the judge's approach to his decision on costs.

The Nature of the Decision Under Appeal

50. The judge was exercising a discretion to order costs against a non-party. He directed himself as to the legal test to be applied when exercising his discretion and he exercised the discretion on a particular factual basis. This appeal raises questions as to whether the judge made errors of law in relation to the test he applied, proceeded on a factual basis that was not open to him, and exceeded permissible parameters when exercising his discretion.

The Judge's Self-Direction on the Test to be Applied

51. Even bearing in mind the warning to appellate courts to avoid "narrow textual analysis", I do find that the judge erred in law as to the test to be applied when making a non-party costs order. At paragraph [12] of his judgment he recognised that non-costs orders were permissible and that the court should conduct a "trial" that was fair to all parties. He also set out a test for the exercise of his discretion which had three elements – such orders should only be made in exceptional circumstances; the key consideration was the conduct of the non-party; and not only should that be conduct that "can be criticised" but it should also have had an impact on the legal costs of the parties in the case. Accordingly, he did not direct himself that:

    i) A non-party costs order should only be made if it is *just* to do so in all the circumstances.

    ii) If the exceptional circumstances relied upon the justify making a non-costs order are the culpable conduct of the non-party, then the non-party should have been guilty of reprehensible behaviour or unreasonable conduct within the proceedings.

As a result, as the remainder of his judgment demonstrates, the judge did not address whether the conduct of the Local Authority was reprehensible or unreasonable, only whether it could be criticised. He did not address whether, if the conduct was not reprehensible or unreasonable, it was otherwise exceptional. And he did not address the core legal test of whether it would be just in all the circumstances to make the order. I would not expect the judge to have set out the relevant authorities or the legal test in fine detail. Nevertheless, key elements of the test that should have been applied were absent. The test that the judge set himself and applied was wrong in law.

The Grounds on which the Judge made a Non-Party Costs Order

52. Having regard to the judgment as a whole it appears to me that the grounds on which the judge made the costs order in favour of the Applicants and the Respondent mother were his views that:

    i) The Local Authority was wrong not to issue public law proceedings.

    ii) The Local Authority had been instrumental in removing the children from the mother who had lost care of her children as a result of state intervention.

    iii) Had the Local Authority issued public law proceedings, then the Applicants would not have needed to engage in private law proceedings.

    iv) Had the Applicants not looked after the children and sought a child arrangements order in private law proceedings, the Local Authority would probably have issued public law proceedings in which the Applicants would have been entitled to public funding for legal representation.

v) The Applicants were suffering financial hardship as a result of being engaged in private law proceedings.

The judge clearly considered that these matters made out a case that the Local Authority had been guilty of conduct that "can be criticised" which had had an adverse impact on the legal costs of the parties in the case which should be remedied by a non-party costs order.

53. The judge has a deep experience of private and public family law proceedings and his view that the Local Authority ought to have issued public law proceedings in this case was one he was clearly entitled to hold. However, the Local Authority was likewise entitled to make its decision and it has not been suggested that it was an unlawful decision. The Family Court is not given the power to direct a Local Authority to issue public law proceedings. The Local Authority had complied with the s.37 orders (the second order at least). It had completed its investigations and concluded that it should not apply for a care order or supervision order. It had complied with s.37(3) CA 1989 by giving its reasons for so deciding and informing the court of any service or assistance provided or to be provided for the children and their family, and any other action which they had taken or proposed to take with respect to the children. Hence, it seems to me, the failure of the Local Authority to issue public law proceedings could not properly be regarded, in itself, as reprehensible behaviour or unreasonable conduct within the proceedings, and could not, without more, constitute exceptional circumstances justifying the making of a non-party costs order.

54. This was not a case in which the Local Authority was found to have acted in bad faith, or to have misled the parties or the court. The judge did not make a finding to that effect. However, he did appear to proceed on the basis that he had been encouraged to believe that public law proceedings would be issued. He said that he recalled that at the hearing on 12 August 2021 the local authority, by the team manager, had "impressed upon me" that care proceedings were "highly likely" to follow. However, as the transcript discloses, the social worker from the Local Authority had told the judge at that hearing that "private law proceedings are more likely to settle the children's future." The judge's recollection appears therefore to have been awry. In any event, there was no undertaking or guarantee offered by the Local Authority that it would issue public law proceedings and it made clear to the court and the parties that it was engaged in a process of deciding whether or not to do so. Therefore, the possibility of there being no public law proceedings was always evident. It was not open to the judge to proceed on the basis that the Local Authority misled the court as to its intentions in respect of public law proceedings. Indeed, as noted, no such finding was made.

55. A ground for the judge's decision to make non-party costs orders was that the Local Authority had been "instrumental" in the removal of the children. It is agreed by all parties that the Local Authority did not remove the children. It would have been unlawful for them to do so without a court order. In what sense could it be said that they were "instrumental" in the removal of the children? The judge acknowledged that there were factual disputes about the circumstances on 28 May 2021 which he had not resolved. There was a factual dispute as to whether the Local Authority, through its social worker, encouraged the Applicants to remove the children from the mother's care, which the Judge recognised. The Applicants' case was that a Local Authority social worker had told them to pick up the children from their schools and take them to the Applicants' home for their protection. The Local Authority disputed that account

not least because, it maintained, it had expected N to exercise his parental responsibility to protect the children and to look after the children in his own home. There was also disagreement as to whether the Local Authority had instructed or advised the Applicants to issue private law proceedings. The Judge had received no evidence from the Applicants as to these matters in dispute. The judge said that he had not "tried" these disputes but that he considered that that "does not matter" because the Local Authority (i) "was involved"; (ii) wished the children to be removed; and (iii) would have instigated proceedings to remove them if necessary. Nevertheless there was no finding that the Local Authority had actively participated in the removal of the children or had actively encouraged the Applicants or N to remove them and then to issue private law proceedings. It might well be, as in many other cases, that the Local Authority was involved in providing support to the family, and that family members, other than the mother, and the Local Authority wanted the same outcome – for the children to leave their mother's care – but a shared desire does not indicate an active involvement in the children's removal. Given that the judge had not received any evidence about the circumstances on 28th May 2021, and given that he had expressly said that he had not resolved the dispute as to the facts, he was not entitled to find that the Local Authority was instrumental in the removal of the children from their mother's care or, as he put it "the mother has lost care of her children as a result of local authority – state – intervention." [17].

56. It is undoubtedly true that private law proceedings would have been unnecessary and, if issued, could have been discontinued, had the Local Authority decided to issue public law proceedings. Likewise, had the children remained with the mother and the Applicants had not taken the steps they did on 28 May 2021, it may well have been the case that the Local Authority would have issued public law proceedings. However, these are not exceptional circumstances. At any stage when the Local Authority is contemplating issuing public family proceedings there may be a tension between, on the one hand, encouraging and supporting a solution within the family and, on the other, seeking a care order or supervision order. Generally, a "least interventionist" approach is encouraged, so that support is given to families to try to avoid public law proceedings. As Mr Martignetti, for the Children's Guardian, pointed out, family members in a similar position to K and L may feel that they are better supported, financially and otherwise, when decisions about the welfare of the children are made through public law proceedings. That may well be true in this and many other cases. However, it would be contrary to the whole ethos of the Children Act 1989 and to Article 8 of the European Convention on Human Rights, for the state to intervene in family's lives by seeking care orders or supervision orders purely as a mechanism to produce financial advantage (or to avoid financial disadvantage) to family members. The fact that family members and a Local Authority may share the same aims of protecting children from harm does not mean that the Local Authority should issue public law proceedings they consider to be unnecessary, let alone that they should do so in order to provide family members with funding for legal representation.

57. It is true that the Applicants have incurred liabilities for legal expenses and, like the Respondent mother, may well incur legal expenses during the remainder of the private law proceedings. The Applicants have taken these apparently vulnerable children into their care and, it seems, have provided a safe and supportive home for them. Nevertheless, Parliament decides what funding should be available at public expenses for advice and representation in private law proceedings. The fact that the Applicants

may be commended for their conduct does not entitle them to such funding. The Applicants referred the court to the decision on financial provision of child costs in legal proceedings *CK v KM* [2010] EWHC 1754 [2011] FLR 208, but that case has no application to circumstances in the present case or to non-party costs orders.

58. Given that the judge himself criticised the conduct of the Local Authority, it was not surprising that he found that their conduct met his test of being conduct that "can be criticised". However, he failed to consider whether the Local Authority had behaved reprehensibly or was guilty of unreasonable conduct within the proceedings. On scrutinising the grounds that the judge seems to have relied upon to make the non-party costs order, they fall well short of justifying a finding that the Local Authority's behaviour was reprehensible or their conduct unreasonable. Nor could the grounds reasonably be regarded as constituting exceptional circumstances justifying the making of such an order. Indeed, although the judge directed himself to consider conduct and that non-party costs orders "are only made in exceptional circumstances", he did not address whether the circumstances he had identified were indeed exceptional.

59. Furthermore, with due respect to the judge, he failed to consider matters relevant to the question of whether in all the circumstances it was just to make the non-party costs order:

i) If the children concerned were being well looked after within the family – which the judge does not appear to have doubted - then it was contrary to penalise the Local Authority for not seeking a care order or supervision order. There must be many cases where the families make arrangements, through the court or otherwise, but for which the children would suffer or would be at risk of suffering from significant harm. The principle of "least intervention" would be frequently breached if Local Authorities faced adverse costs orders whenever they did not issue proceedings. Local Authorities, other agencies and the courts would have to deal with many more public law applications.

ii) The judge did not refer to any schedule of costs in his judgment. He referred to the fact that the Applicants had had to secure a larger house to accommodate the children but that was a financial consequence which would not be remedied by the non-party costs order that he made. He did not address the amount of legal costs which the Applicants, had incurred in the private law proceedings or to what extent those costs were attributable to the culpable conduct, if any, by the Local Authority.

iii) In relation to the causal link between the conduct of the Local Authority and the costs impact on the parties, the judge failed to consider that the costs impact was due to funding arrangements determined by Parliament. The Respondent mother sought the return of the children to her care. Presumably, that would also have been the case in public law proceedings. Whilst it is true that the Local Authority's decision meant that the case proceeded as a private law application rather than a public law application, the costs impact on the Respondent mother was due to funding arrangements for legal advice and representation which were beyond the control of the Local Authority. The same can be said of the position of the Applicants. This was not a case where the Local Authority had acted in a way to waste costs within the existing proceedings.

60. Had the judge taken into account all the circumstances, but disregarding disputed matters on which he had not received any or any sufficient evidence and about which he had not made any findings, then, applying the correct legal test, he could not reasonably have exercised his discretion to make a non-party costs order against the Local Authority. It could not have been said to have been just in all the circumstances. It was beyond the parameters of the permissible exercise of his discretion to make the order.

61. A further, striking feature of the judge's order is that he not only ordered the non-party to pay the Applicants' past costs of the proceedings, but also all the future costs of the Applicants and the Respondent mother. Ms Duxbury accepted that s.51 of the Senior Courts Act 1981 was sufficiently widely drawn to permit a court to make an order in respect of future costs. It is certainly the case that at an interlocutory stage, the court may sometimes order that the costs of a future step in the proceedings, for example, the instruction of an expert witness, be borne by a particular party. However, the prospective costs order in this case was much more far-reaching. The judge could have had no idea what the future costs of the private law proceedings would be – would proceedings resolve with agreement or be robustly contested and protracted, what expert evidence might be required, how many hearings would be needed? There was no estimate of future costs. The judge's view that the Local Authority ought to have acted differently so as to avoid the need for any private law proceedings, clearly led him to order that Local Authority should effectively indemnify the parties in respect of their costs liabilities, in proceedings to which the Local Authority was not a party and over which they would have no influence or control. With respect to the judge, he should have stepped back and considered whether the order was just in all the circumstances. Had he done so he could not reasonably have exercised his discretion to make such a draconian and far-reaching costs order.

62. It is apparent from the judgment as a whole that the costs order made in this case was designed to provide the Applicants and Respondent mother with funding for legal advice and representation to which they had no entitlement under the laws enacted by Parliament. It was a device of the kind that MacDonald J eschewed in *HB v A Local Authority* (above).

63. In conclusion, the judge applied the wrong legal test, proceeded on a factual basis that he was not entitled to assume, disregarded relevant circumstances, and exceeded the permissible parameters of his discretion. The non-party costs order was an impermissible device designed to provide a public source of funding for the parties' legal costs in private family law proceedings. For those reasons I allow the appeal and set aside the non-party costs order in its entirety.

64. The private law proceedings in the Family Court are, I understand, continuing.