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Neutral citation number: [2023] EWFC 69 (B)

IN THE FAMILY COURT AT OXFORD

**IN THE MATTER OF THE CHILDREN ACT 1989 AND IN THE MATTER OF
[EMMA AND HARRY]**

Date: 14 April 2023

Before: HHJ Vincent

Between:

A LOCAL AUTHORITY

Applicant

and

Mrs X (a mother)

Respondent mother

and

Mr X (a father)

Second Respondent father

and

[EMMA AND HARRY]

(by their children's guardian JENNIFER ARNOLD)

Third and Fourth Respondent children

Ann Courtney instructed by the Applicant local authority
Alex Forbes, instructed by Johnson & Gaunt, solicitors for the Respondent mother
Hannah Mettam, instructed by Rotherham solicitors for the Second Respondent father
Dr Emma Gatland, instructed by Reeds solicitors for the Respondent children

Hearing date: 23 February 2023

Approved JUDGMENT

For the purposes of anonymisation the children's names have been changed. The parents are referred to either as the mother or the father, or Mrs X and Mr X.

Introduction

1. The parents have two children. Emma is eight and Harry is six. They live with their parents who are in a committed, loving relationship, supported by a network of family and friends.
2. Until May 2022 the mother worked as a healthcare assistant in a general practitioner's surgery.
3. Dr R is a general practitioner in the surgery where mother works, and therefore her employer. She was also the mother's general practitioner. She is the safeguarding lead for the surgery, and a named general practitioner for safeguarding [in the county]. The children were registered at the same surgery.
4. In May 2022, the practice's nurse manager told Dr R that the mother had told her she had breast cancer, and was due to have a double mastectomy. As the mother's general practitioner, Dr R was surprised to hear this. She contacted the breast cancer team, and received confirmation that the mother did not have breast cancer.
5. Dr R carried out further investigations. Over the weekend of 21 and 22 May 2022 she contacted a surgeon in [place name redacted] who had operated on the mother some twenty years earlier, to make enquiries about their notes of an operation that had been carried out to remove the mother's appendix. This was done without either obtaining the mother's consent, or informing her. At around the same time, it was discovered that the mother had accessed both hers and the children's medical records at work, which was not permitted.
6. Dr R looked at both children's records. Harry at that time had a diagnosis of epilepsy, for which he had been prescribed anti-epileptic medication. He also had a diagnosis of autism. Both children had been referred for investigations into cardiac issues.
7. As a result of the investigations she had made, and recalling comments that the mother had made at work about her son being seriously ill in hospital, Dr R began to become concerned that, *'this was FII'*; she was worried that the mother was herself displaying it, and may have fabricated or induced illness in her children.

First strategy meeting

8. Dr R made a safeguarding referral to MASH (Multi Agency Safeguarding Hub). There was a strategy meeting on Wednesday 1 June 2022. The meeting was

attended by Dr R and two social workers, two members of [*the local*] Police, three consultant paediatricians, the head of safeguarding at [*local*] Hospital, the senior named nurse for the children's safeguarding team at [*the local hospital*], the local authority's designated officer (LADO), and the headteacher of Harry and Emma's primary school.

9. The children's school recorded that both children were 'delightful', and the family seemed to be a very loving and nurturing family. The parents shared drop-offs and pick-ups from school. The headteacher had understood that the mother had cancer during lockdown, they believed her to be having chemotherapy, she had told them before starting the treatment she intended to shave her hair and donate it to a cancer charity. The mother later came into school with a scarf on her head. The headteacher was shocked to discover the mother had not in fact had cancer. There were no reports of Harry having seizures in school, although there had been two incidents shortly after his diagnosis when he seemed, '*not himself*', '*went a bit quiet and stared at the table*'.
10. The potential for conflict of interests arising for Dr R was noted. She was the safeguarding lead, and both mother's employer and general practitioner. It was noted that actions were being taken to ensure she did not get '*embroiled in HR matters.*' However, within the meeting, Dr R expressed the view that, '*it would be gross misconduct as [the mother] has been accessing her own and her children's records. She will be dismissed*', and that Dr R, '*felt they couldn't have [the mother] in the building*'.
11. Dr G, Consultant Community Paediatrician, Designated Doctor for Children's Safeguarding [*county name redacted*], noted, '*there are question marks over things, but it is manageable at the moment.*'
12. Dr Y, Harry's consultant, noted that the diagnosis of autism had been carefully made. While there were now concerns about fabricated symptoms in regard to Harry's epilepsy, it could not be 100% excluded that these were epileptic seizures. The safest course was for him to continue with his current maintenance dose of anti-epileptic medication. Dr Y did not suggest that any of the clinicians treating Harry had been concerned about his or his mother's presentation in the context of fabricated illness.
13. The minutes recorded a discussion querying whether the mother had doses of midazolam in her possession. This is an emergency drug to treat epilepsy. It was suggested the mother might have up to six doses at home, and Dr R told the group that this amount was sufficient to kill four adults. An action point was noted that in the assessment, current prescriptions would be checked, and information obtained about where any medication was kept.

14. Ms W (social worker) is recorded as saying, *'think we can wait this weekend, as acting now may escalate with limited resources and options available to manage this properly over a BH weekend. Further advice needed. There is a pattern emerging; it's not life and death this minute.'*
15. The action plan drawn up by Ms W included consideration of child protection medicals for both children, to pull together a chronology from all agencies, to review fabricated illness guidance and circulate to the group, to *'keep in mind impact of harm to the child versus the behaviours'*, seek further advice from children's social care, and to reconvene the following Tuesday.
16. I do not know to which fabricated illness guidance Ms W was referring. Mr Forbes has referred me to the *Supplementary Guidance to Working Together to Safeguard Children: Safeguarding Children in whom illness is fabricated or induced*, DFSCF, 2008 (the Working Together guidelines), in particular, the following paragraphs:
- §3.41: *Where primary care staff, including GPs, have concerns regarding possible FII they should ensure the child is referred to a paediatrician for a paediatric assessment. This should not delay referral to children's social care when appropriate.*
- §4.6: *A full developmental history and an appropriate developmental assessment should be carried out. Consultation with peers, named or designated professionals or colleagues in other agencies will be an important part of the process of making sense of the underlying reason for these signs and symptoms.*
- §4.9: *Professionals should remain open to all possible explanations.*
- §4.10: *Where there are concerns about possible fabricated or induced illness the signs and symptoms require careful medical evaluation by a paediatrician(s). For children who are not already under the care of a paediatrician, the child's GP should make a referral to a paediatrician, preferably one with expertise in the specialism which seems most appropriate to the reported signs and symptoms.*
- §4.17: *It is expected that the paediatric consultant responsible for the child's healthcare is the lead health professional and therefore has lead responsibility for all decisions pertaining to the child's healthcare (if a child is known to a GP but not to a paediatrician, it is important that a GP referral is made to a paediatrician and she or he assumes lead responsibility for the child's health – see paragraph 4.10).*
- §4.18: *Sometimes it may be apparent that emergency action should be taken at this stage to safeguard a child (see paragraph 3.24 of Working*

Together). Such action may be necessary when a child's life is in danger, for example, through poisoning or toxic substances being introduced into the child's blood stream.

§4.20: *[The initial assessment under s.17 CA 1989] should be undertaken in collaboration with the lead paediatric consultant who is responsible for the child's health care.*

§4.28: *If at any point there is medical evidence to indicate that the child's life is at risk or there is a likelihood of serious immediate harm, an agency with statutory child protection powers should act quickly to secure the immediate safety of the child.'*

17. In March 2021 the Royal College of Paediatrics and Child Health published guidance on Perplexing Presentations (PP) and Fabricated or Induced Illness (FII) in children. The guidance is introduced by a statement from the RCPCH's officer for safeguarding:

'It is very rare for parents or carers to deliberately induce illness in a child by, for example, poisoning them or withholding treatment. Most cases are based on incorrect beliefs or misplaced anxiety which, unchecked, can cause children to undergo harms ranging from missing school and seeing friends, to undergoing unnecessary and painful or even harmful tests and treatments. Paediatricians, and other professionals, have a duty of care to the child but, in almost every case, their work will form part of a collaborative approach which involves the parent or carer as well as the child.'

18. At paragraph 5.1, the RCPCH guidance says:

'The most important question to be considered is whether the child may be at immediate risk of serious harm, particularly by illness induction. This is most likely to occur when there is evidence of frank deception, interfering with specimens, unexplained results of investigations suggesting contamination or poisoning or actual illness induction, or concerns that an open discussion with the parent might lead them to harm the child.'

[Follow-up strategy meeting](#)

19. The follow-up strategy meeting took place on 6 June 2022. This meeting was again attended by Ms W, this time accompanied by her head of service Ms C, by the local authority's principal solicitor and its in-house counsel. Dr R, Mr Y (Harry's consultant in respect of epilepsy), Dr G, and a third (different) paediatrician attended. A different named safeguarding nurse attended, as well as the head of safeguarding at the hospital, Ms T, who had been at the previous meeting. The

LADO and the children's headteacher were there again.

20. It is noted in accordance with the guidance, that a referral to a designated paediatrician would be needed for Emma. It was recorded there was an issue around Harry's diagnosis for epilepsy which needed to be reviewed, but this was not urgent.
21. It was noted that Ms W had reviewed the FII guidance, but it is not clear whether this had been circulated to other members of the group.
22. The headteacher reported there were no concerns about the children at school.
23. The social work team manager raised a concern about how the mother was spoken to so as not to heighten her anxiety. She reminded the group of the need to carry out child protection medicals of the children.
24. In-house counsel then asked, what is the risk at the minute? The minutes record that it was Dr R who responded:

Dr R:- M has picked up prescription for anti-convulsive meds today, It would be interesting to see if he has it in his system- that is a reason for a blood/urine test.

Don't know M well. Don't think she is very clever.

There is every risk she will do something stupid to herself or one of the children - adamant won't have her in surgery. When things have been questioned with her previously, she ups the ante.

She has medication which sedates and causes you to forget things- She has enough to kill someone.

[counsel]: How would she know how to induce a seizure?

Dr R - she's on google all the time. Traditionally children are given a lot of salt but no evidence she does. No evidence of her harming children, but she presents with them.

She presented one of the children with gastroenteritis last week- makes me feel they may not come to school tomorrow

Early pandemic she was telling school she had cancer - a bit of a mix as to where she is getting response from.

She will always be presenting excessively with somebody.

She went 2 years without taking Emma but there is always something on the go.'

25. Although no contact had at this point been made with the children's father, the notes record the social work team manager saying they, *'can't rely on father to protect. Before we make any decisions need to assess him. We won't be sharing with M. May need to remove the children.'*
26. The next entry records the local authority's in-house counsel saying that she is considering emergency action to remove the children. She asks if Dr R could be on standby to attend Court and work on the draft statement - she would, *'want to change the document. Make sure it's not too casual.'*
27. Dr G appears to caution that though they do not know what the mother is capable of, the *'children appear emotionally stable – needs to be proportionate'*. But the local authority lawyer is recorded as saying that the only options are, *'a cushion or a hammer and nothing in between.'* Ms W is recorded as saying that the children *'are at risk of emotional harm just due to M's psychological presentation'*.
28. This note is the only disclosed record of the local authority's decision-making around bringing the care proceedings.
29. The stated purpose of the meeting was to approve the commencement of a section 47 enquiry, but that was never put to the group, and the idea was apparently abandoned. The proposed paediatric assessment was jettisoned. Contrary to the guidance, no referral was made to a paediatrician to take the lead with regard to all decisions relating to the children's health. The child protection medical and proposed blood tests were abandoned. Any thought of discussion with the mother, or discussion with, or assessment of the children's father was abandoned. It is not clear whether there had in fact been any investigations into what medication the mother held at home. The rationale for supposing that either of the children were in imminent danger from poisoning seems to be an anticipation of the mother's response to being dismissed from her job, that decision due to be communicated to her imminently, and Dr R's assertion that because she was *'on google all the time'*; she had the knowledge and intention to induce seizures using anti-epileptic medication.
30. Rather than maintaining an open mind as the guidance suggests, the group appeared to determine that the children's lives were in immediate danger, but the evidence-base for that had not on any view been established.
31. The local authority applied for and obtained an emergency protection order that evening.

32. The children and the parents were woken in the middle of the night by police banging on the door. The children were taken from their beds and placed into foster care. This family had never had any involvement with social services or the Family Court, and had no advance warning of what was happening. The father's offer of keeping the children with him while the mother went to stay somewhere else was rejected.
33. The events of this evening have had a significant, lasting and adverse impact upon the whole family.

Emergency protection order

34. The hearing was remote and started at 6.11 p.m.
35. The judge granted the EPO on the basis that this was 'a genuine emergency', there was, '*compelling evidence that the mother has fabricated illness in herself and in the children [she] is in possession of some dangerous drugs [and] may harm the children.*' The judge read a statement from Dr R who gave brief evidence. The judge accepted her opinion that since the mother had been found out in respect of fabricating a tale of her own illness, she may use the drugs in her possession to prove that the illnesses reported in the children were not fictitious.
36. Neither the written EPO application itself, nor in-house counsel's accompanying note, nor either of the advocates present during the hearing, drew the court's attention to the guidance contained in *X Council v B and others* [2004] EWHC 2015 (Fam) or *Re X (Emergency Protection Orders)* [2006] EWHC 510; [2006] 2 FLR 701 (Fam).
37. In *Re X (Emergency Protection Orders)*, McFarlane J (now the President of the Family Division) referred to *X Council v B and others* (paragraph 64):

In X Council v B (Emergency Protection Orders) [2004] EWHC 2015 (Fam); [2005] 1 FLR 341, Munby J undertook a review of the law and practice relating to EPO's. I gratefully adopt his masterful summary of both the domestic and European jurisprudence on the topic as a result of which (at paragraph 57) he drew the following conclusions:

"The matters I have just been considering are so important that it may be convenient if I here summarise the most important points:

- (i) *An EPO, summarily removing a child from his parents, is a 'draconian' and 'extremely harsh' measure, requiring 'exceptional justification' and 'extraordinarily compelling reasons'. Such an order should not be made unless the FPC is satisfied that it is both necessary and proportionate and*

that no other less radical form of order will achieve the essential end of promoting the welfare of the child. Separation is only to be contemplated if immediate separation is essential to secure the child's safety: 'imminent danger' must be 'actually established'.

- (ii) *Both the local authority which seeks and the FPC which makes an EPO assume a heavy burden of responsibility. It is important that both the local authority and the FPC approach every application for an EPO with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the European Convention rights of both the child and the parents.*
- (iii) *Any order must provide for the least interventionist solution consistent with the preservation of the child's immediate safety.*
- (iv) *If the real purpose of the local authority's application is to enable it to have the child assessed then consideration should be given to whether that objective cannot equally effectively, and more proportionately, be achieved by an application for, or by the making of, a CAO under s 43 of the Children Act 1989.*
- (v) *No EPO should be made for any longer than is absolutely necessary to protect the child. Where the EPO is made on an ex parte (without notice) application very careful consideration should be given to the need to ensure that the initial order is made for the shortest possible period commensurate with the preservation of the child's immediate safety.*
- (vi) *The evidence in support of the application for an EPO must be full, detailed, precise and compelling. Unparticularised generalities will not suffice. The sources of hearsay evidence must be identified. Expressions of opinion must be supported by detailed evidence and properly articulated reasoning.*
- (vii) *Save in wholly exceptional cases, parents must be given adequate prior notice of the date, time and place of any application by a local authority for an EPO. They must also be given proper notice of the evidence the local authority is relying upon.*
- (viii) *Where the application for an EPO is made ex parte the local authority must make out a compelling case for applying without first giving the parents notice. An ex parte application will normally be appropriate only if the case is genuinely one of emergency or other great urgency – and even then it should normally be possible to give some kind of albeit informal notice to the parents – or if there are compelling reasons to believe that the child's*

welfare will be compromised if the parents are alerted in advance to what is going on.

- (ix) *The evidential burden on the local authority is even heavier if the application is made ex parte. Those who seek relief ex parte are under a duty to make the fullest and most candid and frank disclosure of all the relevant circumstances known to them. This duty is not confined to the material facts: it extends to all relevant matters, whether of fact or of law.*
- (x) *Section 45(7)(b) of the Children Act 1989 permits the FPC to hear oral evidence. But it is important that those who are not present should nonetheless be able to know what oral evidence and other materials have been put before the FPC. It is, therefore, particularly important that the FPC complies meticulously with the mandatory requirements of rr 20, 21(5) and 21(6) of the Family Proceedings Courts (Children Act 1989) Rules 1991. The FPC must 'keep a note of the substance of the oral evidence' and must also record in writing not merely its reasons but also any findings of fact.*
- (xi) *The mere fact that the FPC is under the obligations imposed by rr 21(5), 21(6) and 21(8), is no reason why the local authority should not immediately, on request, inform the parents of exactly what has gone on in their absence. Parents against whom an EPO is made ex parte are entitled to be given, if they ask, proper information as to what happened at the hearing and to be told, if they ask: (i) exactly what documents, bundles or other evidential materials were lodged with the FPC either before or during the course of the hearing; and (ii) what legal authorities were cited to the FPC. The local authority's legal representatives should respond forthwith to any reasonable request from the parents or their legal representatives either for copies of the materials read by the FPC or for information about what took place at the hearing. It will, therefore, be prudent for those acting for the local authority in such a case to keep a proper note of the proceedings, lest they otherwise find themselves embarrassed by a proper request for information which they are unable to provide.*
- (xii) *Section 44(5)(b) of the Children Act 1989 provides that the local authority may exercise its parental responsibility only in such manner 'as is reasonably required to safeguard or promote the welfare of the child'. Section 44(5)(a) provides that the local authority shall exercise its power of removal under s 44(4)(b)(i) 'only ... in order to safeguard the welfare of the child'. The local authority must apply its mind very carefully to whether removal is essential in order to secure the child's immediate safety. The mere fact that the local authority has obtained an EPO is not of itself enough. The FPC decides whether to make an EPO. But the local authority*

decides whether to remove. The local authority, even after it has obtained an EPO, is under an obligation to consider less drastic alternatives to emergency removal. Section 44(5) requires a process within the local authority whereby there is a further consideration of the action to be taken after the EPO has been obtained. Though no procedure is specified, it will obviously be prudent for local authorities to have in place procedures to ensure both that the required decision-making actually takes place and that it is appropriately documented.

- (xiii) *Consistently with the local authority's positive obligation under Art 8 to take appropriate action to reunite parent and child, s 44(10)(a) and s 44(11)(a) impose on the local authority a mandatory obligation to return a child who it has removed under s 44(4)(b)(i) to the parent from whom the child was removed if 'it appears to [the local authority] that it is safe for the child to be returned'. This imposes on the local authority a continuing duty to keep the case under review day by day so as to ensure that parent and child are separated for no longer than is necessary to secure the child's safety. In this, as in other respects, the local authority is under a duty to exercise exceptional diligence.*
- (xiv) *Section 44(13) of the Children Act 1989 requires the local authority, subject only to any direction given by the FPC under s 44(6), to allow a child who is subject to an EPO 'reasonable contact' with his parents. Arrangements for contact must be driven by the needs of the family, not stunted by lack of resources.*

38. McFarlane J continued to consider the need for particular care where allegations of FII are made:

Induced or fabricated illness

67. *I have found that the social work team had for some weeks considered that this was probably a case of induced or fabricated illness. The need for particular care and caution in approaching such cases is well known. Extensive guidance has been issued by central government (Safeguarding children in whom illness is fabricated or induced – Department of Health 2002) explaining the particular approach that is required in such cases. A key message to social workers from this guidance is that any concerns about a child's health must be discussed with the GP or a paediatrician. Whether or not a child may be at risk of induced or fabricated illness must of necessity involve a medical assessment of his past health and parental care. It is not a diagnosis that can be made by social workers acting alone, it is a matter that requires skilled medical appraisal.*

68. *In addition to the guidance from central government, some local authorities, for example those in the London area (London Child Protection Procedures – July 2003) have produced their own guidance which includes a whole section covering the procedure for cases of suspected induced or fabricated illness. The LCPC guidance stresses that where a social services department is considering what action to take in such a case 'the decision must be taken in consultation with the consultant paediatrician responsible for the child's health care.'*

69. *The European Court of Human Rights considered the use of an EPO in a case of suspected induced or fabricated illness in P, C and S v UK (2002) 35 EHRR 31; [2002] 2 FLR 631. The facts of that case were different and involved a baby being removed at birth, but the court clearly held that where the possibility of harm arose from the mother introducing something into the child's system (such as a laxative) that did not justify separating mother and child. In the present case, even on what the social workers apparently believed, there is no suggestion of positive action by the mother to induce symptoms, and the implication must be that under the ECHR there is even less justification for emergency removal of the child in those circumstances.*

Progress of care proceedings from June 2022 to February 2023

39. At a short hearing before HHJ Owens on 8 June 2022 interim care orders were made to the local authority, and a contested hearing on interim placement was listed for the following week.

40. The mother instructed Tim Lewis at Johnson & Gaunt solicitors. The father instructed Kate Pendle at Rotherham solicitors, who in turn instructed Ms Mettam, counsel, to attend the hearing on 8 June. Ms Mettam has represented the father at all hearings since then. At the earliest opportunity Mr Lewis and Ms Mettam pressed for the local authority to specify how it met its duties to the parents and children in light of the FII guidance, and to set out its rationale for the without notice application to be made. Mr Forbes was first instructed to represent the mother for the hearing on 3 November 2022. Mr Ferry is the solicitor for the guardian. These lawyers have worked exceptionally hard, and brought the benefit of their legal experience, knowledge and skillsets to hold the local authority to account for its actions, but at the same time to find ways to work collaboratively to progress the case and to drive it towards its conclusion.

41. On 13 June 2022 HHJ Owens made orders under section 38(6) of the Children Act 1989 providing that the local authority should carry out an assessment of the children and the father while the children were in his sole care at the family home. In practice this meant the father was to be supervised twenty-four hours a day in his care of the children. The mother gave an undertaking to leave her home and not to

go within 500 metres of it.

42. The local authority was directed to undertake assessments of the maternal grandparents and maternal aunt and uncle as support for the father, or as potential alternative carers for the children, and to file and serve them by 1 July 2022.
43. The proceedings were then allocated to me. I first met with the parties on 5 July 2022. Information was still being gathered. The local authority indicated that it was intending to remove overnight supervision. The local authority was encouraged by the guardian, the parents and me to provide an updated plan before the next hearing, to include consideration of what support family members could give in this respect.
44. On 25 July 2022 by agreement I discharged the interim care orders and replaced them with interim supervision orders. As well as ongoing orders for disclosure, including of medical records of mother and children, and interrogation reports of the mother's devices, the local authority was directed to provide disclosure around its pre-proceedings investigations and decision making, and a transcript of the EPO hearing was to be obtained. The local authority had still not filed its initial viability assessment of the maternal grandparents. I directed this to be done within five days.
45. It was agreed on 25 July 2022 that a consultant paediatrician should be instructed to carry out an assessment of the children on the basis of their medical records in the first instance. At that time an expert who could do the work at legal aid rates and within a reasonable timescale had not yet been identified.
46. I directed that the local authority formally plead its case in a threshold document by no later than 19 September 2022, by which time it should have had the expert report from the paediatrician.
47. The expert had not been instructed by the time of the hearing on 26 September 2022 and this meant the local authority had not updated its threshold findings.
48. Fortunately, Dr Rahman had by then been identified as the expert and he could file a report by 14 October 2022.
49. At the hearing on 26 September 2022 I expressed some frustration that the local authority had not apparently given consideration to progressing contact between the mother and the children. The children were desperately missing her. The local authority had still not filed or served its initial viability assessment of the grandparents.
50. The local authority was given a further extension of time to 28 October 2022 to file

its threshold document/schedule of findings, with parents' responses to come in thereafter. I listed a further hearing on 7 December, to review the pleadings, medical reports, and consider the way forward.

51. In the event, a hearing was listed sooner, on 3 November 2022, in response to an application made by the mother for an urgent review of the interim arrangements, and of the case more generally. The context for this was Dr Rahman's report, which had been served on 7 October 2022.

Dr Rahman's report

52. Dr Rahman found that both Harry and Emma's development was age appropriate (taking into account Harry's diagnosis of autism). Further:

'Concerns have been raised about FII.

Harry's main reported problems included: bleeding from rectum with possible rectal prolapse, cow's milk protein intolerance, gluten intolerance and seizure disorder.

Though several attendances were involved, this is likely to indicate parental anxiety or other issues with mother's own mental health and reliability rather than fabrication.

Harry's investigations were appropriate for the history provided regarding the seizures.

He may have epilepsy and due to this consideration, his neurologist has advised continuing treatment.'

53. Dr Rahman considered Dr R's statement of 6 June 2022 and noted, that while it raised serious concern, *'it is difficult to exclude the possibility of a seizure disorder in Harry and it is risky to accept her view that, 'a diagnosis of epilepsy was extremely unlikely as the source of the history is unreliable''.*

54. Within his report he wrote, *'I do not think that his seizures can be classed as unexplained or perplexing or fabricated or induced illness. His EEG was normal, but this does not exclude a seizure disorder. His CT scan was normal, but this does not exclude a seizure disorder. The diagnosis of epilepsy is based on a good history. In Harry's case the history provided are suggestive of seizures. This is the reason for starting him on antiepileptic drugs. In addition to his mother, his seizures have been observed by his father and also by school staff.*

There is a possibility that the symptoms that he exhibited may have been misconstrued as seizures, but this is difficult to confirm and therefore his neurologist has advised continuing the anti-epileptic medication

Based on the above, I do not think that his symptoms may have been fabricated or induced. It is also unlikely that it may have been exaggerated”.

55. He continued:

‘A lot of parents blame gluten for their children's symptoms. This is a common feature nowadays and does not suggest fabrication.

I accept that there are certain discrepancies in mother's version of events including family history of bowel disease, febrile seizures, breast cancer, possible intussusception, and Movicol prescriptions.

I have also noted that mother has provided a history of dilated cardiomyopathy for herself which prompted cardiac investigations for Emma.

These features do raise concerns about mother's truthfulness and borders on fabrication, but my overall view is, in relation to the children, it is probably an exaggeration or attention seeking behaviour on her part, rather than true fabricated or induced illness (FII).

I would recommend a psychology review for the mother to explore these matters.’

56. On 14 October 2022 Mr Ferry, the children’s solicitor, invited the local authority to consider a plan for the mother to return to the home, providing this could be adequately safeguarded and managed. Noting the local authority had indicated it had ‘concerns’ in relation to Dr Rahman’s report, Mr Ferry suggested that if the local authority had questions they should be put fairly promptly, and asked what questions the local authority sought to put.

57. On 17 October 2022 the local authority indicated in correspondence that they did not agree with Dr Rahman’s report, and sought current arrangements to stay in place ‘until after the fact-finding exercise’.

58. In the guardian’s report dated 18 October and served on 20 October 2022, the guardian wrote that the children’s headteacher reported the children had ‘lost their sparkle’. Emma was under-achieving academically, Harry was less talkative, both were described as ‘different children’ who were struggling emotionally with the ongoing separation from their mother, who they were seeing only three times a week for ninety minutes at a time. The guardian’s opinion was that the children were suffering significant emotional harm as a consequence of their continued separation from their mother. Nonetheless, the guardian was still at that time

concerned that the mother should be supervised in her care of the children until a psychological assessment of her had been completed.

59. On 25 October 2022 the local authority did arrange a meeting with the family, and drew up a working agreement that provided for mother to return home within a few weeks, and for the grandparents as well as the father to supervise contact between the children and their mother.

60. The local authority's updated threshold document/Scott Schedule was sent by the local authority during the course of the hearing on 3 November 2022. It relied upon a few sections of the report of Dr Birley, (who had reported about the mother's health conditions), but largely relied upon the initial statement of Dr R, whose evidence had been so instrumental at the hearing at the start of proceedings.

61. So far as Dr Rahman was concerned, the local authority's schedule did not just abandon him as an expert, but extraordinarily, there was a section at the end of the schedule which actively sought 'findings' against him including providing a 'superficial analysis and evaluation', failing to take account of discrepancies in the mother's version of events, 'providing a contradictory report', 'wrongly concluding' that this was not a true case of FII, and 'incorrectly' concluding that Harry's seizures were unlikely to be exaggerated.

62. By the time of the hearing on 3 November 2022 the local authority had still not filed or served the viability assessment of the maternal grandparents.

63. On behalf of the parents Mr Forbes and Ms Mettam invited the local authority to review its case on threshold, and its strategy in the case more generally. In particular to consider Dr Rahman's conclusions and the other expert reports, to note that both parents had co-operated fully with the local authority, the children were at home and being well cared for, and the only current concern about the children was the distress they were experiencing as a result of their mother having moved out of the family home.

64. On 3 November 2023 I discharged the mother from her undertakings not to return home, and gave an indication that supervision by the family members as set out in the working agreement made on 25 October 2022 could be at arm's length.

65. At the hearing, the local authority again stated its intention to put questions to Dr Rahman, but had not drafted any (nor made an application to do so pursuant to part 25 of the Family Procedure Rules 2010), so no order was made in that respect. As no party had a chance to consider the updated threshold document in any detail,

and parents' responses were not yet due, further consideration of the need for a fact-finding hearing was put off to the hearing on 7 December 2022 already listed for that purpose.

66. Shortly after the hearing the mother returned to live in the family home. The father reported to his solicitor that both children, *'slept through the night in their own beds for the first time since this began, they have always ended up cuddled next to me or woken in the early hours since this began. This weekend [the mother] was able to settle them in their bedtime routine and watch them fall asleep with smiles. They both slept soundly running into our room the following morning to make sure [the mother] was still here.'*

67. The parents' responses to threshold came in. They corrected some errors from the medical records, made concessions with regard to the mother's conduct, and the false reports she had made about her own health, but it was not accepted by either parent that the things mother had said, no matter how inappropriate and ill-advised, had caused or risked significant harm being caused to the children.

68. At the hearing on 7 December the local authority noted the lack of concessions by the parents to its schedule, and expressed concern that the parents did not accept there were risks to the children. The local authority continued to press for a fact-finding hearing. The parties sought further time to have discussions, the local authority again indicated its intention to put questions to Dr Rahman. The local authority was once again ordered to provide disclosure of documents that had previously been identified as necessary for understanding the initial decision-making process, as well as updated paediatric records in respect of Harry which had been ordered to be disclosed in September.

69. The recital to the order of 7 December 2022 recorded that I had again invited the local authority to review the schedule of findings, and (as I had been indicating since my first involvement with the case in July) that the local authority consider its strategy for the family, in particular the necessity for a fact-finding hearing in circumstances where (i) the parents had indicated their willingness to work with the local authority, (ii) they had said they would engage with psychological or psychiatric assessment or other support offered, (iii) the local authority did not appear to be pursuing removal of the children in the long-term; and (iv) the children continued to be adversely affected by the continuation of the proceedings.

70. The local authority does not appear to have reflected, or reviewed its position. By the time of the next advocates' meeting on 30 January 2023 the local authority had not disclosed any further documents, had not drafted any proposed questions

for Dr Rahman, and was continuing to seek further concessions from the parents ‘in order to resolve threshold’.

71. However, very shortly before the next hearing on 3 February 2023, the local authority communicated to the other parties that it would no longer be seeking a fact-finding hearing, and it would not be seeking public law orders at the conclusion of proceedings.

72. Having heard submissions and analysed the local authority’s threshold findings, I agreed that there should not be a fact-finding hearing. Further, I held that:

- The mother had admitted the significant fact that she had lied about having diagnosis of cancer;
- In respect of the allegations that the mother had fabricated or exaggerated other health conditions in the past, the local authority had not set out in its pleading why, if proved, this had caused the children significant harm, or put them at risk of significant harm;
- There was no evidence that the mother was suffering from a psychiatric illness;
- There was no expert evidence to support the assertion that the mother had fabricated or induced illness in her own children. There were no concerns about the children’s health;
- There were no concerns at all about the care given by the children to the father and no properly particularised allegations made in the schedule of findings of failure to protect.

73. I discharged the interim supervision orders.

74. This was a significant moment for the family.

75. However, the proceedings could not come to an end. Some matters remained in dispute, not least the application made by the mother and supported by the father for costs. Other than that, although the local authority had confirmed it would not be seeking public law orders, there were outstanding questions to be resolved about the narrative to be given to the children, teachers and relevant health professionals, whether there should be any further involvement with the local authority in the family’s life at all, and if so, under what legal framework. The possibility of a family assistance order had been raised. The local authority wished there to be an

ongoing 'safety plan'. The parents were particularly concerned that there should be a clear understanding of the position on all sides, otherwise they feared that they would continue to be subject to undue scrutiny from the local authority in their lives, and the allegations would continue to hang over them.

76. We reconvened for a short final hearing on 23 February 2023.

77. The parenting assessment of the parents (from an independent social worker) had been filed the week before, concluding that the parents were, *'empathetic ... showed a high level of knowledge in terms of their children's individual needs and how best to meet their needs'*, there was, *'a warm loving relationship between both parents with the children'*, and the children naturally sought out their parents for comfort and reassurance.

78. The local authority filed a witness statement from its social worker. Within that document and the local authority's position statement, the local authority asserted that threshold could have been established, but in all the circumstances the local authority considered the proceedings should come to an end with no order. It was suggested that the children should be on a child in need plan, that the children were at continuing risk from their mother, their parents continued to be in denial and unaccepting of the concerns, and that continued involvement from the local authority would be needed. Unhelpfully, the social work statement levelled criticisms against the parents for 'refusing' to participate in a family group conference, and for 'declining' to meet with a clinical psychologist.

79. The parents had not refused the family group conference, but queried its necessity at a point where the family members who would attend had a well-established relationship with the local authority. These family members had spent the last eight months fully involved in supporting the family, including 5.00 am starts, co-ordinating school runs, supervising the mother at all times, and providing almost minute by minute schedules to the local authority to inform care planning in the school holidays.

80. The local authority had not informed the parents' legal representatives about the request made to attend appointments with a clinical psychologist. The parents had not been told what the appointment was for, and were advised by their lawyers to wait until they had more information. Only later did the local authority say this was to assist with developing a narrative to support the children. But the parenting assessor recorded what the mother had told the children, which was sensible, fair and reassuring. It has not been explained to me what it was the local authority thought had not been achieved, and could only be achieved with psychological input.

81. Within the same statement it is asserted that the parents '*would not let us put questions to Dr Rahman*'. This is not true. Despite indicating on a number of occasions that it proposed to put questions to him, the local authority never followed this up (at one point a draft application was submitted at 7pm the night before a hearing but not accompanied by draft questions and not pursued at the hearing itself). The local authority has never drafted questions for the expert.
82. I concluded the proceedings with no order on the local authority's application. The narrative document drafted by the parents' representatives was approved.
83. I wrote letters to the children to try to explain to them what had happened, and to reassure them.
84. A summary of the outcome of the case has been agreed by all parties and is also annexed to this judgment. The summary makes clear that no findings have been made that the mother has fabricated or induced illness in either of her children.

Costs

The law

85. The general rule in civil cases that the unsuccessful party must pay the costs of a successful party does not apply to family proceedings (Family Procedure Rules 2010 r.28.3(5)).
86. The Court does however have discretion to '*make such order as to costs as it thinks just.*' (FPR 2010 r 28.1). In deciding what order (if any) to make about costs, the court must have regard to all the circumstances including the conduct of all the parties. The conduct of the parties includes:
- (a) *conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol;*
 - (b) *whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
 - (c) *the manner in which a party has pursued or defended his case or a particular allegation or issue; and*
 - (d) *whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."*

87. Other than acting reasonably or otherwise, the rules do not describe the particular nature of conduct that might sound in costs.

88. In *Re T (children)* [2012] UKSC 36, the Supreme Court considered the circumstances in which costs orders might be made against local authorities in care proceedings. The answer is, only where the local authority comes in for criticism. Per Lord Phillips at paragraphs 43 and 44:

'Since the Children Act came into force, care proceedings have proceeded on the basis that costs will not be awarded against local authorities where no criticism can be made of the manner in which they have performed their duties under the Act.

For these reasons 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'.

89. I do not consider that I need to find that the local authority's conduct has matched a particular label such as 'reprehensible' or 'egregious' before I can award costs. However it is plain from the authorities and the rules themselves, that a costs order against a local authority will only be made where the local authority's conduct may be criticised, where it has acted unreasonably, and in all the circumstances, the Court considers that the justice of the case demands that a costs order is made.

90. Mr Forbes relies upon the judgment of Baker J in *G v E (Costs)* [2010] EWHC 3385 (Fam), [2010] COPLR Con Vol 454, [2011] 1 FLR 1566. The fact that both parties seeking the costs order are publicly funded should not make a difference to my assessment:

[39] ... The rules about costs must be applied fairly to all litigants, regardless of who they are. In this case, all the costs of litigation will be borne by the public purse. The Legal Services Commission is an equally hard-pressed public agency and the Commission – and the taxpayers who fund it – are entitled to look to the court to apply the costs rules impartially and ensure that there is a level playing field. Gone are the days when it is appropriate for a court to dismiss applications for costs on the basis that it all comes out of the same pot. ...'

91. I have been referred by Mr Forbes to the case of *Coventry City Council v X, Y and Z (Care Proceedings: Costs)* [2011] 1 FLR 1045 in which HHJ Bellamy made a costs order against the local authority, and *Re X (Emergency Protection Orders)*

[2006] 2 FLR 701, in which McFarlane J made costs orders. Both cases, Mr Forbes submits, bear striking similarities to the present case.

92. In *Re X*, McFarlane J held that:

'[19] The local authority's actions on 23 November 2004 in applying for and obtaining the EPO based on the social worker's uninformed opinion that this was a case of fabricated illness were described by counsel for the mother as 'outrageous' and 'inexcusable' leading, as it did, to 'the destruction of this family's ordinary life'; such descriptions do not, in my view, overstate the quality of what took place on that day.

...

[82] Given the work that has gone into preparing authoritative national and local guidance upon cases of induced or fabricated illness, the court is entitled to expect that when a social work team manager asserts in evidence that this is a case of 'Munchausen's syndrome by proxy' or 'factitious illness syndrome' (depending on which note of evidence is correct) the social work team has acted in accordance with the guidance and that the assertion being made is backed up by paediatric opinion.

...

[88] The hearing seemingly took place without the justices being referred to any of the relevant case-law about either EPO applications, or without notice applications. The local authority lawyer in such circumstances must consider him/herself under a duty not only to present the case for the applicant, but also to ensure that it is presented fairly and that the bench are fully aware of the legal context within which the application is made.

...

[101] (l) cases of fabricated or induced illness, where there is no medical evidence of immediate risk of direct physical harm to the child, will rarely warrant an EPO.'

93. In *Coventry City Council, v X Y and Z*, HHJ Bellamy made a costs order against a local authority for the following reasons (at paragraph 197 onwards):

'As I have acknowledged, costs orders against local authorities are infrequently made, and for good reason. However, in this case I am satisfied that it is appropriate for me to order the local authority to make a contribution towards the parents' public funding costs. In arriving at that decision I have in mind all of the analysis set out above but in particular that the local authority:

- a) *has abandoned all of the matters relied upon in its original threshold document on the basis of a belated acknowledgement that there is little or no material which is capable of satisfying the threshold criteria;*

- (b) *upon receipt of the reports Mrs G and Ms J, failed to convene a strategy discussion or otherwise take steps to obtain and evaluate information relating to the children's extensive involvement with health services in order to determine whether there is evidence that this is a case of FII and, if so, whether steps needed to be taken to safeguard the children;*
- (c) *in seeking to remove the children into foster care, fell below accepted standards of best practice in the decision-making process which led to its application to the court for interim care orders in August 2009; and*
- (d) *failed to raise with Dr M the shortcomings in his report, instead relying upon that report completely and uncritically in deciding to amend its threshold document to raise allegations of FII, in drafting those amendments and in proceeding with those allegations up to the 5th day of this fact-finding hearing.'*

94. It is helpful to see the circumstances in which costs orders were made in other cases, but ultimately, I must make my decision about this case based on its own particular facts.

The parties' positions on costs

95. Mr Forbes and Ms Mettam seek an order that the local authority contributes fifty percent of the parents' costs up to and including 2 November 2022, and pays one hundred percent of their costs thereafter.

96. It is not disputed that there were grounds for significant concern at the outset of proceedings, which may well have required instruction of lawyers, and even the issuing of proceedings, but it is argued that the local authority acted unreasonably in rushing to apply for the emergency protection order without notice and before it had conducted the investigations it initially set out to pursue.

97. Thereafter the investigation proceeded, but within a couple of weeks of receiving Dr Rahman's report, the parents argue that the local authority's actions were reprehensible. It was on 3 November 2022 that the parents received the updated schedule (which had been directed to be filed on 28 October 2022). The local authority was entrenched in its pursuit of threshold findings, notwithstanding it did not have the evidence to support them. Further, had the local authority reflected on the bigger picture, in line with long-established guidance in FII cases, it is argued that it would surely have been driven to the conclusion that the proceedings could safely come to a conclusion without the need for public law orders.

98. Instead, proceedings continued for a further four and a half months.
99. On behalf of the local authority, Ms Courtney (who was not responsible for drafting the schedule of findings) submitted that the emergency protection order was granted by an experienced District Judge, having been persuaded by the evidence he heard from Dr R. This she says would indicate that the local authority acted appropriately in applying for it.
100. Ms Courtney argued that the position with Dr Rahman's report was less clear cut than the parents might suggest, and his recommendation for a psychological assessment of the mother was something that needed to be taken into account (although no application for a psychological assessment was made). She said it was not unusual for an expert to be instructed and a party to contest their opinion or to choose no longer to rely upon that expert. She was not able to explain why no questions had ever been drafted to be put to Dr Rahman.
101. She acknowledged that some of the decision making could have been more timely and better thought through, but highlighted the tremendous pressure that this local authority was under, as are local authorities in other areas. She submitted that it could not be said in all the circumstances that the local authority had acted reprehensibly or egregiously, or even unreasonably to the extent that it should be punished by the making of a costs order against it.
102. She acknowledged the torment that the family had been through, but noted that the case had ended well, and queried how it would help for the local authority to be given a financial penalty.
103. Representing the guardian, Dr Gatland did not make any submissions on the question of costs.

Conclusions

104. I must not judge the local authority only with the benefit of hindsight. In June 2022, the local authority discovered that the mother had apparently lied not just to colleagues at work, but teachers at her children's school, and potentially the children, about having had breast cancer. Both children had been subject to various investigations into health-conditions. There was justified cause for concern and certainly a need for further investigation. It is understandable that Dr R and the children's headteacher felt shocked and overwhelmed by the discoveries that Dr R had made. In that moment they no longer knew whether to trust any information that came from the mother, and could not trust their own experiences of her to inform risk assessment. But it is for precisely this reason that the guidance is there,

to enable informed, evidence-based, independent professional assessments of the risk to be made before rushing to action.

105. The local authority is not expected to have made the correct judgment calls at all times, but it needed to operate a decision-making process that was rational, fair and transparent, and based on evidence, not speculation.

106. Further, the approach set out in the documents to which I have been referred, in particular the case law in respect of EPOs and in the FII guidance documents, is not a matter of ‘best practice’, which it would be admirable if local authorities could strive towards. The case law and the guidance records fundamental steps which should be taken in every case where these kinds of issues arise.

107. There were voices at both the first and second strategy meeting advocating for caution, and for further investigation in line with the guidance. There were voices reassuring the group that there was no evidence that the mother had sought to harm the children, that any risk seemed manageable at that time, and cautioning a response that was proportionate to any risk. But by the end of the second meeting, those voices appeared to have been overridden by a hasty decision to take the exceptional step of applying to the Court for emergency protection orders without notice to the parents.

108. The evidence that the local authority has disclosed (which is limited and does not include documents that it has previously been directed to file and serve) leads me to the clear conclusion that in pre-proceedings and leading up to the application for an emergency protection order, the local authority’s conduct can be criticised for the following reasons:

- The local authority approached the case as if there was an immediate serious risk to the children, despite the absence of evidence of, *‘frank deception, interfering with specimens, unexplained results of investigations suggesting contamination or poisoning or actual illness induction, or concerns that an open discussion with the parent might lead them to harm the child’* [RCPCH guidance §5.1];
- It was said in evidence at the EPO hearing that caution was needed before discussing with the mother as she may take steps to ‘prove’ that the children were really ill i.e. by administering drugs to them that could kill them. However, the judge was not told, that other professionals at the strategy meetings had stated there was *‘no evidence of her harming children’*, that it was, *‘not however medically clear where we are with the children’*, or that a

consultant paediatrician had given the opinion that, *'there are question marks over things, but [the situation] is manageable at the moment'*;

- The local authority failed to keep an open mind as advised in the Working Together Guidance (§4.9). It appeared to allow its decision making to be driven by the opinions and fears of Dr R;
- Dr R was not the appropriate person to drive the decision-making because she had a conflict of interest. She was too personally involved as the mother's employer and general practitioner. Advice should have been sought from another paediatrician (RCPCH guidance paragraphs 5.21 and 5.3);
- Further, Dr R was the named safeguarding general practitioner for the area, but the guidance is that a referral should have been made to a consultant paediatrician, who should have taken the lead. At the least, the local authority should somewhere have explained why it was that the views of the consultant paediatricians at the strategy meetings, none of whom were advocating immediate removal of the children from their parents' care, were not canvassed more fully before the decision was made to apply to the Court.
- The local authority has not satisfactorily explained why it was that the decision to hold child protection medicals was effectively over-ridden by the decision to apply to the Court. The guidance requires the local authority to establish the child's actual current state of physical health and/or undertake a full developmental assessment.

109. The local authority's conduct in obtaining the emergency protection order without notice to the parents can also be criticised, for the following reasons:

- Far from approaching the application with *'an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the European Convention rights of both the child and the parents'*, the local authority did not put before the court evidence that was *'full, detailed, precise and compelling'*, and did not make *'the fullest and most candid and frank disclosure of all the relevant circumstances known to them'*. Dr R had some expertise in the issues arising, but her close professional relationship with the mother as her employer, and perhaps understandably emotional and personalised response to the revelations about the mother's lies should have brought into stark relief the need for independent input from a consultant paediatrician of precisely the sort required by the guidance. It was not drawn the Court's attention that Dr R had a conflict of interest.

- Dr R's opinion that the children were at risk of harm from poisoning from their mother was speculative. Risk assessment is of course speculative to some extent, but the evidence basis for it had not been established.
- It was not drawn to the Court's attention that the FII guidance had not been followed in material respects. It was not drawn to the Court's attention that consultant paediatricians had expressed a view that the situation was *'manageable'*.
- The advocate for the local authority did not draw the case of *Re X* to the court's attention (although the judge should have been aware of this case);
- The local authority did not draw the RCPCH or Working Together guidance on FII to the court's attention;
- There is no evidence that the local authority gave any consideration as to whether a less interventionist approach could have been taken. It's in-house lawyer's statement that this was a cushion or a hammer and nothing in between was palpably incorrect. Had the local authority followed the guidance, and their initial thinking, they could have had meaningful conversations with the children's father, and mother, taken the children to child protection medicals, explored the possibility of supervised care in the home, removal of medication, or the mother moving out, while further investigation by a consultant paediatrician took place.

110. Having obtained the order, the local authority could still have prevented the children from being taken from their beds in the middle of the night. Going back to the case of *Re X*, referred to above, having obtained the emergency protection order the local authority was under an obligation to, *'apply its mind very carefully to whether removal is essential in order to secure the child's immediate safety. The mere fact that the local authority has obtained an EPO is not of itself enough The local authority, even after it has obtained an EPO, is under an obligation to consider less drastic alternatives to emergency removal. Section 44(5) requires a process within the local authority whereby there is a further consideration of the action to be taken after the EPO has been obtained. Though no procedure is specified, it will obviously be prudent for local authorities to have in place procedures to ensure both that the required decision-making actually takes place and that it is appropriately documented.'*

111. The local authority has not put forward any evidence to suggest that it had any procedures in place to ensure either that the decision-making took place at this stage, or that it was appropriately documented. There appears to have been no consideration of less drastic alternatives.

112. Once proceedings were underway, and the paediatric report from Dr Rahman finally obtained on 7 October 2022, the local authority's conduct was unreasonable because:

- Rather than seek clarification from Dr Rahman, or apply to the Court for a further expert opinion, or choose to accept his opinion, the local authority sought findings against the court appointed expert paediatrician in its schedule of findings dated 3 November 2022, and placed continued reliance on Dr R's opinion evidence, where Dr R was a witness of fact, not an expert;
- Even when the inappropriateness of this was pointed out by the other parties and the court on 3 November, the local authority took no action, but reproduced the 'findings' sought in a 'Composite Schedule of Findings' dated 5 December 2022. The point was raised again at the hearing on 7 December, but the 'findings' sought remained in the schedule before the Court on 3 February 2023;
- Notwithstanding that it did not apply to put questions to Dr Rahman, or seek alternative expert opinion, the local authority continued to indicate in correspondence and to the Court that it intended to pursue the findings on its schedule of allegations against both the parents and Dr Rahman, for a further four months. The change of position came on 2 February 2023 (just one day before the further case management hearing).
- At the hearing on 3 February there was a lack of clarity from the local authority about its position. Even at the final hearing, it continued to assert that the mother presented a risk to her children from which they required to be safeguarded by a 'safety plan', notwithstanding by this stage the Court had found that the local authority could not establish that the threshold for making public orders was crossed;
- From the outset, Ms Mettam and her solicitor, and Mr Lewis for the mother, pressed the local authority to provide information that would enable the parties to understand the process by which the decision was made to launch the proceedings without notice, to obtain the EPO, and the evidence that formed the basis of those decisions. The local authority has been consistently poor in responding to those requests, later made orders of the Court, and continued to disregard those orders, neither providing reasons, nor applying to the Court for extensions. Arguably, this did not just prevent the parties from understanding what had happened, and caused additional work for other parties' representatives, but contributed to the overall lack of reflection from the local authority on its own position as the case proceeded;

- From an early stage in proceedings, the local authority has been urged by the Court and the other parties to consider the overall strategy in this case, and the necessity for lengthy proceedings in circumstances where the parents expressed their willingness to work with the local authority, undergo assessments or enter agreements, and the children were returned to the family home early on in the proceedings. All the FII guidance points clearly towards striving for a collaborative approach. However, the local authority appeared to be focused only on driving the case towards a fact-finding exercise, notwithstanding at no point did it have expert evidence to substantiate its own pleaded case.

113. Taken together, the local authority's conduct before and during the proceedings has been unreasonable, and could be described as reprehensible. Setting out the route by which I have come to this conclusion at some length in this judgment is not intended as a means of haranguing the local authority, or singling out any individual for personal criticism. It is to provide a basis for the local authority to conduct its own review, and take whatever actions it may decide are needed to ensure best practice in the future.

114. Had the FII guidance been followed, and the local authority followed through with its original planning - to progress to a section 47 investigation, for the children to have child protection medicals, for a consultant paediatrician to be instructed to take the lead, for discussions to be had with one or both of the parents, exploration of lesser interventionist means of protecting the children - there is a real prospect that these children may not have been subject to care proceedings at all.

115. Even if these proceedings were necessary, and/or even if the emergency protection order was required, had the local authority conducted itself in accordance with guidance, it is hard to see that the removal of the children from their parents in the middle of the night without any forewarning would ever have been thought appropriate.

116. Having issued proceedings before even the start of proper investigation had commenced, the local authority was under an obligation to keep under close review the evidence as it was coming in. Upon receiving the evidence of the jointly instructed consultant paediatrician which did not support a finding of FII, and having received the parents' responses to threshold, the local authority should have analysed and reflected on the evidence base. The local authority did not, and instead doubled down on its stance, which was an unreasonable one. As a result, the parents and children were subject to the continuation of the proceedings, and to the intervention of the local authority in their lives, for longer than necessary.

117. Having regard to the manner in which the local authority has conducted itself before as well as during the proceedings, justice dictates that the local authority contributes fifty percent of the parents' costs up to and including 2 November 2023 and one hundred percent of their costs thereafter.

Standard or indemnity basis for assessment?

118. I have been referred to *Re B (children)* [2007] EWCA Civ 921 which held that costs assessed on the indemnity basis would be '*a wholly exceptional order*' to make. Mr Forbes referred me to the civil case of *Balmoral Group Ltd v Borealis* [2006] EWHC 2531 (Comm), which considered the types of conduct which might attract an award of costs assessed on the indemnity basis.

119. The starting point is again that the Court has a discretion to make an order as it thinks just, but must take into account the conduct of all the parties.

120. I have directed that the local authority should contribute to both the mother's and the father's legal costs. Instead of submitting their bills for assessment to the legal aid agency, if not agreed, the bills will fall to be assessed by a process of detailed assessment. Where there is a doubt about a particular item on the bill, standard assessment resolves the doubt in favour of the paying party (in this case the local authority). Assessment on the indemnity basis resolves the doubt in favour of the receiving party.

121. So I have to decide whether the justice of this case would be met by doubts on assessment being resolved in favour of the parents' representatives, or the local authority.

122. In the particular circumstances of this case, I am satisfied that costs should be assessed on the indemnity basis. Two aspects of the local authority's conduct lead me to that conclusion. Firstly, the local authority's failings that I have identified above were not just careless or sloppy unjustified errors as a result of lack of resource, pressure of workload or any particular challenges in this case. They appear to have been the product of deliberate disregard for orders of the court, the relevant guidance and the legitimate concerns of the mother and father. No satisfactory explanation for this conduct has been given.

123. Secondly, and perhaps of more weight so far as the question of basis of assessment is concerned, is how that impacted the way the parents could respond to the case against them, as analysed in Ms Mettam's submissions to the Court.

124. As noted above, the repeated requests for information about the local authority's decision-making process, the application for the emergency protection order, and disclosure of evidence including about the children's past and ongoing health appointments were ignored. Court orders were disregarded and no explanation provided.
125. The local authority consistently said it intended to put questions to Dr Rahman but did not respond to requests for draft questions to be shared. Notwithstanding the inappropriateness of seeking findings against him had been raised a number of times at Court, those findings were repeated in the composite schedule filed in December and only finally abandoned the day before the hearing on 3 February 2023.
126. Mr Lewis and Ms Pendle obtained the mother's and children's medical records in the summer. They painstakingly went through the records, took instructions from their clients and carefully responded to the schedule of findings, identifying the parts of the evidence where there were discrepancies or a mis-recording of an entry in the records. An explanation was given by the mother at an early stage about accessing hers and the children's records. She had not made any changes to the children's records. She had changed her surname in her medical records to her married name as she had been told there would be difficulties in travelling abroad if the name on her travel documents did not match the name on her covid vaccination certificate.
127. The local authority apparently made no attempt to consider or reflect upon the parents' responses, but in the composite schedule repeated all the allegations as they had initially been made, notwithstanding that Mr Lewis's careful analysis had shown some allegations to be unsustainable.
128. Even after the hearing on 3 February 2023 when the local authority had confirmed it was no longer seeking public law orders and I had given the judgment as to threshold, the statement submitted by the local authority for the final hearing required significant input from the parents' representatives. They had to respond to the criticisms of the parents, explain why the terms of the draft 'safety plan' were not appropriate in the light of the finding that the threshold as pleaded could not be established, and work on the narrative statement.
129. In these circumstances, if a question arose as to the reasonableness of Mr Lewis or Ms Pendle having spent time reviewing the records, sending letters, or any other element of the evidently hard work they have contributed to this case in order

to represent their clients, I am satisfied that those doubts should be resolved in their favour.

130. Similarly, both Mr Forbes and Ms Mettam have had to respond to documents provided at the eleventh hour, to review carefully the relevant guidance and cross-check against the reality of what happened in this case, and battle in advocates' meetings to move things forward. They have prepared comprehensive and helpful written and oral submissions for each hearing. They have represented their clients exceptionally well - as no doubt they would have in any event - but their task has been made harder because of the way the local authority has conducted itself.

131. I find that any doubts as to the reasonableness of their fees should be resolved in their favour as the receiving parties.

HHJ Joanna Vincent

Family Court, Oxford

Draft judgment sent: 7 April 2023

Approved judgment handed down: 14 April 2023

Annex 1

COURT APPROVED SUMMARY OF INFORMATION

1. There are entries within the children's medical records recording that Mrs X "has factitious disorder". This is untrue. She has no such diagnosis. This inaccurate information should never have been shared and must be corrected.
2. Care proceedings were issued because of professionals' concerns that Mother had exaggerated/fabricated illness in her own medical records. This was not established in court.
3. The court has made no findings of significant harm or the likelihood of significant harm against either parent. Findings were not pursued by the Local Authority. There has been no evidence to support the assertion that Mother is suffering a psychiatric illness.
4. The children live with both parents. There are no Court orders in place. Any past requirement for supervision of the children in the mother's care has been removed.
5. The family, and the professionals around them, should proceed now on the basis that Mother did not induce or fabricate illness in her children. There is not even room for a suspicion that she has done so in the past.
6. The parents have agreed, without prejudice to any of the above, that the mother will consult with the father concerning any medical or health issues relating to the children save for in an emergency. This does not prevent the mother from attending medical appointments for her children.
7. Nothing in the above observations should be taken as preventing legitimate safeguarding concerns from being raised by medical professionals about the children in the future.

24 February 2023

Dear Emma and Harry,

My name is Judge Vincent and I work at the Family Court in Oxford.

My job is to make sure that children are safe, and that their mums and dads can look after them. If mums and dads need help to look after their children, I make sure they get the help they need.

Social workers also have the job of making sure that children are safe. If social workers have a worry, they come and tell me about it.

I know that both of you are happy and healthy children. Your mum and dad love you more than anything in the world. They look after you and give you everything you need. They can keep you safe.

I know that both of you had some health issues. Your mum was the one who took you to the appointments. A good parent takes their child to the doctor to make sure they are well. But sometimes a mum or dad is so focused on wanting their child to be well and healthy, they can start imagining that the littlest thing is a sign of illness. Then, they can start believing their child is seriously ill, when they are not ill at all. Instead of the child going to the doctor to get better and keep healthy, they might get medicine or treatment when they don't need it. That can be dangerous for them.

This is what the social workers were worried about with your mum. This is the reason that she had to leave home for a few months.

I am happy to tell you that the social workers have looked into everything. They know now that your mum, and your dad, can keep you safe.

I would like to reassure you that the two of you have done nothing wrong. There is nothing wrong with going to see the doctor if you have a worry about your health. In fact, it is a very good idea.

If in the future you are not feeling well, you can always talk to your mum or your dad about it, and they will make sure that you get the care you need. Your mum

is not going to be in trouble for taking you to the doctor. She is a great mum. I know that she can be trusted to look after you. So can your dad.

I know you missed your mum when she was away. It was a really hard time for you and for all your family. You knew that your mum would never hurt you, but I am afraid your mum had to stay away until the social workers were sure it was safe for her to come home.

I am very sorry that you and your family had to go through this experience. It was to make sure that you were safe, but it must have been very hard for you all.

I am pleased to tell you that now the social workers are happy your mum and dad can keep you safe, there is no need for there to be a case about you in the family court. You can live your normal family life again. I hope that you two feel very proud of yourselves for how you have looked after each other, and managed this very difficult time in your lives.

I would like to wish you all the best for the future.

Yours sincerely,

Her Honour Judge Joanna Vincent,

The Family Court, Oxford