

HONG KONG / JUDGMENT

LACHY v. YC

COURT

Family Court

DECIDED

21 November 2017

CASE / FILE NUMBER

FCJA2057/2016

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj FCJA 2057 / 2016 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION JOINT APPLICATION NUMBER 2057 OF 2016

BETWEEN LACHY 1st Applicant and YC 2nd Applicant

Coram: Her Honour Judge Sharon D. Melloy in Chambers (Not open to public) Dates of Hearing:
26 and 27 September 2017 Date of closing submissions: 23 October 2017 Date of Judgement: 21
November 2017

JUDGMENT

(Fact Finding hearing)

Introduction

AUTONUMOUT This is a hearing to determine whether or not the father s girlfriend (Ms. N) has sexually abused the only child of the family, a little girl called O, or in the alternative whether Ms. N has behaved in a way that could be deemed to be inappropriate . O was born on the XX January 2014 and is now 3 years of age. At the time that the allegations were made she was not yet three years of age. At a hearing on the 13 April 2017 the mother was given an opportunity to withdraw these allegations. She chose not to and as a result the court ordered that there should be a Fact Finding hearing. This came before the court on the 26 and 27 September 2017.

2. The father was originally under the impression that the mother was also accusing him of sexual abuse. However, the mother has made it clear since she filed her 2nd affirmation dated the 9 May 2017 that this was not the case. Her concern is solely with respect to Ms. N.

Background

3. The allegations made by the mother came in the context of a potential dispute over custody and care and control of the child. The parties are both ethnically Chinese but the father was born and grew up in the United Kingdom, whereas the mother was originally from the Mainland. They married on the XX March 2009 in Hong Kong and, as I have said, O was born on the XX January 2014. It seems that they have spent most of their married life based in Hong Kong, although the mother in particular has travelled frequently for business. The father is a barrister and the mother has her own precious gem stone and jewellery companies.
4. It seems that unhappy differences arose between the couple and they separated, although the date of that separation does not appear to be agreed. In any event a joint application for divorce was filed on the 14 June 2016. In that application it is stated that the father shall have the custody and care and control of the child with reasonable access to the mother. Minutes of Agreement dated the 19 May 2016 were also filed and again this document stated that it was agreed that the father would have custody and care and control of the child. This document is signed by both parties.
5. It is the father's case that he was the primary carer of the child at that time and that O was living with him and that he cared for her with the assistance of his mother and a domestic helper. This is denied by the mother who maintains that she has been the primary care taking parent of the child since birth. She also refers to the parties sharing O's care.
6. In any event, on the 12 January 2017 the decree nisi was pronounced. On the same day the court received a joint affirmation from the parties in which it was stated that it was agreed that the mother would now have custody of O with reasonable access to the father. A further document stated that it was agreed that the father would pay child maintenance of HK\$10,000 per month. Given the differing agreements the court adjourned the question of both custody and ancillary relief. Eight days later the father filed a summons seeking interim custody of O and claimed in his supporting affirmation that the mother had misrepresented the situation to him, particularly with respect to the employment of a domestic helper and the mother's business commitments. This summons was returnable before the court on the 6 March 2017. On the 7 February 2017 the father issued an ex parte summons on notice seeking inter alia interim custody and care and control of O. This application was returnable before the court on the 10 February 2017. It was at this hearing that the mother's allegations first came to light. An interim order was made on that occasion splitting O's time between the father's household and the mother's household. Further the father undertook to ensure that Ms N had no form of contact and did not see O, whilst O was in his care and the mother undertook to ensure that her new dog was kept secure whilst O was in her care. As indicated above the Fact Finding hearing was set down for trial on the 13 April 2017 after the mother was given an opportunity to withdraw her allegations. On that occasion she was also warned that she might face an indemnity costs order in the event that it was found that she had made up these allegations. On that occasion the father also sought

to vary his undertaking with respect to Ms N. This was opposed by the mother and the court did not intervene further pending the hearing preferring to err on the side of caution.

Undertakings were also given by both parties not to discuss the proceedings with the child.

The issue

7. The issue then is whether or not Ms N has sexually abused O or in the alternative whether she has behaved in a way towards O that could be deemed to be inappropriate . The law
8. In the judgment of FCMC 12118 of 2010, Specific Issues, dated the 7 March 2014 I set out the law relating to matters such as this in some detail. I have therefore taken the liberty of repeating the relevant sections as set out below:
13. The Family Court does of course follow the civil standard of proof when determining issues of this nature. Thus the court has to decide on the balance of probabilities whether it is more likely than not that these incidences took place.
14. Counsel for the wife has very helpfully set out the up to date position on the law in his closing submission as follows: The Burden and Standard of Proof of the Allegation 3 It is trite in our legal system that he who alleges bears the burden of proving his allegation. There is no exception in the present proceedings although family proceedings are regarded as quasi-inquisitorial. Therefore, it is accepted that W [the wife] bears the burden of proving the Allegation. [The same applies in this case]. 4 The majority in the United Kingdom House of Lords in *Re H & Other (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 held that the civil standard requiring proof on a balance of probabilities continues to apply where, in civil proceedings, an allegation is made of criminal (or similarly serious) misconduct, but explained that such standard is to be applied flexibly, factoring in the inherently greater improbability of serious misconduct as compared with lesser forms of misconduct, therefore requiring the person bearing the burden of proving the allegation to prove it with evidence of a commensurate cogency. 5 This approach was adopted by the Hong Kong Court of Final Appeal in *Nina Kung v Wong Din Shin* (2005) 8 HKCFAR 387 (see para. 181 of the judgment). Nevertheless, afterall, the civil standard shall still apply while this Court has to bear in mind the seriousness of the misconduct alleged, recognizing that it carries an inherent degree of improbability.
9. In addition, the solicitors for the father provided further case law and analysis in their opening submission, which went to the general point concerning the standard of proof required in a case where serious allegations of misconduct are made in the context of civil proceedings as here. They said inter alia as follows:
4. The law regarding the requisite standard of proof for serious criminal allegation alleged in civil cases was set out in the following cases. In *HKSAR v Lee Ming Tee*, FACC 1 of 2003, Sir Anthony Mason NPJ cited at paragraph 71: In *re H (Minors)* [1996] AC 563 where Lord Nicholls of Birkenhead (with whom Lord Goff of Chieveley and Lord Mustill concurred) said (at 586E) When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation

the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

5. In *Ming Shiu Chung v Ming Shiu Sum*, FACV 25 of 2005, Ribeiro PJ which was by cited Sir Anthony Mason NPJ in *HKSAR v Lee Ming Tee*, FACC 1 of 2003, that inferences of fraud or serious misconduct are not to be reached by conjecture nor ... on a mere balance of probabilities. They are to be plainly established as a matter of inference from proved facts
6. In *Nina Kung v Wang Din Shin*, FACV 12 of 2004, Mr. Justice Chan stated that paragraph 185 that: the court is invited to reach a conclusion of forgery as an inference to be drawn on the basis of circumstantial evidence, any such inference must be properly grounded in the primary facts found. The court guards against indulging in conjecture under the guise of drawing an inference where the primary evidence does not logically and reasonably justify the particular inference in question.
10. With respect I agree. It is then accepted that the burden of proof lies with the mother and that given the seriousness of the allegations made, she has to prove to a very high standard indeed that what she alleges is infact correct. In other words, she has to provide compelling evidence to support her case. The mother s case
11. The mother sets out her allegations in her 2nd affirmation of the 9 May 2017 as follows: The behaviour of O
9. Since around late October 2016, every time when O stayed overnight at my place, I noticed that she would display unwillingness and express fear to taking a bath. She would cry whenever I asked her to take a bath. On two to three occasions, while taking a bath, I saw O pulling her nipples hard and putting one of her fingers inside her private parts. I was deeply shocked to observe such a behaviour from O, but initially I wondered if that might be attributable to her curiosity on her body and might be part of a child development. Accordingly, I only told O not to conduct such acts and did not ask further.
10. Although O was not yet three years old at that time and could not articulate her feelings in detail, I could easily feel her mood and physical conditions since I had been the primary carer for her since child birth. Between November 2016 and early January 2017, I noticed that O was often not in mood. She appeared to be preoccupied and in a trance from time to time. At that time, I was worried that O might not be getting sufficient nutrition or that her general health conditions were not good. Accordingly, I consulted a Chinese physician to give her some Chinese herbs to increase her appetite.
11. During December 2016 to January 2017, again, whenever O stayed overnight at my place, she would display unwillingness and fear to taking a bath. She would cry and refuse to take a bath. In order to ease her anxiety, I suggested that I took a bath with her so we could play water together. On two to three occasions, while taking a bath together, O pulled her nipples hard again and tried to touch my private parts. I told her that would hurt and told her to stop. I explained to O the difference between a child female and an adult female, that she

should not pull her nipples so hard or let anyone touch them.

12. On one occasion in December 2016, after finished taking a bath and while I was helping O dry her body, O put her finger inside her vagina again. I saw her putting her whole finger in and out of her private part. I was so shocked at that time I did not know how to react other than telling her to stop.
13. I do not consider that was an act that a normal 2-year-old would do and do not think that was a normal conduct. Accordingly, I searched on the internet and consulted my close friends who also have daughters about the situation. I was in great anxiety that my daughter's conduct was affected some other persons.
12. As indicated above, although concerned, the mother did not attach very much weight to these so called acts at first and simply put it down to a young child's natural curiosity about her own body. This changed however following O's 3rd birthday party at her mother's house on the XX January 2017. Notwithstanding the toing and froing over the arrangements for O as set out above, the parties were still on relatively good terms at that time and although there is some dispute about what actually happened on that day it does not appear to be disputed that the father came to the birthday party and dropped off a birthday cake for O. There were various people at the birthday party including a friend of both the father and the mother called M. According to the mother:
 21. In the afternoon when we were about to cut the birthday cake, M suddenly said in front of me, L, my sister and another friend, AC, that the 1st Applicant [the father] told him that Ms. N was very upset that the 1st Applicant had consented to grant the custody, care and control of O to me. The 1st Applicant told M that Ms. N had requested that the 1st Applicant take immediate steps to get back the custody, care and control of O, and that the 1st Applicant would not be a man if he failed. The 1st Applicant indicated his concerns that Ms. N might leave him if he lost custody, care and control of O. I was surprised to hear of M's conversation with the 1st Applicant. However, there were other guests present at that time and I did not discuss further with M on this point there and then.
 22. Later that evening, after most of the guests had left, I told L, AC and my sister that I was concerned about the 1st Applicant's earlier conversation with M. I described my observations as stated in paragraphs 9-12 above to L and my sister, and they were both shocked to learn of O's conduct. L, being a mother of a boy and a girl, immediately suggested me to consult a professional doctor and report the incident to the police if necessary.
13. The mother then phoned the Hong Kong Society for the Protection of Children to seek advice. She did not report the matter to the Police at that time. She did though inform both the father and the paternal grandmother of her concerns namely that she somehow thought, as a result of the conversation referred to above, that Ms. N was responsible for O's explicit sexualized behaviour. Consequently, she insisted that Ms. N not be allowed to bathe O or take her swimming or touch her naked body or indeed be alone with her. She says that

after the father gave his undertaking in court that Ms. N not have any contact with O, that the so called acts ceased. The mother eventually reported the matter to the Police on the 25 April 2017.

14. Following the hearing in court on the 10 February 2017 the mother then posted a copy of the undertaking given by the father on Facebook, contrary to the implied undertaking on confidentiality. She did this for the first time on the 11 February 2017. Facebook took the post down on the 18 February and the mother reposted it on the 20 February. It was finally removed sometime after the 23 February after the father sent the mother a pre action letter for contempt. Ms. N also wrote to the mother directly expressing her concern about this. I am told that the mother did not respond.
15. The Social Welfare Report was filed on the 28 March 2017. On the 22 June 2017 the mother filed her 4th affirmation in reply. In that affirmation she maintained her basic stance as follows: Suspected Sexual Harassment by Ms. N
41. I have already stated clearly why I have concerns over potential sexual harassments suffered by O in my 2nd Affirmation and I do not intend to repeat my grounds here. The logic is, given the 1st Applicant, his mother and the domestic helper have had the chance to bathe O since she was a baby, the only new element which preceded O s inappropriate touching was the appearance of Ms. N. In fact, after the 1st Applicant s undertaking preventing Ms. N s contact with O, O s inappropriate touching has stopped.
42. I would very much hope that O had never been assaulted. Maybe she just imitated the touching from Ms. N or maybe she witnessed some initiate interactions between the 1st Applicant and Ms. N when O stayed at the 1st Applicant s place (given that the 1st applicant often got drunk and would not care who was around). However, the reactions of the 1st Applicant, his mother and Ms. N have deepened my worries.
43. They have been saying different things at different times. Ms. N denied that she had ever bathed O, but the 1st Applicant had affirmed that Ms. N had helped bathed O in paragraph 11 of L s 5th Affirmation. They have never mentioned that Ms. N had touched the private parts of O, and now they admit and are trying to explain away why Ms. N would have done so on occasions. If really no harassment had taken place, how would O be going through a traumatic experience (paragraph 51 of L s 5th Affirmation)? Why would Ms. N be anxious about the court finding any truth in my observations (paragraph 4 of L s 5th Affirmation).
44. I deny that I had alleged the 1st Applicant having sexually harassed O. Even the various messages and audio scripts shown in L s 5th Affirmation had confirmed my approval that both of O s parents could have physical contact with and bathe O.
45. An account of events above shows that my concerns in relation to sexual harassment allegation against Ms. N is not unfounded and Ms. N s credibility is questionable.

45. Regarding my late reporting of my observation of O, I had already stated in the paragraph 9 of my 2nd affirmation that I suspected O's inappropriate conduct was due to her curiosity on her body and child development so I did not notify the 1st Applicant and report to the police for the sexual assault in as early as late October 2016. I only harboured my suspicion of sexual assault towards Ms. N after consultation with my friends, professionals and asking O on whom had touched her private part on 15th January 2017. Once I have held the suspicion towards Ms. N, I immediately notified the 1st Applicant and demanded that Ms. N could not touch O.

Conclusion

46. In view of the responses above to the wrongful allegations and fabricated facts by the 1st Applicant and Ms. N, I re-affirm my reasonable causes that O might have been subject to sexual assaults, and questioned the 1st Applicant's suitability as a custodian due to his past records of mistreating O, inability to control emotions with frequent drinking and relation with other women.
16. It is of note that the mother was unable to provide any actual evidence in support of this very serious allegation of sexual abuse and/or inappropriate behavior. It seems that her position was merely based on conjecture.
17. In the mother's closing submission, she said as follows:
5. Upon reading Ms. P's psychologist report [the report was filed on the 11 July 2017] and hearing the evidence at the Hearing, Ms. Y agrees that there might not be any actual sexual abuse against the Child per se. However, from the evidence, it is reasonable to suspect there might be some kind of harassments / inappropriate behaviour which had been shown / seen by the Child, which led to the well-being of the Child being affected. The mother submitted in her opening submission that she would be able to discharge the high burden of proof required of her and that at the end of the hearing she would invite the court to conclude that inappropriate behavior did occur in front of O. It seems that by that stage she was not insisting that O had in fact been sexually abused by Ms. N. However, it is of note that she was again unable to provide any actual evidence in support of what she said in this respect. The father's case
18. The father for his part alleges that the mother has deliberately and maliciously made up these allegations in order to malign both him and his girlfriend. He points out that there is not a shred of evidence to support either the mother's primary or secondary position and that her whole case is built on suspicion and surmise and her own subjective inferences and speculation. This is especially damaging given that Ms. N is a school teacher of young children and that as indicated above the mother posted his undertaking on Facebook. The father says that he has never seen O behave in the way described by the mother. In summary he said in his closing submission that:

20. It is the 1st Applicant's case that he himself, the domestic helper and his mother have never seen O touch herself inappropriately in the manner described by the 2nd Applicant, and has always been happy and healthy under his watch (see paras. 12 and 13 of the 1st Applicant's 5th Affirmation).
21. It is Ms. N's case that she has never and would never touch O inappropriately and that she never and would never teach O to touch herself inappropriately, and that the allegations against her sicken her (see para. 23 of her affirmation).
19. In so far as the events surrounding O's 3rd birthday party are concerned the father said as follows in his 5th affirmation of the 7 June 2017:
24. I strongly deny all of the allegations made against me at paras. 20 to 23 of the 2nd Affirmation. I did not tell M [the friend] that Ms. N had put pressure on me to fight for the return of O. I did not tell M that I was afraid that Ms. N would leave me unless I fought for the custody of O. All I told M was that I was upset about signing custody of O over to the 2nd Applicant and Ms. N was also upset about my situation. I do not know how M could have said what is alleged, if he in fact did. On 12th May 2017 at around 21.17, after I had read the 2nd Affirmation of the 2nd Applicant I called up M and I asked him whether he told his wife and the 2nd Applicant what they had alleged against him. He said that he had no recollection. I asked him whether he had any recollection of me telling him what they had alleged and he replied that he had no recollection. He also said that he had a lot to drink that day and couldn't remember much. I told him that I had never said what the 2nd Applicant and his wife alleged against me and said that he only remembered that I said Ms. N and I were sad because I had signed custody of O over to the 2nd Applicant. I suspect that the 2nd Applicant's sister and friends at the party could have gossiped, made subjective inferences, put words in my mouth, and caused the 2nd Applicant to believe that Ms. N was a threat to the 2nd Applicant's status as a mother. Illogical inference of sexual assault against Ms. N
25. In any event I do not see how M's alleged words against me, which falsely paints the picture that I am some sort of puppet of Ms. N, advance or support the 2nd Applicant's allegations of sexual abuse against Ms. N. They are irrelevant. Furthermore, I do not see how M's alleged allegations that I had told him that Ms. N had put pressure on me to fight for the custody of O could trigger the 2nd Applicant to link what was said by M to the alleged fact that O had touched herself inappropriately (see para. 22 of the 2nd Applicant's 2nd Affirmation). The 2 matters are wholly distinct, unless the 2nd Applicant has preconceptions and prejudices against Ms. N. I strongly suspect that the 2nd Applicant is on some sort of witch-hunt, against Ms. N as she is fueled by jealousy of O and Ms. N's relationship.
20. In conclusion he states:

CONCLUSION

53. The 2nd Applicant's allegations as to O's alleged inappropriate behavior are materially inconsistent and unreliable. My domestic helper, my mother and myself have never witnessed O touch herself inappropriately. Even if O had touched her private parts, it can be attributed to one of many reasons including that O is possibly being curious about her own body. This is simply no reasonable basis for the 2nd applicant to accuse Ms. N and/or me of sexually abusing O. There is no reasonable nexus between O inappropriately touching herself and Ms. N sexually abusing O. With respect I entirely agree with this analysis of the situation. He adds that:
54. The 2nd Applicant's allegations against Ms. N and me occurred 3 days after she had obtained custody of O on 12th January 2017. The WhatsApp messages support that the 2nd Applicant has ulterior motives against Ms. N and that the 2nd Applicant is: ageist; racist; jealous of Ms. N; perceives Ms. N as a threat to her status as O's mother; and does not approve of my relationship with Ms. N. These appear to be the real reasons why the 2nd Applicant has made these malicious and false allegations against Ms. N.
21. Although this may have been the mother's motive, it seems to me that there might be a simpler explanation, namely that the mother thought that her allegations may ultimately bolster any claim that she might have for sole custody and care and control of O. It is of note that M was not called as a witness. Neither has the mother been able to explain the causal link between O's behavior and Ms. N. The Clinical Psychologists Report
22. Ms. P, the clinical psychologist provided a very helpful report and was similarly helpful in the witness box. She said that she tended to believe the mother's account of what happened but interpreted these acts differently. Ms. P described her interaction with the mother as follows: The mother's allegation against the father's girlfriend
13. The mother informed that since October to November of 2016, the child refused to take bath during the stay at her house (e.g. screaming and refusing to take off her clothes when the mother told her to take bath). The mother told by that time, she employed some ways to handle (e.g. offering more toys for bathing to make it more appealing to the child; disguising some dust as worms and putting on the child so that the latter was more willing to clean up herself). The mother told these ways worked out well. When taking bath for the child, the mother saw a few things that bothered her: (i) the child pulled her own nipples; (ii) the child lowered her head to peep her lower private part; (iii) after bathing, the mother cleaned up the child with towel and then put her in bed while she was getting clothing for the child. The child reportedly put her finger into her lower private part and then pulled her finger out. For the acts (i) to (iii) (referred to as the acts hereafter), the mother told she once considered as the child's curiosity about sex and which was normal to her. As for her handling, the mother said she once had told the child to stop putting her finger into her lower private part. The child reportedly looked up to her with a smile while she accordingly stopped so. The mother was asked of the frequency and time frame of witnessing the acts. The mother sounded

unsure. She then told the acts took place every time she took bath for the child. The time frame was from October to November in 2016 and until the Court ordered stopping contact between the girlfriend and the child in February 2017.

14. The mother confirmed that she had never informed or alerted the father of the acts of the child despite having observed so for several months. She explained that she considered as the child's curiosity about sex and was normal. The turning point was at the birthday party of the child in January 2017. The mother informed a common friend attending the party quoted the father saying that the girlfriend would be separated from him if he could not get the custody of the child. This quote had triggered off the mother's worries. The mother interpreted the quote as: the girlfriend was not loving of the father but using the father to approach the child and the only explanation for her approaching the child was pertaining to the purpose of sexually abusing the child. The suspicions of sexual abuse had triggered off the mother's recollections about some pieces (e.g. the father's taking the child for swimming in around October to November 2016 despite the weather was cool) which had coincided with timing she noticed the acts.
15. If the mother's line of thinking was followed (i.e. the girlfriend would be separated from the father if he could not get the custody of the child), there could be alternatively explanation for this. I had hypothetically put up an explanation for this to the mother that the girlfriend might want the father to have the child's custody because financial arrangement of the child in the future could be more predictable and under control. Then, the girlfriend's agenda of wishing the father to have the custody, as the mother so believed, was not exclusively limited to approaching the child for sexually abusing her. Despite what I had raised, the mother insisted that based on her gut sense as a mother, sexual abuse must have taken place for the child and the abuser must be the girlfriend.
16. The mother contacted a social worker over telephone enquiring ways to handle. She said with advice from that social worker, she had asked the child apart from the mother, who else had touched her lower private part. The child reportedly replied the father, the (father
s) domestic helper, the paternal grandmother and the father's girlfriend. The mother told the girl was hesitant on naming the father's girlfriend. Apart from this specific enquiry, the mother told she had no other information gathered from the child direct regarding the acts
(i) to (iii).
17. The mother repeatedly told she would rather be she herself having made false accusation against the girlfriend. Nonetheless, by the acts of the child, the mother told firmly that according to her gut sense as a mother, child sexual abuse must have taken place. By the sequence of events (the child displayed the acts
(i) to (iii) from October 2016 and until the Court stopped contact between the girlfriend and the child in February 2017) and her own elimination of other parties involved in the child's routine (e.g. the mother observed the child to be at ease in relating with school personnel

and her classmates), the mother deduced that it was extremely probable that the abuser was the father's girlfriend. The mother concluded that the child's display of the acts was sexual by nature. She strongly believed the acts had resulted from the girlfriend's performing the same acts on the child and/or the child's having witnessed similar sexual acts between the father and the girlfriend. The mother said in order to protect the child, she had called up the father and also his own mother alerting them of the sexual abuse and told them not to allow the girlfriend taking bath for the child, but was accused by the father as being jealousy of the good relationship between the child and the girlfriend. She then asked the father to stop the girlfriend from being alone with the child. When asked if she had trust in the father that he would protect the child from harm or hurt, the mother told she trusted the father would protect the child if he knew there was harm. The mother informed she had already reported the case to the police in April 2017 and yet, she was unsure of the follow-up action by the police. She said she had overheard the police saying that she reported the case for getting the custody of the child in the upcoming hearing. The mother then swore in front of me that she did not do this for the custody but just for protection of the child.

23. Ms. P concluded that: Conclusion and recommendation
37. The parents, Mr. ACHYL and Madam YC, were getting divorced and the questions of custody and access arrangement of their only child, O, were put up to the Family Court. Upon the mother's insistence on her allegation that the father's girlfriend had improper behavior against the child (sexual abuse), the Court had scheduled a Fact Finding Hearing and a Pre-trial Review with respect to the mother's allegation. Meanwhile, the Court requested for a clinical psychologist report with submission date on or before 14th July 2017. Under this context, the parents and the child were seen. Also collateral information about the child were gathered from her school. The parents are impressed to be genuinely concerned about the child. The mother's self-reports about having witnessed the child's acts when taking bath for the child (the child's pulling her own nipples; peeping at her lower private part; and putting her finger in and out of her lower private part) are consistent in terms of content this time and also as compared with her previous reports made during social investigation by caseworker. While I incline believing that the mother has reported what she has witnessed, her links drawn to sexual abuse and specifically by the father's girlfriend cannot be substantiated if based on information gathered for this report. Having said this, it should not be definitely concluded that no sexual abuse has ever happened to the child. It remains obscure if the findings in this report could ease the mind of the mother and if the parents could come up with way-out(s) as they continue to go back and forth over this issue, in the midst of custody disputes and disputes over other issues (e.g. finance). Still, both parents views about possible way-out are deliberated in the report as a reference. Ms. N
24. Ms. N's affirmation dated the 7 June 2017 makes for quite difficult reading. However, she was clear both in her affirmation and in the witness box that:

17. I have read paragraph 21 of the 2nd Applicant's 2nd Affirmation where it states that I had told or put pressure on the 1st Applicant to fight for the custody of O, by intimating to the 1st Applicant that I would leave him if he did not. I specifically deny these allegations against me. In fact it makes no sense for me to have said this, considering that the 1st Applicant had just signed over custody only one day before.
21. At para. 31 of the 2nd Applicant's 2nd Affirmation she accuses me of bathing O. I deny that I have ever bathed O. I have only played with O in the bath whilst the domestic helper was bathing O, as described hereinbefore at para. 13.
22. At para. 30 of the 2nd Applicant's 2nd Affirmation she states that O had mentioned, along with the 2nd Applicant, the 1st Applicant and I, that I had touched her private parts. If this is true, I can only say that I had touched O's private parts with a tissue when I wiped them after she had gone to the toilet, as already referred to in para. 11 hereinabove.
23. I have and would never do anything to harm O. I deny all accusations of sexual abuse that the 2nd Applicant has maliciously alleged against me. I am extremely offended by her malicious and unfounded accusations. For the avoidance of doubt, I have and would never touch O inappropriately, and I have and would never teach O to touch herself inappropriately. All of these allegations of sexual abuse against me make me feel sick.
25. Ms. N further describes the stress that she has been under as a result of these allegations and in particular the posting of the father's undertaking twice on Facebook. She concludes:
29. I sincerely hope that one can appreciate the level of stress and anxiety that this whole ordeal has caused me. The 2nd Applicant's act of publishing the Post on Facebook was clearly intended to damage the 1st Applicant's and my reputation, and to cause us much stress and hardship. I accept that to be the case. Discussion
26. I have heard from all of the parties in the witness box. Generally speaking, I found Ms. N to be a credible and a wholly believable witness. I have no doubt that this has been a terrible ordeal for her. It was unfortunate that Ms. N appeared to have discussed the hearing with the father prior to her giving evidence (and the father as a practicing barrister should have known better) but nevertheless I found her to be credible. I accept that she has not touched O in a sexual way or behaved in front of her in a way that might be considered inappropriate. (At one point it was suggested to both Ms. N and the father that they may have had sexual relations or behaved in an overtly sexual manner in front of O). Ms. N was understandably very upset by this suggestion and generally and categorically denied any impropriety. Indeed, it seems to me that she conducted herself with admirable restraint given the circumstances, especially with respect to the Facebook postings. She was both reasonably calm and measured in her responses in the witness box.

27. In contrast the mother did not come across well. She made very long speeches and often did not answer the questions put to her directly. She remained convinced that Ms. N had behaved inappropriately towards O despite the lack of any cogent evidence to support what she said and seemed unable or unwilling to consider other alternatives. I accept the father's analysis of this in paragraph 20 (53) above.
28. I was particularly concerned that the mother posted the father's undertaking on Facebook. This was inexcusable behavior on her part and I accept that this was both vindictive and nasty. It was also wholly unnecessary.
29. The father maintains that the mother was motivated by jealousy and that she is both racist and ageist. (Ms. N is Caucasian and a little older with grown up children). Although that is possible, as indicated above, I think it is more likely that the mother thought that these allegations might assist her in her application for sole custody and care and control of O. It seems to me that there is no evidence to support the allegations made and that she simply jumped to conclusions and then refused to climb down completely despite being given the opportunity to do so on at least one occasion.
30. I also accept, as suggested by Ms. P in the witness box that these so called acts of O, if they happened (and I am also more inclined to accept that they did happen, although perhaps not quite as described by the mother) perhaps shocking to an adult were simply the explorations of a young child who was naturally curious about her own body. It is of note that Ms. P did not think that this behavior was particularly unusual. This was also the mother's original thinking. It is very unfortunate indeed that she did not stick with this.
31. In such circumstances I completely exonerate Ms. N. There is no evidence at all to support the terrible allegations made by the mother against her. In such circumstances the father's undertaking dated the 10 February 2017 shall be discharged with immediate effect. The mother was obliged to produce compelling evidence to support her allegations and she has been unable to do so. Costs
32. The father seeks his costs on an indemnity basis. The mother for her part asks that the normal order be made i.e. that there be no order as to costs.
33. I accept that O probably did display some of the acts that so concerned the mother and therefore that the mother did not simply make the whole thing up. But by the same token the mother's actions did have a malicious undercurrent. I have been particularly concerned by the posting of the father's undertaking by the mother on Facebook and the fact that she did this not once but twice!! It also seems to me that the mother over reacted and jumped to conclusions. She is an intelligent woman and she was legally represented throughout. Nevertheless, she insisted on her position even though there was no tangible evidence to support it. It is a matter of great concern to me that litigants should not be able to hide behind the fact that a matter is child related to mask litigation behavior which would not be countenanced in any other situation. Consequently, although an order for indemnity costs seems excessive in the circumstances, I have nonetheless decided that the mother should

14 / 14