Case No: C1/2012/2342

Neutral Citation Number: [2013] EWCA Civ 863
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR TIMOTHY STRAKER QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 21st February 2013

Before:

LORD JUSTICE PILL
and
LADY JUSTICE BLACK

- -

Between:

DEMPSEY

Appellant

- and -

LONDON BOROUGH OF SUTTON

Respondent

- -

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Mr Stephen Cragg (instructed by Irwin Mitchell LLP) appeared on behalf of the **Appellant**.

Mr Hilton Harrop-Griffiths (instructed by Adults and Education**,** LB Sutton) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Pill:

1. This is an appeal by Ms Susan Dempsey, the appellant, against a decision of Mr Timothy Straker QC, acting as a Deputy High Court Judge, on 22 August 2012. The appellant made an application for judicial review complaining of the failure by the London Borough of Sutton ("LBS") to provide her with suitable accommodation. A claim was also made against NHS South West London for failure to fund her existing placement at1 Sewardstone Close, but that has not in the event been pursued. I will refer to them as the primary care trust ("PCT").

2. The appellant, who had worked as a nurse for many years, underwent surgery for the removal of a brain tumour on 19 October 2010. On 22 October she suffered a stroke. She now suffers from frontal ataxia, dizziness, poor motor co-ordination and dexterity, restricted mobility, dysarthria, dysphasia and dysmetria. She is wheelchair-bound.

3. From 8 March 2011 the appellant was a resident at 1 Sewardstone Close, a placement which provides for long-term and medium-term services for people with complex physical and nursing needs. Her placement was financed by the PCT.

4. The appellant was told of a proposal by LBS to move her to Belsize Court, Sutton, in mid-December 2011. That is an independent live-in placement. The appellant visited Belsize Court. Initially she was not opposed to going there, but, well before the relevant events, she formed the view that her care needs would not be met there and it would not provide an environment where she would be able to make progress by way of rehabilitation. She consulted solicitors. On her behalf the solicitors wrote to LBS on 22 November 2011 requesting a copy of the appellant's most recent NHS and Community Care Act 1990 section 47 assessment and care plan.

5. There were discussions. The material was not immediately forthcoming. The solicitors then stated that, if the appellant was to be moved from 1 Sewardstone Close on 15 December (as had been planned) without substantial evidence that her needs would be met elsewhere, they would write a formal Letter before Action challenging the decision and, if necessary, taking proceedings.

6. The question arose as to the continued funding of the existing placement by the PCT. They had formed the view that the appellant no longer had primary healthcare needs which required continuing rehabilitation at Sewardstone Close. In a letter dated 9 December 2011 the LBS wrote to the appellant's solicitors referring to that opinion and stating:

> "The London Borough of Sutton has identified what it deems to be a suitable community placement for your client and confirms that they would have no objection to your client moving and taking up a tenancy there from the 4th January 2011, if the PCT

> are prepared to commission the on-going placement at the Rehabilitation unit..."

7. In the event the PCT were not prepared to fund the current placement as from 15 December 2011 and the responsibility for the appellant became that of LBS.

8. The solicitors requested sight of any assessment of the care plan as it related to the proposed accommodation at Belsize Court. It is clear to me, on a consideration of the documents, that Belsize Court was the proposed place of placement. When LBS referred to what it deemed to be a suitable community placement it was Belsize Court that they had in mind. Mr Harrop-Griffiths for the LBS says that it was the only place available at the time. One must keep aware of the strains imposed on the resources of councils by the statutory requirements.

9. By letter of 12 December 2011 the solicitors repeated the appellant's claim that the proposed placement at Belsize Court would not meet her needs "rehabilitation-wise or socially". It was pointed out that they had yet to receive any paperwork from LBS including a copy of the appellant's social care assessment.

10. That situation having arisen, the solicitors wrote the appropriate pre-action protocol and then commenced proceedings for judicial review. They claimed injunctive relief. The reasons for urgency were stated to be:

> "Funding for the placement will cease tomorrow, 15 December 2011. It is proposed that she moves tomorrow to unsuitable alternative provision arranged by the London Borough of Sutton."

    What was challenged was the decision of LBS to fail to provide suitable alternative accommodation.

11. The application came before Wilkie J, who considered documents lodged by the parties. The judge ordered that the defendants, both of them, the PCT being a party at that stage "..shall arrange for and fund the provision of accommodation and services at the claimant's current placement at 1 Sewardstone Close forthwith and until further notice".

12. The judge ordered that the application for permission to apply for judicial review be considered as soon as possible and in any event before 23 January 2012. On 21 December 2011 a care planning document was produced by the council. That continued to recommend that the appellant be placed at Belsize Court. In detailed Grounds of Resistance it was accepted that the options had not been put directly to the appellant in writing, but LBS claimed that the oversight had now been remedied.

13. The case came before Stadlen J on 20 January 2012: that is, close to the end of the period contemplated by Wilkie J, business in the vacation having of course

intervened. Stadlen J listed a hearing for 13 March 2012. However, on 1 March 2012 a round-table meeting was arranged and the LBS produced a new proposal under which the appellant could be accommodated in a flat in independent living at Flat 17, 49 Hackbridge Road. That building was almost complete by that time and, when it was completed, a care package was arranged by LBS and a consent order signed on 11 May 2012. The appellant moved into the premises on 21 May 2012.

14. The issue of costs came before Mr Timothy Straker QC. He ruled that there should be no order for costs, having considered submissions, and made these observations:

> "(1) The claim form sought judicial review in respect of a decision by the interested party from whom costs are not sought [that is, the PCT] to cease funding a particular placement. The claim form also challenged a continuing decision by LBS [the defendant] from whom costs are sought.
>
> (2) The background was that of a claimant suffering from or having suffered serious ailments with continuing concern as to her care or treatment. Such continuing care or treatment is provided pursuant to a detailed legislative, regulatory and administrative regime.
>
> (3) It is by no means clear that the claimant would ultimately have succeeded in her claim and in any event the claim as originally formulated was not pursued. Further and in any event the regime to which I have drawn attention provides opportunities for complaints and reviews, rendering the appropriateness of judicial review questionable.
>
> (4) M's case (Court of Appeal [2012] EWCA Civ 595) is plainly of importance. This is not a case falling in the first category given by the Master of the Rolls. It is more like the third than the second but subject to the powerful point about the regime which I made earlier.
>
> (5) I recognise that an alternative remedy argument can be touched by the exercise of discretion. In order to be conclusive as to the precise merits of the claim and how they would have been resolved would in my judgment be a disproportionate expenditure of judicial time.
>
> (6) I consider it more likely than not that had the question of costs fully argued out a fair result would have been regarded as no order as to costs."

The judge then said that he continued to make provision for an assessment of the appellant's publicly funded costs.

15. In my judgment the learned deputy judge is plainly in error in having regard to the other possible remedies. Undoubtedly they are present but, placed as the appellant and those advising her were by mid-December 2011, it appears to me to be wholly unrealistic to take the view that this was a time for following a complaints procedure or some other course.

16. Secondly, there has been a mention of Article 8, and that may be what the judge had in mind when he referred to the part of the claim as originally formulated not being pursued. That point, in my judgment rightly, has not been developed by Mr Harrop-Griffiths. The remedy sought in substance was the obtaining from LBS, who bore the statutory possibility to provide it, of accommodation which was suitable.

17. The judge referred to the case of M and to paragraph 60 where Lord Neuberger of Abbotsbury MR made a classification of types of situation which arise in this context where judicial review has not proceeded to a hearing. The Master of the Rolls did also refer in paragraph 45 to the general rule in civil litigation, which is of course that a successful party can look to the unsuccessful party for his costs (CPR Rule 44.3(2)(a)). The first category in the Master of the Rolls' classification is the case where a claimant has been wholly successful, whether following a contested hearing or pursuant to a settlement. Second is a case where he has only succeeded in part. And a further case is the following:

> "...where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case."

The court went on to consider them.

18. In seeking to uphold the decision of the judge Mr Harrop-Griffiths submits that this is a case where it could not be certain who would have won had it proceeded to a full hearing. He referred to the practical difficulties of the council, who had only Belsize Court available, and the unreasonableness, he submits, in the difficult position they were of having to meet the costs of the appellant. Mr Harrop-Griffiths has referred to the case of R(Naureen; Hayat) v Salford City Council [2012] EWCA Civ 1795, a decision of this court, the leading judgment being given by Jackson LJ. In that case the court concluded that no order for costs was the appropriate result. Jackson LJ set out a number of circumstances which led to that conclusion. One of them, in my judgment, starkly contrasts the case with the present one. The case did not proceed because of the action of a third party, the Secretary of State, in granting to the claimant indefinite leave to remain. The issue was as to the duties under the National Assistance Act 1948, section 21(1)(a). It became unnecessary to resolve that once the Secretary of State by his intervention had

made the appropriate grant to the claimant. That, in my judgment, is very different from the present situation.

19. One has to consider whether it was reasonable for an appellant to commence proceedings when she did. I have no doubt that those advising her took a proper and sensible course. Their position was that, first, the PCT would not arrange for funding after the 15 December. LBS made it clear that her remaining in the existing accommodation depended on the PCT meeting the costs. They were not prepared to meet the costs and the responsibility thereupon fell upon LBS. Their one offer was unacceptable to the appellant. Moreover the solicitors did not have the advantage of the appropriate care assessments to enable them to advise the appellant as to what course she could take and whether it might, in the circumstances, be appropriate for her, notwithstanding her wishes, to go to Belsize Court. They could not advise about that because the appropriate assessments had not been provided.

20. The matter then came into the judicial arena and an interim order was granted on a consideration of the papers. The timetable was set and a hearing date was arranged. The appellant had achieved what she set out to achieve by way of gaining time.

21. Then, with good sense all round and the date for judicial review looming, accommodation became available which LBS were prepared to offer and which was acceptable to the appellant. It was for supported living in a disabled persons' unit, which both sides thought acceptable to meet her needs.

22. In those circumstances there is, in my judgment, no doubt that the appellant is entitled to her costs. The initial commencement of proceedings was justified. The rulings of the court could not have been more favourable to her and she achieved what she set out to achieve: that is, an offer of accommodation from LBS, the responsible body, for accommodation which was suitable and acceptable to her. One has, of course, sympathy for the position of LBS in the limited resources with which they were placed. If it could have been said prior to the commencing of proceedings, well we cannot offer anything else just at the moment but if a short interim arrangement can be made we shall soon be in a position to offer suitable accommodation, if that had been the proposal and if at the same time the appropriate care assessments had been placed before the solicitor, it could have been a different situation, but it is far from what in fact occurred.

23. This is not a case where one needs to agonize as to who might have won had it come to trial. There was really no issue between the parties, save as to the possible issue, which for the reasons I have given could not arise, as to the suitability of Belsize Court. The LBS had the duty to provide accommodation. They had the duty to make assessments on which the decisions as to that accommodation could have been reached. It was necessary for the appellant to go to court to achieve security during the interim period and to obtain the assessment and the subsequent offer which in fact she received.

24. There is a danger in taking an over-technical view of this question of costs, which has been the subject of a series of cases in this court. It would not always be necessary to try to consider the hypothetical situation of what might have happened if events had taken a different course. One has to take an overall view of the situation and, applying good sense, decide on the reasonableness of the conduct of the parties including the conduct of the party seeking costs. I repeat my concern for the position of local authorities placed in the position this one was, which may be a frequent occurrence, but when they have a duty and in the state of affairs as it was in mid-December 2011, the appellant in my judgment acted entirely reasonably in taking the action she did.

25. Accordingly I would allow the appeal and award her costs against LBS.

Lady Justice Black:

26. I agree.

Order: Appeal allowed