

CO/4093/2011 and CO/4097/2011

Neutral Citation Number: [2011] EWHC 3216 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 16 November 2011

B e f o r e:

HIS HONOUR JUDGE MCKENNA
(Sitting as a Deputy High Court Judge)

Between:

THE QUEEN ON THE APPLICATION OF GREEN,

Claimant

v

GLOUCESTERSHIRE COUNTY COUNCIL,

Defendant

AND

THE QUEEN ON THE APPLICATION OF ROWE

Claimant

v

SOMERSET COUNTY COUNCIL

Defendant

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Ms H Mountfield, QC (instructed by Public Interest Lawyers Limited) appeared on behalf of the **Claimants**

Mr J Goudie, QC and Mr E Capewell (instructed by In-house County Council) appeared on behalf of the **Defendant**

JUDGMENT
(As Approved by the Court)
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1. THE DEPUTY JUDGE: Having succeeded, on my findings, at least on one of the grounds of challenge, the claimants in both actions seek declarations that the decisions in question were unlawful as a result of the respective defendants', on my findings, failure to comply with their public sector equality duties and orders quashing those decisions and any consequential executive decisions implementing the decisions in question together with consequential costs orders, whilst the defendants for their part submit that the relief should be limited to declaratory relief only, or alternatively, if I were minded to quash the relevant decisions, it should only be in respect of those libraries used by the named claimants and in any event should exclude both defendants' mobile library fleets.
2. The first point to remind myself is that the question of remedy is a matter of discretion. I was referred to the judgment of Hobhouse LJ as he then was in Credit Suisse v Allerdale Borough Council, reported at 1997 QB page 306 and in particular a passage at letter C on page 355 which is a useful summary:

"The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act..."
3. In this case the defendants submit that the principal considerations relevant to the exercise of my discretion are the needs of good administration, especially in the present, particularly challenging, fiscal circumstances, the effect on third parties, and in particular in this regard, Mr Goudie makes reference to the recent evidence of Ms Laurence and Ms Allen dated 4 November 2011, as to the steps which are in hand for various community groups to take over the running of certain libraries in the two County Council areas and the utility of granting relief in the light of subsequent developments and of course the fiscal landscape.
4. Having regard to those considerations, counsel for the defendants makes a number of points which have varying degrees of substance. In no particular order of importance, or indeed substance, what is said is that the claimants' success has been limited. Neither the substance nor the rationality of the decisions have been questioned and of course it is right to say that the claimants did not succeed on two of the three grounds. Secondly, it is said that it is highly likely that if the decisions under challenge are to be quashed, given the challenging financial situation, when the defendants retake their decisions they will be substantially the same or indeed may be even more draconian, I think that was the word used by Mr Goudie, in terms of the depth of the cuts.
5. The third point, which is made on the defendants' behalf in this regard, is that there were subsequent environmental impact assessments taken when executive decisions were made which it was submitted, at the very least significantly cured the earlier deficiencies and that that submission supports limiting the relief to declarations rather than going on to quash.

6. The final point in this regard was the prejudice to the respective defendants' good administration and to third parties of an order quashing the decisions, given the financial situation, and given the steps that were already in hand, referred to in the statements of Ms Allen and Ms Laurence.
7. These are of course all relevant considerations in the exercise of my discretion, but I have no doubt that they are significantly outweighed by a number of other factors, not least of which is the fact that **the decisions under challenge failed to give effect to the public sector equality duties and were not merely unlawful decisions but were, in substance, as Ms Mountfield submits, amounted to bad government. It is important to the rule of law to give due respect to these issues of equality. The breach of the equality duties is a substantive and not merely a technical or procedural defect.**
8. I found particularly persuasive the submissions made by Ms Mountfield in this regard and indeed the various other points made in her skeleton argument, namely that the decisions, if allowed to stand, would result in major and unfavourable changes to the provision of statutory services for persons generally in Somerset and Gloucestershire and in particular for the classes of persons most affected by library closure, including the equality groups intended to be protected.
9. In the light of the injunctive relief that has been granted in this case there is no practical bar to the decisions being revisited and are re-made in accordance with the statutory equality duties. Nothing has been undone and therefore I can see no reason why I should not make a quashing order in respect of the decisions which I have found to be unlawful. Indeed, failure to do so would be to my mind to send quite the wrong message to other local authorities who may be considering restructuring their library services. **For all these reasons I conclude that nothing short of a quashing order of the decisions meets the merits in the wider sense in this case.**
10. I then come to the issue of the extent of the relief. Again, superficially attractive though the submissions made by Mr Goudie are as to the limiting of the relief to the particular libraries used by the named claimants and in particular as to his fallback position at the very least excluding mobile libraries, on analysis, those submissions are wrong in principle and would leave uncorrected a public law wrong, as Ms Mountfield puts it in her skeleton argument. **These proceedings were never about the vindication of the individual claimants' access to their particular libraries but were challenges to the legality of the decisions made by the two County Councils on a countywide basis; they were significantly supported by contributions from local residents. I have no doubt that these claimants had both the necessary standing and a sufficient interest in the whole of the restructuring of library provision in their respective counties and that the claims which were brought, funded as they are partially by private contribution and partly by legal services funding, were brought in the wider public interest.** I am also not convinced that the defendants' slicing approach is or would be workable in practice. The decisions under challenge were unitary decisions in respect of the provision of library services throughout the two counties and were inter-related structurally, financially and geographically. Moreover it would be inequitable, not to say invidious as Ms Mountfield puts it in her skeleton argument, to restrict the relief in the way suggested so that decisions which I have concluded were unlawful should continue in

force in respect of the majority of the populations of the two counties but not in respect of the minority who use the libraries used by the claimants. For all these reasons therefore I conclude that the appropriate relief is that sought by the claimants as identified in paragraph 1 (1) and (2) of the claimants' submissions as to relief and costs.

11. That brings me to the issue of costs. The short point made on behalf of the claimants is that the decisions, having been found to be unlawful, mean they have won and they should be entitled to their costs, the general rule under the CPR being that the successful party should recover its costs from the unsuccessful party. That said, the court can make another order in appropriate circumstances and of course very often there is a real issue as to which party did in fact win in the real sense of the word.
12. I am indebted to Mr Goudie for reminding me of the relevant provisions of CPR 44 relating to the discretion that the court has in this regard and I recite the relevant extracts from CPR 44 (3) by reference to paragraph 3 of his skeleton. This is:

"(1) The court has discretion as to –

- (a) whether costs are payable by one party to another;
- (b) the amount of those costs; and
- (c) when they are to be paid.

"(2) If the court decides to make an order about costs –

- (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
- (b) the court may make a different order.

"...(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –

- (a) the conduct of all the parties;
- (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
- (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

"(5) 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."

13. The defendants point to the fact that the claimants were unsuccessful in two of the three grounds of challenge and submit that in the light of that I should make a different order as to costs and an order that reflects the fact that the claimants failed on two of the three grounds.
14. It is also submitted on behalf of the defendants that I should consider the way in which it was said the claimants pursued and exaggerated aspects of their claim. There are also references in Mr Goudie's skeleton argument to conduct issues relating to what he described as instances where costs were avoidably run up and he gives a couple of examples. I do not propose to refer to those in detail since it seems to me that in the circumstances of these cases those are really matters for detailed assessment rather than the principle of the extent of the costs order which I should make in this case.
15. I have given careful consideration to whether or not the fact that the claimants did not succeed on their analysis of the 1964 Act and as to the consultations are matters which should be reflected adversely in costs. In the end I have concluded that I should not depart from the usual order as to costs in this case, **namely that the claimants, having succeeded in persuading me that the decisions under challenge were unlawful and in persuading me that the appropriate remedy in this case is not simply declaratory relief but quashing orders, the claimants have indeed in a real sense won this litigation and that success should be reflected fully in the costs order that I make.**
16. There was a substantial inter-relationship between the three grounds. Indeed, I think Mr Goudie in his submissions this morning conceded as much at least in respect of the consultation and the public sector equality duty grounds, although in fairness he did make the point that he felt that the first ground relating to the 1964 Act was in a separate category, and indeed it was, but it seems to me that it was an argument which **was perfectly reasonable for the claimants to run** and I am satisfied that **they ran it in a reasonable and proportionate way**, albeit ultimately, as in the case of the Brent case, subject to appeal, that argument was lost. For all these reasons therefore I would make an order to the effect that the claimants should recover their costs of both claims against the respective defendants and for those costs, on a standard basis, to be subject to detailed assessment if not agreed.
17. The final point, I think, subject to appeal, that I have to consider, is an application made by the claimants for the discharge of the protected costs order made by Beatson J in July. In this regard I have read the application notice recently filed on 15 November and the witness statement of Daniel Carey of Public Interest Lawyers Limited, who sets out the background to the protective costs order in some detail and asks the court to discharge the order in effect in its entirety. That application is opposed in part by the

defendants. They accept that the protected costs order should be discharged but only prospectively from a date when the claimants' solicitors were notified by the Legal Services Commission that public funding would be forthcoming. That date appears from paragraph 6 of the defendants' submissions on costs to be 22 September 2011.

18. Mr Goudie in his skeleton argument puts forward four principled reasons for suggesting that the order should be discharged with effect from the date in September rather than, in effect, *ab initio*. I am not persuaded by any of those arguments. It seems to me that the protected costs order was made to protect the position of the claimants whilst the question of public funding was pursued. The fact that it took the Legal Services Commission a considerable period of time to adjudicate, and as I understand from Mr Carey's witness statement there had to be two appeals before a certificate was issued, is neither here nor there. The fact of the matter is that the certificate was dated 1 May 2001 and in those circumstances as a matter of principle it seems to me that that is the date which is the relevant date. In the circumstances therefore I would accede to the application made by the claimants and simply discharge the protected costs order.
19. That just leaves your next application, Mr Goudie.
20. MR GOUDIE: My Lord, which is an application on behalf of both counties for permission to appeal.
21. THE DEPUTY JUDGE: Yes.
22. MR GOUDIE: My Lord, put very shortly on the basis that the Court of Appeal should consider three, to some extent, inter-related matters. Firstly, the effect of due regard which it has had at later stages for the decision-making processes, here in the cabinet member executive decision, as evidenced by the further EIAs which were produced. Secondly, the correct approach to the discharge of the equality duty as a continuing duty in a multifaceted and sequential decision-making process. Thirdly, and perhaps separately from the first two, the question of the further information gathering which should have taken place, particularly in the light of the fact that your Lordship found no breach of section 7 of the Libraries Act 1964 Act on the basis of failure to gather information.
23. THE DEPUTY JUDGE: Yes.
24. MR GOUDIE: There have been, now, numerous first instance decisions in relation to public sector equality duty. In our submission it is appropriate that some of these cases at least should go to the Court of Appeal and that this is an appropriate case for which that --
25. THE DEPUTY JUDGE: Is the Court of Appeal not seized with that issue in respect of Brent, anyway? They were hearing it last week.
26. MR GOUDIE: They were. It was heard last Thursday and Friday and judgment was reserved.
27. THE DEPUTY JUDGE: Yes.

28. MR GOUDIE: As I understand it, not being directly involved in that case, the main, though not only argument on the appeal, related to questions of indirect discrimination rather than the public sector equality duty more generally.
29. THE DEPUTY JUDGE: You were not in that, but Ms Mountfield, were you in that?
30. MS MOUNTFIELD: Yes, although I did not conduct the appeal on Thursday and Friday last week, but I have seen the grounds of appeal and discussed them with counsel who did make those submissions.
31. THE DEPUTY JUDGE: Was it Ms Rose who did it?
32. MS MOUNTFIELD: It was Diana Rose who made those submissions. The argument was not confined merely to indirect discrimination. One of the fundamental points was whether a decision-making process would have due regard to equality at the outset. Of course in effect it was cured by an equality impact assessment which the judge found was adequate before the formal decision was taken by the Council, that was a fundamental part of the grounds of appeal. Indeed, the quality of the decision-making process and the extent of the information gathering requirements is, again, integral to grounds of appeal in that case.
33. THE DEPUTY JUDGE: So 1 and 2 of Mr Goudie's points ought to be considered by the Court of Appeal in that case, ought they not?
34. MS MOUNTFIELD: Yes, my Lord.
35. THE DEPUTY JUDGE: But not 3, because that is fact-specific.
36. MR GOUDIE: Yes. My Lord, what one never knows, with all due respect to the Court of Appeal in relation to judgments they have not delivered, is what issues they will ultimately grapple with and which will be parked for another occasion. In our submission, if your Lordship's persuaded -- the Brent case apart -- that permission to appeal should be granted, the fact that the Court of Appeal may or may not cover some of the ground which would arise on an appeal in this case is not a reason for refusing permission to appeal. It would obviously be a very relevant matter for my respective clients to consider once they have seen the Brent judgment whenever that may be, I am not aware there is any indication as to when it will be --
37. THE DEPUTY JUDGE: Not been told.
38. MR GOUDIE: -- in terms of the pursuit or otherwise of the appeal but they should have the option of being able to pursue an appeal if that is their ultimate considered position, or positions.
39. THE DEPUTY JUDGE: Thank you very much.
40. MS MOUNTFIELD: My Lord, in my submission, neither of the bases upon which one might grant permission to appeal is made out here. Firstly, there is no wider public

interest in an appeal on these issues being heard. I mean no disrespect to your judgment, it is an application of law.

41. THE DEPUTY JUDGE: I agree, I think it is fact-specific at the end of the day.
42. MS MOUNTFIELD: It is a fact-specific application of law settled in many Court of Appeal decisions as well as first instance decisions.
43. Secondly, it is obviously right on public sector equality duty.
44. THE DEPUTY JUDGE: I would like to think so, yes.
45. MS MOUNTFIELD: My Lord, Mr Goudie has not explained how it would be said that you were wrong. You asked, was this substantial and rigorous enough, and found that it was not on the facts. Were you to be minded to grant permission to appeal I would be asking for permission to cross-appeal on the linked --
46. THE DEPUTY JUDGE: Yes, I appreciate that. Thank you very much, I do not need to hear any more.
47. I am asked for permission to appeal in three areas, the effect on due regard, which it has had at later stages. What was your second point, Mr Goudie? I cannot read my notes.
48. MR GOUDIE: My Lord, the discharge of the equality --
49. THE DEPUTY JUDGE: The Court of Appeal should --
50. MR GOUDIE: -- continuing duty in a multifaceted and sequential decision.
51. THE DEPUTY JUDGE: Yes, and the third one, the question of any further information gathering, particularly in the light of the findings on section 7 of the 1964 Act point.
52. MR GOUDIE: My Lord, yes.
53. THE DEPUTY JUDGE: I am very conscious of the fact that the Court of Appeal is already seized of issues arising out of, in this case, the Brent proposals for library closure. Those issues include section 7 of the 1964 Act and what constitutes due regard under the public sector equality duties. Of course I do not know what the substance of the arguments before their Lordships was, still less as to how they will deal with issues arising out of public sector equality duties.
54. However, it seems to me the appropriate approach in this case is that if the **Court of Appeal** think it appropriate to visit these issues then they will give permission. To my mind, my decision was a fact-based decision having regard to the particular investigations undertaken by the two local authorities involved in this case. It has no wider significance. **This is not an appropriate case to give permission, there are no wider issues.** Obviously if the Court of Appeal disagrees, Mr Goudie, you will be successful in your application.

55. MR GOUDIE: Thank you, my Lord.
56. THE DEPUTY JUDGE: And maybe Ms Mountfield in any cross application. Thank you both very much for a very interesting canter through the law in these areas. I look forward to hearing what happens going forward.
57. Thank you both.