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2001 WL 1535414

Frank Cowl & Ors v Plymouth City Council

2001/2067

Court of Appeal (Civil Division)

14 December 2001

Before: The Lord Chief Justice of England and Wales Lord Justice Mummery and Lord Justice Buxton

Friday 14th December, 2001

On Appeal from the Queens Bench Division Administrative Court

Representation

Mr Richard Wilmot Smith QC & Miss Jenni Richards (instructed by Mackintosh Duncan) appeared for the Appellants.

Mr Roger McCarthy QC (instructed by Plymouth Legal Practice) appeared for the Respondents.

LORD WOOLF CJ:

This is the judgment of the Court.

1. The importance of this appeal is that it illustrates that, even in disputes between public authorities and the members of the public for whom they are responsible, insufficient attention is paid to the paramount importance of avoiding litigation whenever this is possible. Particularly in the case of these disputes both sides must by now be acutely conscious of the contribution alternative dispute resolution can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.

2. The appeal also demonstrates that courts should scrutinise extremely carefully applications for judicial review in the case of applications of the class with which this appeal is concerned. The courts should then make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts. The legal aid authorities should co-operate in support of this approach.

3. To achieve this objective the court may have to hold, on its own initiative, an inter partes hearing at which the parties can explain what steps they have taken to resolve the dispute without the involvement of the courts. In particular the parties should be asked why a complaints procedure or some other form of ADR has not been used or adapted to resolve or reduce the issues which are in dispute. If litigation is necessary the courts should deter the parties from adopting an unnecessarily confrontational approach to the litigation. If this had happened in this case many thousands of pounds in costs could have been saved and considerable stress to the parties could have been avoided.

4. The appeal relates to an application for judicial review by originally eight, but now seven claimants, who reside in Granby Way, a residential care home owned and run by Plymouth City Council ("Plymouth"). The eighth claimant has sadly died during the course of the proceedings. Their ages vary between 77 and 92 with the exception of one claimant who is only 66. They are all frail and in poor health and have lived at Granby Way for differing periods, the longest period being about nine years.

5. The claimants seek judicial review of a decision by Plymouth dated the 5th of

February 2001 which confirmed the decision of its social services committee of the 23rd January 2001 to close two homes, one of which, Granby Way, is occupied by the claimants.

6. The claimants all regard Granby Way as their home. Naturally they are extremely upset at the prospect of having to live elsewhere. Their distress at possibly having to move is increased by the fact that at least three of their number claim they have a legitimate expectation that Granby Way would be their home for life. This is alleged to follow from assurances to that effect made by employees of Plymouth.

7. On 4 May 2001, an application for permission to apply for judicial review was made by the claimants. On 13 June 2001 Harrison J directed an oral hearing of the application and this was heard by him on 19 June. The hearing was expedited because the claimants contended that they were in urgent need of protection. This was despite the fact that on 10 May Plymouth had written to the court indicating its willingness to undertake not to move the claimants from Granby Way for a period of six weeks and a complaints procedure existed and there is a statutory complaints procedure.

8. In their application, the claimants are seeking to have the closure decision quashed. They are also seeking an order to compel Plymouth to carry out "lawful and comprehensive assessments of the residents' community care needs and to prepare 'care plans' in respect of each resident in accordance with government guidance". In addition, declarations are claimed based on the failure of Plymouth to carry out a comprehensive assessment of the consequences of a move on the claimants and to prepare appropriate care plans. Inherent in the litigation is the fact that the claimants cannot do better than achieve the consideration of the question of closure in conjunction with a proper assessment of the claimants' needs and care plans.

9. This being the position, the response of Plymouth to the application for permission should have been regarded as positive. The response was contained in an open letter of 23 May. The letter indicates the view of Plymouth that the application raises "no relevant arguable issues of legal principle". The letter sets out matters of law upon which Plymouth considered there was agreement and issues of law upon which there was no agreement but which Plymouth considered were not relevant. This was because Plymouth was at all material times prepared to assume that the claimants' view of the law was correct. The letter also states that Plymouth was willing to treat the claimants' grounds for seeking judicial review and the evidence submitted in support as a complaint submitted by a qualifying individual on behalf of each of claimants. Plymouth would consider each of those complaints pursuant to section 7B on the Local Authority Social Services Act 1970 . The letter added that Plymouth was willing to put the complaint before a panel to be convened as soon as reasonably practicable to be chaired by an independent person within the meaning of the 1990 directions. The letter added that the panel will be able to consider written and oral submissions by the residents or on their behalf, on among other matters, the question of whether any of the claimants were given "home for life" promises upon which they were entitled to rely. Although the panel's decisions are not strictly binding on the local authority, Plymouth stated that it was conscious of the need to give sufficient weight to its conclusions, and to the consequences of not doing so, as set out in R v Avon CC ex parte M [1994] 2FLR1006.

10. The letter added that the statutory complaints regime was expressly designed to assist complaints "in relation to the discharge of, or any failure to discharge any of, an authority's social services functions" in respect of particular applicants. It was stated that the regime was well suited to resolve the issues the claimants raised about the assessments. In addition the letter gave an assurance that there was no question of services being reduced or Plymouth moving any of the claimants (unless their condition demanded this) until the conclusion of the complaints process. The letter concluded by referring to a judgment of Schiemann LJ in Lloyd v Barking and Dagenham LBC [2001] EWCA CIV 533, 11 April 2001 , and pointing out the limits on the resources of Plymouth and the fact that the claimants were publicly funded.

11. This was a very sensible proposal to make. It may not have been couched in the ideal terms but any necessary modification could and should have been the subject of

negotiations. However, instead, the wheels of the litigation began turning. The letter did not stop their progress; first to a procedural hearing before Harrison J and then to a full hearing before Scott Baker J.

12. The chronology prepared on behalf of the complainants explains what they contend happened at the hearing before Harrison J. It was held on 19 June 2001. "[Plymouth] sought adjournment of the permission hearing so that it could flesh out its complaint procedure proposals; [Plymouth] expressly accepted that the current proposals could not be properly considered because insufficient information was provided and confirmed that it did not suggest that the complaints procedure was an alternative remedy to judicial review." Plymouth's skeleton puts forward a different picture. If that skeleton is correct Plymouth were adopting a course of which we would approve. An adjournment was refused and permission granted by Harrison J.

13. We do not have a transcript of the hearing before Harrison J. There was no appeal from his decision and we do not criticise his decision. However, with the benefit of hindsight, it seems unfortunate that, even though Plymouth should have not been in a situation where they had to seek an adjournment, the use of the complaints procedure was not explored even if this meant an adjournment was necessary. A great deal of expense, a great deal of time and a great deal of anxiety to the claimants could have been avoided if the complaints procedure had been used.

14. It appears that one reason why the wheels of the litigation may have continued to roll is that both parties were under the impression that unless they agreed otherwise the complainants were *entitled* to proceed with their application for judicial review unless the complaints procedure on offer technically constituted an "alternative remedy" which would fulfil all the functions of judicial review. This is too narrow an approach to adopt when considering whether an application to judicial review should be stayed. The parties do not today, under the CPR, have a right to have a resolution of their respective contentions by judicial review in the absence of an alternative procedure which would cover exactly the same ground as judicial review. The courts should not permit, except for good reason, proceedings for judicial review to proceed if a significant part of the issues between the parties could be resolved outside the litigation process. The disadvantages of doing so are limited. If subsequently it becomes apparent that there is a legal issue to be resolved, that can thereafter be examined by the courts which may be considerably assisted by the findings made by the complaints panel.

15. For the hearing on 19 July 2001 the claimants prepared a supplemental skeleton argument which set out ten reasons why the complaint procedure is not a suitable alternative remedy to judicial review. We have examined each of those reasons carefully and in our judgement they establish no basis on which the claimants could reasonably object to the matters in issue being dealt with by the complaints procedure, as modified at the hearing before us. As an alternative, they certainly could have been the subject of mediation.

16. A report was obtained on behalf of the claimants from Dr. Peter Jefferys, a consultant in old-age psychiatry. This report was served on Plymouth on 11 July 2001. The report indicated that Dr Jefferys had grave concerns about the impact of closure and a move on the physical and mental health of the claimants.

17. Having heard argument on the 19th, 20th and 23rd days of July 2001 Mr Justice Scott Baker gave judgment on 14 September 2001. In his judgment he carefully examines the sequence of events and then comes to the conclusion that the evidence was not sufficient to establish that any of the claimants had been given a promise of a home for life which would be sufficient to establish that the representations relied upon were made. He indicated that he considered it was unfortunate that the claimants had not accepted the offer which Plymouth had made to examine again the factual basis of the 'home-for life' promise' issue. He came to the conclusion that the consultation process carried out by the defendants was adequate for what was required at that stage. He indicated that Plymouth would have received back the message "loud and clear that the residents wanted to stay and for the home to remain open". The judge added that

Plymouth would know that implementing a decision to close would not be likely to be easy because of the age and need of the claimants. He considered that many of the claimants' arguments about what was not done were irrelevant "because they are things that would properly fall to be done at a later stage in the process". (para 34)

18. The final issue with which the judge dealt relates to articles 2, 3 and 8 of ECHR . He indicated that he did not propose to deal with article 2 and 3 because the whole question of moving individuals was premature. The issue did not fall for consideration until each individual case was considered in the context of a full needs assessment and against whatever alternative accommodation may be available. As to article 8 , the judge pointed out that a balancing act was involved in applying that article and he concluded that there could be no circumstance which he could envisage where Plymouth could be acting compatibly with common law and its other statutory obligations and yet be in breach of that article. He therefore came to the conclusion that Plymouth had not acted unlawfully and that they had properly adopted a staged process with regard to the proposed closure of Granby Way. He considered community care assessment would eventually be required which would involve geriatric assessments and risk management. In his view Plymouth would have to look very carefully at how closure would affect each individual and what alternative arrangements might be viable. But he felt consideration of these matters would be premature when the closure process is still perhaps two years from completion.

19. Scott Baker J concluded that in these circumstances he was not required to determine the "alternative remedy" issue. However, he repeated that he regarded it as unfortunate that the offer made by Plymouth as to the use of the complaints procedure had not been accepted. He ended his judgment by saying:

> "Apparently the offer remains open. These are sensitive and difficult cases and there is in my view a duty on those connected with them to be careful not to raise either the temperature or expectations."

20. A long argument was then advanced to the judge why he should give permission to appeal. He was correct not do so. There was then an application to the single judge of the Court of Appeal who did give leave on paper, indicating, however that the approach adopted in the skeleton argument "may well be overblown". The judge considered that the appeal could last between half a day to a day. He obviously therefore did not envisage the volume of evidence and authorities which were placed before the Court of Appeal for the substantive hearing.

21. Having read the numerous witness statements placed before us and the substantial skeleton arguments prior to the hearing, the members of this court came to the clear conclusion that the appeal raised no point of legal principle. However, while this was the position, the appellants were intent on examining in detail the previous decisions of courts, primarily at first instance, involving the closure of care homes in order to erect a series of legal hoops which it was contended Plymouth had to proceed through before it could close Granby Way. In reality, however, there was no legal principle which divided the parties. It was common ground that there has to be the fullest assessment of the effect of a possible move on the claimants before a decision whether to move the claimants could be reached. Plymouth were perfectly prepared to carry out such an assessment, and recognise that as yet it has not been carried out and that it has to be carried out. This does not satisfy the claimants. They contend that as a matter of law the assessment is required to take place before closure. But absent any statutory requirement what is important is that an assessment takes place, not the time at which it takes place.

22. We understand the reason why the claimants attach such importance to the assessment being carried out before the decision to close. They do not want an assessment as to the propriety of moving the individual claimants to be taken against a decision that the home is to be closed as that could, they fear, prejudge the outcome. This is why they submit that the full assessment should take place before the decision to close the home is taken. The position of Plymouth now, whatever may have been the

position in the past, is clearly to regard the decision to close as merely a decision in principle; that is, to close Granby Way subject to the full assessment of the impact upon the residents of their having to move. This approach on the part of Plymouth is understandable. Plymouth needed to make financial savings. The closure of Granby Way and another home would produce the required financial saving. From Plymouth's point of view therefore the first step was to consider whether closure would be a viable option. For this purpose they needed a limited assessment of the impact on the residents and of the practicality of their being re-housed, but no more than this. This exercise was carried out. The decision was made to proceed with this option. Detailed examination of what is involved in re-housing was then required so that a final decision could be made. The final decision would only be made after the full assessment of the impact upon the residents. Such an approach could be beneficial to the residents because, if the closure option was not viable, there was no need to subject them to the stress which would be involved in determining what would happen to them if they had to move.

23. Unfortunately Plymouth failed to make their strategy clear. They should have done this at the outset. Initially, therefore, there was justification for the claimants' concern that they were to be moved without any proper assessment being made before a final decision to close had taken place.

24. Nonetheless the decision which was taken did not have the technicality the claimants attached to it. There was nothing wrong with Plymouth adopting a two-stage process, with the detailed assessment being part of the second process. However, if this was what they were doing, it is regrettable that far from explaining it they obscured the fact that this was their intention. On the other hand, those who were acting on behalf of the claimants adopted a far too technical approach. Their treatment in their skeleton argument of the authorities on which they rely make this abundantly clear.

25. We do not single out either side's lawyers for particular criticism. What followed was due to the unfortunate culture in litigation of this nature of over-judicialising the processes which are involved. It is indeed unfortunate that, that process having started, instead of the parties focussing on the future they insisted on arguing about what had occurred in the past. So far as the claimants were concerned, that was of no value since Plymouth were prepared, as they ultimately made clear was their position, to re-consider the whole issue. Without the need for the vast costs which must have been incurred in this case already being incurred, the parties should have been able to come to a sensible conclusion as to how to dispose the issues which divided them. If they could not do this without help, then an independent mediator should have been recruited to assist. That would have been a far cheaper course to adopt. Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible.

26. The disadvantages of what happened instead were apparent to the trial judge. They were also apparent to this court. At the opening of the hearing we therefore insisted on the parties focussing on what mattered, which was the future wellbeing of the claimants. Having made clear our views, building on the proposal which had been made in the 23 May letter, the parties had no difficulty in coming to a sensible agreement in the terms which are annexed to this judgment and will form part of the order of the court. The terms go beyond what Plymouth was required to do under the statutory complaint procedure. This does not however, matter because it is always open to the parties to agree to go beyond their statutory obligations. For example, sensibly the claimants are to have the benefit of representatives to appear on their behalf, who may well be non-lawyers who can be extremely experienced in handling issues of the nature of those which are involved. We trust that the parties will now draw a line under what has happened in the past and focus instead on what should happen in the future.

27. This case will have served some purpose if it makes it clear that the lawyers acting on both sides of a dispute of this sort are under a heavy obligation to resort to litigation only if it is really unavoidable. If they cannot resolve the whole of the dispute by the use of the complaints procedure they should resolve the dispute so far as is practicable

without involving litigation. At least in this way some of the expense and delay will be avoided. We hope that the highly skilled and caring practitioners who practise in this area will learn from what we regard as the very unfortunate history of this case.

28. While we dismiss the appeal, as already indicated, we schedule the terms agreed by the parties in terms prepared by Buxton LJ.

Agreement:

Plymouth City Council [the Council] agrees with the applicants in the present proceedings as follows:

1. The question of the closure of Granby Way Residential Home [Granby Way] will be formally reconsidered by the Social Services Committee of the Council ["the Committee"] and by the full Council.

2. As a precursor to that reconsideration the Council will set up a complaints review panel with the following terms of reference:

A. To investigate

- The claims of residents of Granby Way that that some or all of them have been promised a home for life there by the Council or by its predecessor;
- The risk/care assessment issues;
- Claims relating to the effect of the move, if any, on residents at Granby Way.

B. To make findings of fact

C. To make recommendations to the Council arising from those findings.

3. The panel will comprise three independent members: an independent chairman to be nominated by the President of the Law Society, and two others representing the interests of care providers and of service users respectively.

4. The complainants and the authority will both submit written representations on the matter top the panel, the complainants within 28 days and the authority in reply within a further seven days.

5. The authority will provide a clerk for the panel and the administrative services, including a venue for the panel to meet in, and printing of their report. It will also arrange for legal advice, if required, from an independent law firm.

6. If required the authority will arrange for the complainants to be transported to a hearing, and provide facilities for them to be able to make such representations to the panel as they may wish, including if necessary an advocate (as defined in the Disabled Persons (Advice and Representation) Act 1986).

7. The complainants, and other persons interested in the case, will receive a copy of the report. If appropriate, and agreed by all parties, the report (or summary of it) may be published, edited as may be required to preserve the anonymity of those complainants who do not wish to be identified.

8. The question of whether any of the present claimants should move from Granby Way to other accommodation will be included for consideration in the panel's procedure. The panel will make a recommendation to the Committee. The Committee will specifically consider whether Granby Way should be closed so as to cause the claimants or any of them to leave, and will make a recommendation which will then be formally considered by the full Council.

9. The panel are entitled to take account of, by are not bound by, the findings of Mr Justice Scott Baker in relation to the contested "home for life" promises.

10. The claimants will be maintained at Granby Way in their own rooms and with staffing that meets to the requirements of the Registration and Staffing Authority pending the completion of the steps set out in paragraph 8 above.

11. For the avoidance of doubt, it is agreed that before any final decision is taken in

relation to the future of Granby Way the Committee and the Council will

(a) take into account the emotional, psychological and physical health of the residents and the impact of a move upon them and in particular the reports of Dr Jefferys dated 10 July 2001 and 29 October 2001;

(b) comply with its obligations (if any) under the Human Rights Act 1998 and in particular Articles 2, 3 and 8 of the ECHR ;

(c) investigate, using appropriate procedures, the issue of whether any of the residents were offered (whether orally or in writing) the promise of a home for life at Granby Way and will take into account when coming to its final decision the results of that investigation.

Order: Appeal dismissed with costs; order for costs not to be drawn up for period of six weeks; liberty to apply to commission; if application is made court of appeal to hear argument before order becomes final.