Whapples, R (on the application of) v Birmingham East & North Primary Care Trust [2008] ADR.L.R. 04/07

CA on appeal from Administrative Court (Mr Justice Cranston) before Ward LJ; Thomas LJ. 7th April 2008

Lord Justice Ward:

1. On 13 March Cranston J made orders in the Administrative Court to this effect: that the application of the applicant, Ruth Whapples, for an interim order requiring the defendant, the Birmingham East and North Primary Care Trust, to appoint Brownbills Associates Limited as the claimant's interim case manager be refused; secondly that the claimant's application for permission to claim judicial review on the ground that the defendant acted unreasonably in not agreeing to mediation of the dispute between the parties be refused; thirdly that the claimant's application for permission to claim judicial review on the ground that the defendant acted unreasonably and in breach of the claimant's rights under Article 8 of the European Convention on Human Rights in failing to provide health care for the claimant through an independent user trust be refused; fourthly that the claimant's application for permission to claim judicial review on the ground that the defendant acted unlawfully in breaching a legitimate expectation on the claimant's part that the defendant would act in compliance with clause 7 of the agreement comprising the 2005 judicial review be refused; and that her claim for permission to claim judicial review on the sole ground the defendant arguably acted unlawfully on some other basis than legitimate expectation in that it arguably failed to comply with clause 7 of the agreement be stayed for six weeks from that date.

2. Dyson LJ directed that the claimant's application for permission to appeal that order be listed on notice to the respondent to be heard by two Lord Justices, and that is the application we have entertained at considerable length this morning. Ordinarily, I emphasise, applications for permission are listed for half an hour; this case has lasted well over two and a half hours. Let me recite a little of the history to set the background. So far as the applicant's health is concerned it is a tragic story. It is one which, as I have said in the course of argument, would doubtless lead to all sides of the court expressing sympathy with her predicament. I take it from the judgment and recite paragraph 2 of that judgment:

   "The claimant is a 51-year old woman. She lives in a ground floor housing association flat in Birmingham. She is tetraplegic and cannot move any of her limbs. She has also been severely visually impaired since birth. During various periods of her life she has been the victim of physical and mental abuse. In a jointly commissioned report by Dr Norman Macaskill, a consultant psychiatrist, in May 2005, his professional conclusion is that she has chronic post-traumatic stress disorder which is related to the various traumatic events in her life and ***"she also suffers from long-term problems of loss of trust and an increased sense of vulnerability which affect her day to day care needs"****. Due to these disabilities -- the visual defect, the tetraplegia and the post-traumatic stress disorder -- she needs continuous health care. There is no dispute that the obligation to provide this care derives from health as opposed to social needs, and so is the responsibility of the National Health Service, and in particular of the defendant."*

3. We have been given a little more information about her present state of health. We have been referred to a report of a Dr Bell which was commissioned, I think, specially for the judicial review proceedings. It comes with his own caveat that he bases much of his information solely upon telephone conversations with the patient and there are, hence, obvious -- in his words --potential vulnerabilities of a report written under such restraints. But he says this at paragraph 6.1 of his report:

   "The extent of the PTSD as set out by Dr Macaskill and confirmed in direct questioning of the patient, is such that although she would not wish to go without her normal carers and would not want the above complications to develop, the degree of her distress would be such that 'she would only feel safe if the door was locked and no-one could come near her' [I think this is a reference to the possibility of her being placed in institutional care]. The net result of this without consideration of her mental well-being, would be a disturbance of her nutritional status and vulnerability to the above morbidity, with either amplification of her health-care needs or foreshortening of her life."

4. The picture painted is, therefore, rightly described by Mr Wise as one which calls for anxious scrutiny by this court that all is being done for her which ought properly to be done. Her general practitioner, Dr Ralston, has also provided a further report which was not before the judge, being dated 3 April. In that he speaks of a pressing need for a further assessment of this patient's needs. Such an assessment was offered by the respondent as part of the draft order they put forward before the judge in the court below, and the offer is repeated today. I would have thought, speaking entirely for myself, that it is almost axiomatic that this lady should have a further assessment, and that it should be undertaken as soon as possible. Moreover, I venture to say, with all due respect to the huge army of legal advisers, four counsel in this court, several solicitors and assistant solicitors, not to mention, I suspect, the care workers from the hospital, that the less involvement there is from the lawyers and the less money is wasted on this litigation the better for all concerned. I would have thought that the cost of these proceedings and the involvement of lawyers thus far has probably already exceeded the annual cost of £150,000 which it is said to be necessary for the care of this patient. It is about time that came to an end.

5. These proceedings are the second battle engaged between the parties. For practical purposes I need only refer to the fact that a report was commissioned from Bush & Co in November 2003 to advise on the proper management of this unhappy patient. For reasons not explored before us and not material in any event, the applicant was not satisfied with the respondent's care of her in the months that followed and she took proceedings in the Administrative Court in 2005 which were compromised as was made apparent from the recitation of the judge's order. I must refer to some of the terms of that compromise. First it is important to note that it did contain an agreement between the parties which was recited as the preamble to the agreed order. And so the parties agreed:

"1. In order to ensure that the Claimant receives the level of care specified in the care plan drafted by Bush & Co on 10 November 2003 (as amended on 2 December 2003…) the recruitment process is to be continued by the Independent Case Manager so as to set up and maintain a full dedicated team of nurses and carers to provide a 24-hours per day 7 days per week package of care as set out in the expert nursing assessment."

6. Paragraph two recited the role that that independent case manager was to perform. It was, among other things, to make all necessary arrangements to put in place and maintain the 24-hour package agreed by the parties as being necessary to meet the claimant's needs including any further recruitment if required. It was also agreed that the case manager should act as an intermediary between the claimant and her carers on the one hand and the defendant and the other statutory authorities on the other hand; that he or she is to be the sole case manager, is to be independent of the defendant and its complex care team and is to provide a buffer so as to ensure that the PTSD triggers, that would arise if there was direct contact between the defendant and the claimant or her carers, do not arise. So there we have a succinct description of the role that was envisaged the independent care manager -- the ICM, as it has been abbreviated -- should play. Paragraph seven of the agreement is then important. It reads:

"In the event of a change of Independent Care Manager, the replacement Independent Care Manager is to be agreed between the Defendant and the Claimant."

7. It will be noted immediately there is no default provision in that agreement as to what should happen in the event that the parties could not agree, which, given the history we have had laid before us, was almost inevitably likely to happen.

8. There was no provision for an independent party to be given the nomination, for example, of the president of the appropriate professional body or something of that sort. The agreement was that that application be withdrawn, and so it was. There was no provision for the proceedings to be stayed. Whether or not that court is the appropriate court from which to seek further directions as to the implementation of the agreement or some other court is a matter upon which I will touch in a moment. It seems to me that many of the difficulties with which we are now faced arise directly from the implementation of that agreement, and that if any court is to be troubled with those questions -- my emphasis being on *any* -- then it is either the Administrative Court to look again at the 2005 proceedings if it can or a civil court to construe the terms of an agreement reached between the parties. But there we are.

9. Following that agreement an independent care manager was appointed, indeed, I think, replaced, lastly, by a company called CRM Limited. Concerns began to be expressed about their abilities properly to carry out their functions, and, as a result of that, notice was given by the Primary Care Trust in November to discontinue their services in three months' time, that contract expiring, therefore, on, I think, 11 February. They were to continue the management until their termination. No-one has apparently replaced CRM.

10. In a case in which it has been stressed by Mr Wise that it is of crucial urgency, it is not without significance that no steps were taken in this case until the very last minute, when judicial review proceedings were commenced. The relief sought in those proceedings was this. The claimant sought orders: firstly an interim order requiring the defendant to appoint Brownbills or Emma Bradley-Bond as the independent case manager; secondly she sought a declaration that the defendant was unreasonable not to have agreed mediation; thirdly a declaration that her legitimate expectation created by the agreement was frustrated; fourthly a declaration that the court had the power to provide health care through an independent user trust and that the defendant should either reinstate the former independent care manager or replace it with some other. What has happened is that the Primary Care Trust have put forward a series of names for replacement of CRM. At first there was no indication of the acceptance of any of them as satisfactory, though latterly Brownbills appears to be in favour. Secondly the respondents proposed various means of ensuring that adequate care is provided, but the names mentioned have been rejected as unsatisfactory because, due to her chronic stress disorder, none of them are acceptable to her.

11. In the result, therefore, with no care manager appointed, the Primary Care Trust are doing its best to provide the care themselves. They have, however, begun already to undertake the necessary advertising for a replacement care manager. Because this is a significantly lucrative contract, it is one which requires by operation of law, thanks to directives from Brussels, the undertaking of an extensive advertising campaign and compliance with a raft of regulations, which, when one looks at them, causes one to shudder. But that is the task they have already embarked upon, and among those who will come into the frame for consideration will be Brownbills. Since these proceedings have commenced there are concerns about Brownbills' ability to service that sort of undertaking, principally because it appears they do not have the staff to carry out the work themselves and would merely sub-contract nursing staff from nursing agencies. That is the state of affairs which the applicant has in the past found to be unsatisfactory and one can perhaps understand why. So there is no apparent certainty at the moment that Brownbills can fulfil the functions properly required of it.

12. The judge dealt with the matter in this way. He said in a commendably short judgment that he would not make the interim order to appoint a temporary care manager. He set out his reasons in paragraph 26 of his judgment:

"In my judgment, however, I should not make that interim order. It would be contrary to the legal principles I have already identified especially when the defendant has indicated that it can appoint Brownbills 'in hours' so long as they know it meets their criteria, one aspect being value for money. They also say, not unreasonably in my view, that they need to know what the claimant's solicitors have said to Brownbills in terms of requirements. Some, but not all such information has been provided. For the avoidance of doubt I should say that I do not consider that it is in breach of

the claimant's Article 8 rights not to make such an order. Brownbills appears to offer an interim solution but in my judgment it is not the court's role to force the defendant to contract with it before it makes its checks. I refuse permission on this aspect of the claim."

Likewise with regard to the claim in respect of mediation, he dealt with that in paragraph 27:

"In relation to medication , that, of course, as I indicated earlier, is sometimes a preferred option. The court often encourages alternative dispute resolution rather than involving persons in litigation. It was something that Collins J referred to in the ***Gunter*** *case at paragraph 19. Mediation had been tried there and failed and Collins J expressed regret. I accept Mr Wise's submissions that what has happened so far does not constitute mediation, in as much as there is a suggestion on the part of the defendant that what has happened might well be categorised as mediation. In my judgment, however, it is not arguable that the defendant is in breach of its obligations in terms of its public law obligation to act rationally in not agreeing to mediation in this area."*

13. In dealing with the allegation that the respondent was in breach of the claimant's legitimate expectations, founded upon clause seven of the compromise agreement, the judge found that to be a matter of some difficulty. He said in paragraph 29 of his judgment that he would need to be persuaded that a compromise and possibly even a contract entered into by a public body and couched in the way that clause seven is drafted gives rise to public law remedies rather than some other type of remedy. He had in mind remedies arising out of the terms of the contract, its construction and so forth, and as a result he made no finding on there being any failure to adhere to the 2005 agreement and he considered that the best course would be to leave that question open for further determination, hence the stay which he imposed on his order in that respect. As for the claim with regard to the independent user trust, his conclusion in paragraph 30 was that there was no way, in his view, that it was even arguable that the failure to go down that route would be contrary to the rights of the claimant.

14. So far as the legal basis for this claim is concerned, the respondent accepts that it has duties under the National Health Act to service the health care needs of this patient. Section 18 of the Act, recited by the judge, recites just that, namely that the Primary Care Trust must – but, importantly, to the extent that it considers necessary to meet all reasonable requirements -- exercise its powers to provide primary medical services in its area. No challenge has been made to the judge's summary of the law set out in paragraph 18 of his judgment, that:

"…the duty under the statute is to provide primary medical services, but this is to meet reasonable requirements. The primary medical services provided must be provided within a budget."

In other words there is a broad statutory discretion on the Primary Care Trust as to the provision of services and of course the obligation that they must act within the budget. In particular cases the consequence is that a primary care trust has a considerable discretion as to the services that it is to provide.

"19. The role of the court in all this is, firstly, supervisory. It has to ensure that a public body, like a Primary Care Trust, acts in accordance with the law."

15. The law is at its base the statute and he pointed out that there was no secondary legislation nor any guidance. In addition, of course, the court is, like the Primary Care Trust itself, to comply with the Human Rights Convention. The judge went on, however, to draw attention to observations of Collins J in the case of ***Gunter v The South Western Staffordshire PCT*** [2005] EWHC 1894 Admin, in which the judge apparently expressed views about the unsatisfactory way in which disputes of this kind are being brought before the Administrative Court, when in truth and in fact it is a medical matter to be left to the medical practitioners and to be kept far away from the lawyers. In all of that I wholeheartedly concur, and I repeat my strictures as to the terrible waste of money that this case has already incurred.

16. Mr Wise, who appears again for the applicant, concentrates his fire on the failure to provide for an interim care manager. It seemed to come as some surprise to Mr Straker QC, who again appears for the respondent, that they were seeking the interim appointment of Brownbills, but be that as it may it may not much matter. How does Mr Wise put his case? I am not sure that I am entirely clear what the answer is. Here there is an agreement between the parties to provide an interim care manager. I do not apprehend that there is an allegation that there is a breach of the agreement. Moreover if that was the way the case was being argued I would not have thought the Administrative Court is the appropriate venue in which to engage in a contractual dispute of that kind. It does not seem to me, however, that where the agreement provides for a replacement to be appointed by agreement and the parties fail to agree, it necessary follows that either party is necessarily in breach of that; short, perhaps, of having failed to use best endeavours which may be implied as a term of that particular provision.

17. In fact the Primary Care Trust are doing their best at the moment, on the evidence before us, to replace the care manager. They are hamstrung by the procurement regulations to go through the elaborate process before their choice can be made. That is accepted by the applicant. There has necessarily to be some hiatus, some delay, before that process can be continued. In the meantime can it possibly be said that they are, in administrative law terms, acting unreasonably in not appointment whomsoever the applicant directs them to appoint? I think the answer to that is plainly no. They are clearly acting reasonably in doing what they are doing. There is no obligation, statutory or contractual, upon them to submit to the demands of the applicant, careful though they will necessarily have to be as prudent carers for this lady, to take account of her severe mental condition and the obvious harm to her health when she is upset by those who have to manage the care of her health. But for my part I cannot begin to see the glimmerings of a case that the local authority acted irrationally or perversely in not

appointing an interim care manager. Does Article 8 impact upon that in any way at all? Mr Wise submits that the Article is engaged, in the sense that the appointment or lack of appointment of a care manager will have some impact on the private life of the patient. Accepting that, although not entirely convinced by it, the question is whether or not the lack of intervention at this stage can be justified as necessary as conforming to social needs, or in other words, as Mr Wise accepted in answer to my question, as a matter of proportionality. Here again I find his case to be simply unarguable.

18. Here the local authority have crucial difficulties which have to be borne in mind: the procurement responsibility; the management of their budget; the juggling of all of their resources. That is a matter which gives them a range of discretion but also impacts upon whether they are possibly in breach of their human right duties. Mr Wise has to persuade us that, as Laws J, as he then was, in the case of ***R v Ealing LBC ex p Parkinson*** [1996] 8 Admin LR 281, observed that there are:

"…it is true, rare cases where the public law court is able to conclude that only one result was legally open to the body in question, and in that case an order of Mandamus may issue to require that result to be arrived at."

19. I am not at all persuaded that one has reached the stage where one can say this is that rare case where only one result was legally open to the Primary Care Trust. On the contrary there are a number of options open to them before they are bound to appoint Brownbills, whose deficiencies in managing this contract are manifest in view of the fact they do not employ the staff to carry out the work they are required to do. In human right terms, it seems to me that Mr Wise does not overcome the claim by the health authority that they are acting proportionately in taking the steps they are for the good of this unhappy lady. There is nothing in this case compelling the interim order being made by the court, and in my judgment the judge was plainly right to reject that claim.

20. Mr Wise did not press the other grounds, perhaps for want of time, but, dealing shortly with them: as for the claim that the defendants acted unreasonably in failing to mediate, on the contrary it appears from the evidence we have heard that there was a form of medication on 14 January. There was at least a meeting at which attempts were made to find the answers to this intractable problem, and that broke down. Now, heartily as in favour of mediation as I am, it does not seem to me that the applicant begins to show a case that it was unreasonable for the authority to engage in further mediation. I repeat: I am very much in favour of it. I accept Mr Wise's submission that it is surprising how frequently even the most intractable case produces a satisfactory outcome in mediation assisted by a trained mediator. But that is a million miles away from saying that it is so unreasonable of a party not to undertake mediation at a stage before litigation. That argument, in my view, simply cannot run and the judge was fully entitled to say that there is no arguable case in that regard.

21. As for the appointment of an independent user trust, the order sought is a declaration that they had the power to do so and that the failure to agree to do so is both unreasonable and contrary to their positive obligations, one meets the same answer. There are a range of options open to the Primary Care Trust in a case like this. That is one. It may be that the Health Care Commission invited the parties to consider it. The Health Care Commission did not suggest it as the one and only option that was open. It may have advantages. It may have disadvantages, in that a member of the respondent has to be a member of the trust. And it is equally open to the trust to say, given the fragility of Miss Whapples' mental state, her inevitable – I do not mean this pejoratively, I mean it sympathetically – her inevitable suspicion that anything that the Primary Care Trust has a hand in will not be good for her, that that sort of view will infect the appointment of the independent trust. It is certainly a matter that the defendant was entitled to take into account in refusing at this stage to go down that avenue whilst they are actively pursuing the appointment of the interim care manager, which contractually they are bound to do. So there too the judge was absolutely right in his judgment.

22. We listened to this application at considerable length almost as mediators at times as we sought to broker some sort of deal between the parties. It was in vain. It was, I hope, a measure of the sympathy that I, for my part, and I am sure I speak for my lord as well, feel for the predicament of this applicant. But I repeat: judicial review is not the means with which to deal with her difficulties. These proceedings are, in my judgment, wholly misconceived. The judge was correct to dismiss the claim in so far as he did. He has left open one lifeline and that is sufficient if it should become necessary to go back to the court, but I repeat that the sooner the medical men get to grips with this problem and leave the lawyers out of it the better for this case and this patient. I would dismiss this application.

Lord Justice Thomas:

23. I agree.

Order: Application refused

Mr I Wise and Ms C Gallagher (instructed by Messrs Irwin Mitchell) appeared on behalf of the Applicant.
Mr T Straker QC and Ms L Busch (instructed by Messrs Bevan Brittan) appeared on behalf of the Respondent.