Clinical Negligence & Costs: XDE v North Middlesex University Hospital NHS Trust [2020] EWCA Civ 543

Dominic Bright

Is it reasonable to change funding regime from legal aid to CFA giving rise to additional liabilities of about £1.1million?

Facts

The appellant's clinical negligence claim followed an alleged delay in recognising and treating her tuberculosis meningitis, which, she claimed, caused her catastrophic brain injury. This was her second appeal against judgment disallowing additional liabilities, namely success fees of solicitors, counsel and the after the event insurance premium.

Issues

There were four issues.

First, whether or not there is a broad equivalence between legal aid and CFA-lite. Secondly, what importance should be given to the *actual* reasons for the change in funding.

Thirdly, whether CFA-lite is obviously superior to legal aid, so that the change in funding is justified by this fact alone. Fourthly, whether a good, objective reason for the change in funding is sufficient, regardless of the actual reason.

Discussion

Coulson LJ – with whom Floyd and Lewison LJJ agreed – gave the leading judgment.

On the first issue, there is a broad equivalence between legal aid and CFA-lite. The latter comprising an agreement whereby a client's liability to pay his lawyers' costs is limited to that which is recoverable from the other party.

The guidance in *Surrey (A Child) v Barnet and Chase Farm Hospitals NHS Trust* [2018] EWCA Civ 451, [2018] 1 WLR 5831 ("*Surrey*") at [29-30] is of general application when assessing the reasonableness of costs consequences following change from one funding regime to another. It applies even where there is no question of a *Simmons v Castle* [2012] EWCA Civ 1288, [2013] 1 WLR 1239 uplift.

On the second issue, the *actual* reasons for incurring costs are *material*; in general, matters that were *not* part of the decision-making process are *im*material.

On the third issue, five reasons were given that CFA-lite was not obviously superior to legal aid, including the findings of three costs judges that there was little to choose between the regimes.

On the fourth issue, there were two "very high hurdles" before a good, *objective* reason for the change in funding would be sufficient to render the decision reasonable, regardless of the *actual* reason: the weight of contrary *authorities* and the inherent *un*likelihood.

Disposal

The appeal was dismissed with the following conclusion:

> "The decision in *Surrey* appears to have worked well in practice. It stresses that, in general terms, there is little to choose between legal aid funding, on the one hand, and a CFA-lite arrangement on the other. In disputes about the recoverability from the paying party of additional liabilities where the funding has changed from the former to the latter, what matters is the reasonableness of the decision to change funding. That inevitably highlights the actual reasons for the change."

Property: When is a 'house' not a 'house'?

Adam Swirsky

S. 1(1) of the Leasehold Reform Act 1967 allows a tenant of a long lease to acquire on fair terms the freehold or an extension of their lease. The only definition of a 'house' for the purpose of the Act is found in s. 2 and this excludes a 'house' that isn't structurally detached or a 'house' where a material part of that house lies above or below a part of the structure not comprised in the 'house'.

In **Freehold Properties 250 Ltd v Beverley Ann Field & others [2020] EWHA 792 (Ch)** the court had to consider whether the owners of the long leases of a number of houses on the same development were entitled to acquire the freehold title when their leases excluded certain structural parts of the building including the roof and foundations. At first instance the freehold owners had lost, arguing that the 'houses' demised were not houses within the meaning of s. 2(1) of the Act.

On appeal, the appellant argued that the right to enfranchise applied only to a tenant of the whole of a leasehold house thereby excluding the houses subject to the appeal in circumstances where the structural parts of the houses were excluded from the demised premises such that the tenants were tenants of part only of a house and did not have the right to enfranchise. The appellant pointed to the provisions of s. 2 and argued that it would have been curious if, without further statutory articulation, some legal interest less than an interest in substantially the whole of the leasehold sufficed to qualify for enfranchisement.

The court agreed with the appellant freehold owners and went on to consider the anti-avoidance provisions in s. 23 which provide that any agreement relating to a tenancy shall be void in so far as it purports to exclude or modify any right to acquire the freehold or an extended lease or right to compensation under this Part of this Act. However, the court found that this provision was not sufficiently wide to include a provision which limited the tenant's demise to just part of a building, even if that limitation had the consequence of taking a lease outside of the ambit of the Act.

Property: Luton Community Housing v Durdana [2020] EWCA Civ 445, 26 March 2020

Barbara Zeitler

The Public Sector Equality Duty ('PSED') under s. 149 Equality Act 2010 ('EqA') continues to exercise the courts. This article and the article on *McMahon v Watford BC* discuss how the courts are applying the PSED in the context of housing law.

S. 149 EqA focuses on advancing equality. It requires a body carrying out public functions to have due regard to equality of opportunity and elimination of discrimination, but does not amend the statutory powers and functions of a public authority set out in other legislation. A court will not dismiss a possession claim where a breach of the PSED is relied upon if satisfied that it is highly likely

that the outcome would not have been substantially different had no breach of the PSED occurred: *Aldwyck Housing Group v Forward* [2020] 1 WLR 584 (which was decided after the first-instance decision in *Durdana*).

Durdana considers the application of s. 149 EqA in the context of possession proceedings. Luton Community Housing ('LCH') sought possession of the property let to Ms Durdana on discretionary ground 17 Schedule 2 Housing Act 1988 (false statement inducing grant of a tenancy). In 2017, LCH became aware that Ms Durdana and her husband had provided false information about their housing and financial circumstances on a housing application form.

At trial, it was common ground that Ground 17 was made out, but Ms Durdana contended that it would not be reasonable to make a possession order and, further, that LCH had breached its duties under s. 149 EqA, not having considered the impact of the possession claim on her and her daughter. The child suffers from cerebral palsy and Ms Durdana from PTSD.

The LCH officer serving the Notice of Seeking Possession was not aware of Ms Durdana's health condition and that of her daughter, but stated in evidence that if their conditions had been known, it would have been proportionate and reasonable to seek a possession order. After commencement of the possession proceedings, the LCH officer carried out an Equality Act assessment. The officer had no experience of Equality Act assessments and was unfamiliar with the PSED.

The judge found that LCH had breached the PSED. She was not satisfied that on the facts of the case the LCH's decision to seek possession would 'inevitably' be the same if the PSED been complied with, and dismissed the claim. Although it was not necessary to consider reasonableness, the judge indicated that the breach of the PSED would make it unreasonable to make a possession order.

The Court of Appeal allowed LCH's appeal. While the judge had been correct conclude that there was a breach of the PSED, she had misdirected herself in that she considered whether the outcome would have been inevitable rather than highly likely. The court concluded that in light of the shortage of public housing LCH was justified in seeking to remove tenants who had obtained their property by deception and the medical evidence did not suggest that the effect of eviction on Ms Durdana and her daughter would be 'acute or disproportionate' [para. 36]. The matter was be remitted to the judge for a consideration whether it was reasonable to make the possession order.

This case shows that while a breach of the PSED will not necessarily mean the end of a possession claim, public landlords should be very mindful of their duties under s. 149 EqA.

Property: McMahon v Watford BC; Kiefer v Hertsmere BC [2020] EWCA Civ 497, 8 April 2020

Barbara Zeitler

Following on from *Luton Community Housing Ltd v Durdana* (also discussed in this round up), the Court of Appeal has handed down an important decision on the interaction of the test of vulnerability under s. 189(1)(c) Housing Act 1996 ('HA') and the Public Sector Equality Duty ('PSED') under s. 149 Equality Act 2020 ('EqA').

Pursuant to s. 189(1)(c) HA 1996, a person has priority need for accommodation if s/he is 'vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason'. *Hotak v LB Southwark & other appeals* [2016] AC 811 provides that an officer carrying out a review of a homelessness decision has to 'focus very sharply' on whether the application us under a disability (or has another relevant protected characteristic), (ii) the extent to such disability, (iii) the likely effect of

such disability, when taken together with other features, on the application if and when homeless, and (iv) whether the applicant is as a result 'vulnerable'.

The PSED applies to the way in which a public authority exercises its functions; it is not a free-standing duty. It is a duty to have regard to the goals identified in s. 149 EqA. Pursuant to *Haque v Hackney LBC* [2017] PSTR 769, a reviewing officer need not make express findings about whether an applicant for housing does or does not have a disability or the precise effect of the PSED.

In these two joined cases, one of the homeless applicants suffered from mobility problems, the other from a variety of physical and mental health problems. In both cases, the first instance judges had held that the reviewing officer had correctly assessed the vulnerability of the homeless applicant, but had not complied with the local authority's duty under the PSED. The judges were troubled by the fact that there had not been any consideration whether the homeless applicants were disabled within the meaning of EqA.

Examining the relationship between vulnerability under the HA and the PSED under EqA, Lewison LJ noted that while there was a substantial overlap between a vulnerability assessment and the PSED, there were also differences. The most important difference was that the question whether a person had a disability, ie one of the protected characteristics under EqA, was to be assessed without reference to measures being taken to correct or treat that disability, whereas vulnerability was to be assessed by taking account of such measures [para. 45]. A reviewing officer did not need to make findings whether an applicant had or did not have a disability or the precise effect of the PSED [para. 62]. The Court held that the greater the overlap between a statutory duty under consideration and the PSED, performing the statutory duty will make compliance with the PSED more likely. In the case of vulnerability, there was a substantial overlap with the PSED [paras. 67-68]. The first instance judges had taken too narrow a view of the reviewing officers' decisions read as a whole. The Court concluded that there: 'is a real danger of the PSED being used as a peg on which to hang a highly technical argument that an otherwise unimpeachable vulnerability decision should be quashed…..[The PSED] is not there to set technical traps for conscientious attempts by hard-pressed reviewing officers to cover every conceivable issue. Nor is it a disciplinary stick with which to beat them' [para. 89].

This decision gives considerable latitude to reviewing officers. Nevertheless, a 'sharp focus' on the extent of a person's dis/ability and consequences of the same is required.