The King on the application of Better Streets for Kensington & Chelsea, Justin Abbot v Royal Borough of Kensington & Chelsea

No Substantial Judicial Treatment

Court
King's Bench Division (Administrative Court)

Judgment Date
8 December 2022

No. CO/2097/2021

High Court Of Justice King's Bench Division Administrative Court

[2022] EWHC 3500 (Admin), 2022 WL 18587639

Before: Mr Justice Lane

Thursday, 8 December 2022

Representation

Miss J Wigley KC (instructed by Leigh Day) appeared on behalf of the Claimanst.
Mr C Streeten (instructed by Bi-Borough Legal) appeared on behalf of the Defendant.

Judgment

Mr Justice Lane:

1. This is an application by the claimant to set aside the order of Upper Tribunal Judge Cooke, sitting as a Deputy High Court Judge on 23 November 2022, who refused the application by the claimants to amend their grounds of claim in order to add a further ground of judicial review. The proposed new ground concerns the assertion that the defendant created a legitimate expectation in the minds of the claimants, which it then failed to honour.

2. There is power to set aside only in two circumstances. The first is if the requirements of CPR 23.8(a) or (b) do not apply. In this case, the relevant sub-paragraph is (b). This gives the court a power to make an order without a hearing if the parties agree that the matter should be disposed of without a hearing. In the absence of agreement, any order that the court makes without a hearing on the application will be on its own initiative. In such a circumstance there is a right to have the order set aside.

3. In the present case the claimants clearly ticked the requisite box on the application form for a decision without a hearing. They say that the defendant's response was not, however, sufficiently clear as to be binding. (See in this regard *R(Compton) v Wiltshire Primary Care Trust* [2009] 1WLR 1436). I reject that submission. I find that the defendant's reply, in which it said it would provide its "formal response" to the application, was a sufficiently clear acceptance of the written process that had been set in motion by the claimants. I do not consider that this was affected by the claimants filing a reply to that response of the defendant.

4. It is common ground that the claimants 'reply did not reach the Deputy High Court Judge before she made her order. The ticking of the box and its acceptance by the defendant were, however, in my view all that mattered. It cannot be inferred from the claimants' actions that they were, in reality, agreeing to the application being decided in writing on some conditional

basis that they would get the last word on the application. This is particularly so, given that we are here concerned with an application to add a ground of judicial review where there is, of course, no right of reply to an acknowledgement of service before a decision is taken on the arguability of the ground.

5. I turn, therefore, to the second basis on which the Deputy High Court Judge's order may be set aside. CPR 3.1(7) provides as follows:

> "A power of the court under these Rules to make an order includes a power to vary or revoke the order."

This general power is, however, not a general disposing provision without limits. (See in this regard *Tibbles v SIG Plc [2012] EWCA Civ 518*). In the present case no good reason has been put forward for allowing the court at this stage to intervene in respect of the Deputy High Court Judge's order.

6. The history of the proceedings is relevant. They have been ongoing for some time. There has been ample opportunity for the claimants to seek to raise an additional ground, had they seen fit to do so. Until very recently, they had not seen fit. The change in view came about when the claimants instructed new leading counsel. I make no criticism of her for taking instructions at a late stage. The point is, however, that the claimants have been ably represented at earlier stages when, as I have said, an opportunity could have been taken to seek to add an additional ground.

7. Then there is the issue of prejudice to the defendant. Mr Streeten has advanced reasons in his skeleton argument as to why there would be prejudice. He says in short that there could well be a need to obtain evidence, in the event that permission to argue this ground is granted. For the claimants, Miss Wigley KC disagrees. In the circumstances, I consider that the court is entitled to accept the defendant's position in this regard, unless it can be shown on its face to be manifestly misconceived, or not advanced in good faith; and there is no evidence of either of those circumstances arising in the present case.

8. I consider evidence could well be needed, if the ground were admitted. It might be necessary to explain or justify why, if it were to be found to be the case, the defendant resiled from the legitimate expectation which it had given to the claimants. Miss Wigley states, somewhat boldly in my view, that the court could always adjourn in order to enable the defendant to obtain such evidence as it saw fit. That is, with respect, to disregard the high-level statements which have come from the courts in recent times, regarding the need for procedural rigour in this area of the law. (See *Talpada v Secretary of State for the Home Department [2018] EWCA Civ 841 at paragraph 67* et seq; *Keep Bourne End Green v Buckinghamshire Council [2020] EWHC 1984 (Admin)*).

9. Although both counsel addressed me on the merits of the proposed ground, at this stage it is difficult to see how an ordinary merits consideration by this court would be appropriate. If it were, it would set at nought the need for procedural rigour. If all that needed to be shown at this belated stage in the proceedings was that the proposed ground was arguable, then procedural rigour would count for nothing. Having regard to the authorities, that must be wholly wrong.

10. Accordingly, I consider the appropriate approach is to take a similar line to that which the court adopts when it is considering relief from sanctions; namely, to apply, under the so-called *Mitchell* principles, the test of whether the ground is so strong that, having regard to all other relevant circumstances, it would be contrary to the overriding objective to refuse

the application to amend. Having examined the proposed ground and heard submissions on it, I cannot conclude that the proposed ground reaches that level.

11. For these reasons, this application is refused.