Neutral Citation Number: [2013] EWCA Civ 1566

Case No: B5/2013/1334

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Southend County Court
District Judge Dudley
ISS00353

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 December 2013

Before:

LORD JUSTICE RICHARDS
LORD JUSTICE LEWISON
and
MR. JUSTICE COLERIDGE

- -

Between:

SWAN HOUSING ASSOCIATION LIMITED	**Appellant**
- and -	
MR CARY GILL	**Respondent**

- -
- -

Mr Andrew Lane (instructed by **Batchelors Solicitors**) for the **Appellant**
Mr Jonathan Manning and Ms Rebecca Chan (instructed by **Chennells Solicitors**) for the **Respondent**

Hearing dates: 19 November 2013

- -

Approved Judgment

Mr. Justice Coleridge:

Introduction and main contentions of the parties

1. At the conclusion of the hearing of this appeal on 19 November 2013, the court announced its decision allowing the appeal and granting an injunction in the terms sought by the Appellant. These are my reasons for that decision.

2. By permission of Lord Justice Patten granted on 26 July this year the Appellant, Swan Housing Association Ltd, appeals the decision of District Judge Dudley sitting in the Southend County Court on 29 April 2013. The Lord Justice when granting permission gave these reasons:

   i) The judge made a finding of disability without any medical evidence to support it and even though it was not relied on by the defendant. Nor is it clear what are the acts of discrimination as defined in section 15 of the 2010 Act which are said to be involved in the defendant's conduct.

   ii) The appeal has a real prospect of success.

3. The order which is the subject of the appeal simply dismissed the Appellant's application for an anti-social behaviour injunction against the Respondent pursuant to The Housing Act 1996 ("the 1996 Act") sections 153A and D. The injunction concerned the Respondent's occupation of his home at 3A St Mary's Road, Southend, Essex ("the property") which is an assured tenancy of which the Appellant is the landlord. The Appellant's grounds for the grant of an injunction are that the Respondent has done acts which were in breach of his tenancy and a nuisance to adjoining occupiers.

4. The Appellant has no complaint about the main primary findings made by the District Judge in respect of the acts complained of. The District Judge found them to be established by the evidence he read and heard. However the District Judge went way beyond that simple analysis and refused the Appellant's application for an injunction on grounds relating to the Respondent's supposed disability under the Equality Act 2010 ss 6, 15 and s 149 ("the 2010 Act").

5. The Appellant's complaint against the District Judge's decision is that it was based on these disability related grounds which had not been advanced by the Respondent at any stage prior to the Respondent's submission (and then only at the instigation and prompting of the District Judge) and in any event were entirely unsupported by any proper evidence, much less medical evidence, that the Respondent was disabled. In particular the Respondent's pleadings and written evidence were almost silent on the point and no reliance had ever been placed on them. Overall, the Appellant says that neither considerations of disability nor the 2010 Act play any part in the determination of this application.

6. So let me turn first to **Grounds One and three of the grounds of appeal**, which for completeness I shall now set out:

Ground One reads:

> " The learned District Judge failed to consider properly or at all whether the Respondent's medical condition fell within the definition of "disability" for the purposes of the 2010 Act (section 6, Schedule 1) or whether, if it did, the actions complained of arose in consequence of his disability (section 15). In so far as his judgment is found to have addressed these issues the learned District Judge had no or no proper basis for coming to affirmative conclusions in either instance (and was wrong in law in his conclusions) or for identifying the medical condition alleged."

Ground Three reads: "The learned District Judge was wrong in fact and law to find that section 35 of the 2010 Act had been contravened by the Appellant."

7. The Respondent's response to these two grounds, to be found in his skeleton argument for this appeal, makes this sensible concession:

> "Taking grounds 1 and 3 together, the Respondent accepts that the Judge probably went too far, given absence of medical evidence before him, in concluding that the Respondent's medical conditions fell within s.6, 2010 Act, as a disability which in turn gave rise to the finding of discrimination under s.35, 2010 Act. Those arguments were not raised by the Respondent in closing, although the Judge raised them of his own motion with counsel for each party. Accordingly, the Respondent does not seek to uphold the Judgment below on the basis of the finding of discrimination."

8. On the papers I have read that seems to be an inevitable but nonetheless sensible concession but it has an important impact on the rest of the appeal as will become apparent.

9. So it is not necessary to dwell on arguments under ss 6, 15 and 35 of 2010 Act. Manifestly there was no evidence upon which the District Judge could make a finding that the Respondent was disabled. The mere fact that the Respondent asserted, not very forcibly, in his written evidence that he suffered from Asperger's syndrome, without more, could not amount to evidence of disability as defined by the 2010 Act or to evidence of discrimination arising from it. And the District Judge was not entitled to become a self appointed medical expert by e.g. relying on his own medical dictionary to fill in the gaps.

10. I turn to **Ground Two** which is still contentious. It reads, along with submissions contained in the Appellant's skeleton argument:

> "The learned District Judge was wrong in law to address the question of section 149(2) of the 2010 Act in the absence of any pleading to this effect or requirement for evidence of the

same (the basis for his finding of applicability and contravention of this duty thereby being flawed).

24. What is maintained by the Respondent is that the learned District Judge was however entitled to reach a finding as to an alleged breach of the section 149 public sector equality duty and thereupon in his discretion dismiss the ASBI claim.

25. Not only was there no direct evidence as to the applicability of the 2010 Act (particularly in respect of the discrimination argument) but the defence of 7 October 2011 to the claim expressly omitted any reliance on or reference to the 2010 Act .

26. This approach was unsurprisingly mirrored by the skeleton argument filed on behalf of the Respondent to the 24 April 2013 trial, which similarly omits any reference to the 2010 Act and only refers to the Respondent's "dyslexia and aspergers syndrome" in part of one sentence in reference to the court's overriding discretion not to make an ASBI even if the statutory conditions are satisfied.

27. That the learned District Judge allowed such an argument to be considered was a serious procedural irregularity".

11. The Respondent makes no concession in relation to this ground. Based on the public sector equality duty arising under section 149 of the 2010 Act, he says the broad duty arising under this section and the Appellant's failure to comply with it are considerations which were and are relevant to the District Judge's discretionary exercise in considering, in a more general way, the appropriateness of granting an injunction under section 153A and/or D of the 1996 Act.

12. It is put in this way:

"33. The Respondent's case on this appeal may be summarised as follows:

(i) the Judge was entitled to consider the Equality Act issues on the evidence before him, including the unchallenged evidence of the Respondent;

(ii) the Judge was also entitled to hold that the Appellant had entirely failed to discharge its public sector equality duty ("PSED") under s.149, 2010 Act: indeed, on the evidence of Ms Navin, such a ruling was inevitable;

(iii) the essence of the PSED is consideration of (*i.e.* having "due regard" to) the impact of the proposed action on the

> person affected by it, during the course of the decision-making process, (*i.e.* not as an *ex-post facto* rationalisation);
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> (iv) in exercising his discretion whether or not to grant an injunction, the Judge was entitled to take account of the impact on the Respondent of doing so, in particular, he was bound to take the impact into account when faced with the unchallenged evidence as to the Respondent's mental health;
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> (v) the Judge was also entitled to take into account the status of the Court as a public authority and his concerns about the ability of the Respondent to comply with any Order he may make;
>
> (vi) given the Appellant's complete failure to consider the impact of an injunction on the Respondent's mental health and its consequent inability to satisfy the Judge as to the issues referred to above (see (iv) and (v) above), the Judge was fully entitled, when exercising his discretion, to refuse an injunction; this is a conventional exercise of the discretion of the court in injunctive proceedings, especially where the terms sought are such that the impact on the Respondent would be considerable and would require significant positive action by the Respondent to avoid breach (*i.e.* removing greenhouses and gazebos etc). This ruling does not preclude the Appellant from relief indefinitely.
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> 34. On this basis, it is respectfully submitted that the appeal should be dismissed".

Factual background

13. I will provide a little more factual detail as to how this appeal arises in order to deal with Ground Two of the appeal.

14. On 29 June 2011, i.e. nearly two years before the judgment, the Appellant applied for an anti-social behaviour injunction pursuant to sections 153A and 153D of the 1996 Act, against the Respondent, an assured tenant of theirs in respect of the Property. The Property is a ground floor flat in a semi detached residential house which has been divided into two flats, one of which is the Property.

15. The injunction was to compel the Respondent to (1) re-instate unimpeded access over a passageway between numbers 3 and 5 St Mary's Road, (2) remove a gazebo and greenhouses which were trespassing on the garden of the first floor flat and a passageway, (3) re-instate fencing, (4) refrain from interfering with the communal door or otherwise preventing the occupants of the first floor flat from using the entrance, (5) refrain from using the Property for business purposes, and (6) remove a CCTV camera installed without the Appellant's permission.

16. Following the hearing of evidence at trial on 24 April 2013, District Judge Dudley gave judgment on 29 April 2013 having asked for further argument on the 2010 Act which he had raised. The judgment is to be found at pp133-142 in the bundle.

17. He made the following main findings:

    i) that the Respondent had engaged in various actions which were capable of causing nuisance and annoyance, as he put it, the Respondent "very largely" having admitted the acts complained of so that section 153A of the 1996 Act was satisfied.

    ii) save for the question of the Respondent's disability, that suggested that "on the face of it" an ASBI should be granted.

    iii) that it had only been recently that it had come to the Appellant's attention that the Respondent had Asperger's syndrome, but he accepted there was no medical evidence that the Respondent suffered from this condition. Nevertheless by reference to a medical dictionary he had in his possession and had looked at, he found that some of the Respondent's traits were consistent with such a diagnosis and so he held that the Appellant should have reviewed whether to continue with the injunction proceedings when they did find out, and indeed he went further and found that they were "on notice" from 2004.

    iv) therefore that the Appellant did not have due regard to the Respondent's disability and had accordingly contravened sections 35 and 149 of the 2010 Act.

18. The important passage in the judgment is to found at paragraphs 31-33 and they call for quotation in full:

> "31. I am quite satisfied that this gentleman does in fact suffer from Asperger's Syndrome. I am equally satisfied that the Claimant in this case has contravened the Equality Act 2010. I turn first of all to the section to which Mr Gill's counsel referred me, i.e. s.149(1) which states that,
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> "A public authority [which the Claimant is, but also of course this court is] must, in the exercise of its functions, have due regard to the need to:
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under this Act;
>
> (b) advance equality of opportunity [which does not really arise]…
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it
>
> More specifically, s.135(1)(b) and (c) is engaged – that is, in relation to those who have management of premises.

> "A person who manages premises must not discriminate against a person who occupies the premises
>
> (a) in the way in which A allows B, or by not allowing B, to make use of a benefit or facility;
>
> (b) by evicting B…;
>
> (c) by subjecting [the occupier] to any other detriment".
>
> 32. If I were to grant an injunction in this case I would be failing in the court's duty to have regard to the disability of the Defendant under s.149(1) of the Act. I would be allowing the Claimant to contravene both that section and s.135(1)(b). It is quite clear that what should have happened as soon as any slight hint of disability came into existence – and, as I say, I think that must have happened by 2004, Swan should have had due regard to that disability and should have carried out an assessment of the situation in the light of their suspicion of such disability. It may be that if they had done that, many of the problems that have occurred since would not have occurred. But, having failed to do that, when in 2012 they new that the Defendant was definitely saying he has Asperger's Syndrome, they should then have reviewed the continuation of his claim to decide whether there was some other, or better way in which they might approach the case in the light of the disability. They did not do that. If I were to grant them an injunction I would be subjecting Mr Gill to a very considerable detriment. Suffering from the condition that he suffers from, his ability to comply with such an injunction would clearly, on medical grounds, be compromised. He would therefore run a far greater risk than any other ordinary member of the public in breaching that injunction and becoming liable for the penalties that would flow from such a breach. That discriminates him against the general public and puts him in a position of hazard which he should not be put in. This court does not propose to act in a way which would discriminate against the Defendant.
>
> 33. It is for those reasons that the claim by the claimant is dismissed".

19. A simple reading of those two paragraphs immediately reveals the following errors, amongst others.

    i) The finding that the "gentleman does in fact suffer from Asperger's syndrome" was not properly supported by evidence and went beyond the District Judge's function in the absence of any medical evidence.

    ii) The court itself is not a public authority for the purposes of section 149 (although the Appellant arguably is or at least exercises public functions within section 149(2)).

iii) Section 35 (wrongly transcribed then and thereafter as section 135) only applies, in the circumstances of this case, to a person who is actually disabled. It is conceded that the Respondent is not properly so categorised.

iv) The quotation of section 149 and section 15 as it were, in the same breath and within the same paragraph elides the purpose of the two sections and reveals a fundamental misunderstanding of the distinction between the effect of the two sections.

v) Paragraph 32 of the judgment similarly has a number of flawed statements all flowing from the eliding of the two sections 35 and 149 and the assumption that the Respondent had a disability.

vi) The reference to "subjecting Mr Gill to a very considerable detriment" is a reference to section 35 of the 2010 Act which has no application here.

20. In the end I am afraid to say with great respect to the District Judge, this whole part of his reasoning was both flawed and a conspicuous red herring. The Respondent's attempts in his skeleton argument to argue that in some more general way the District Judge was entitled to piece together the wisps of evidence about the Respondent's possible Asperger's to form a coherent basis for an assertion that section 149 had been breached is a creative attempt to make bricks out of straw but in the end it is without real foundation.

21. Given the concession already made by the Respondent and the further plain errors identified above it seems to me that Ground Two of the grounds of appeal is also made out and the exercise of the District Judge's discretion was inevitably flawed. Accordingly, the decision not to grant an injunction must be set aside.

22. But where does this court go from here? Mr Manning on behalf of the Respondent urges in these circumstances that either the decision should be reaffirmed in the exercise of our own discretion and applying properly section 149, or the case remitted to the court below for further consideration. Mr Lane for the Appellant invites us to exercise our own discretion and so grant the injunction.

23. I am satisfied that this court is in a position to put itself in the position of the lower court and now exercise its own discretion.

24. Section 149 reads as follows:

149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

25. That section primarily imposes upon public authorities the duty to "have regard to" the matters mentioned when formulating policy in the exercise of its functions. However Mr Manning argues, especially in his written outline submissions in response, that the duty goes further than that.

26. I quote from those submissions directly:

> "(iii) The PSED does not require proof of the existence of a protected characteristic (in this case, a disability within section 6, 2010 Act); rather, it arises in any case where it is not clear that no such protected characteristic is relevant. See *e.g.*
>
> (i) *R (Greenwich Community Law Centre) v Greenwich LBC* [2012] EWCA Civ 496 *per* Elias LJ at [30] "…it is only if a characteristic…is likely to arise…that [it] need[s] to be taken into consideration. I would only add the qualification that there may be cases where that possibility exists in which case there may be a need for further investigation before that characteristic can be ignored…"
>
> (ii) *R(Pieretti) v Enfield LBC* [2010] EWCA Civ 1104 *per* Wilson LJ at [35] the relevant question to ask was "did [the decision maker] fail to make further inquiry in relation to some such feature of the evidence presented to her as raised a real possibility that the appellant was disabled…".
>
> (iv) The PSED arises not only in respect of functions concerning the formulation of policy, but also in respect of functions which relate to individual decisions: see *Pieretti, per* Wilson LJ at [26].
>
> (v) In the present case, there was plainly a likelihood or at least a real possibility that Mr Gill was disabled, such that the Appellant was obliged to have due regard to the impact of its decision to seek injunctive relief against him, and to consider the need to avoid or mitigate such impact on him. Not only was the Appellant aware, at all material times, of the Respondent's history as a supported tenant (see *e.g.* Appellant's letter dated 11 February 2010, but, since April 2012, that he claimed to suffer from Asperger's Syndrome and dyslexia (para.9).
>
> (vi) In the circumstances, the evidence before the Judge below was entirely sufficient to entitle him to find that there had been a breach by the Appellant of the section 149 duty.

> (vii) The matters referred to in the Appellant's Updated Skeleton Argument at paras 27(d) and 28 concerning the Respondent's answers in cross-examination (*i.e.* that he said his disabilities had no impact on the allegations against him) do not assist its case."

27. Even if Mr Manning is correct in the use he makes of the authorities he there cites, and even if the Appellant had scrupulously fulfilled and applied its PSED duty, it would inevitably have been a brief exercise given the fact that there was no medical evidence that the Respondent was disabled and no reliance on the matter by the Respondent. Further, in the exercise of this court's discretion it seems to me additionally that we are entitled to take into account even the limited evidence in the court below.

28. The Respondent was asked specifically whether his alleged Asperger's syndrome affected any of the issues complained about in the case and in each instance he denied that it did (transcript p.169). He concluded that he "*always had Asperger's*" and that "*it shouldn't really have an effect on anything – other than how I integrate with society. That's the only difference. How people would deal with something is, you know, reflected differently in their actions to the way I would*."

29. Taking all this evidence together I am not persuaded that section 149 has any material applicability to the facts of this case.

30. The Respondent's final argument in relation to the exercise of discretion is founded on section 153A(2) of the 1996 Act which gives the Court a broad discretion to take into account all the circumstances when considering the grant of an injunction. Even if there is no disability, the Respondent argues, the court should nonetheless have regard to the Respondent's mental health in a more general way.

31. It is put it this way:

> "in exercising his discretion whether or not to grant an injunction, the Judge was entitled to take account of the impact on the Respondent of doing so, in particular, he was bound to take the impact into account when faced with the unchallenged evidence as to the Respondent's mental health".

32. The problem with that argument is that it too has no real evidential basis.

33. Without wanting to fall into the trap which ensnared the learned District Judge, of applying layman's knowledge to the characteristics of Asperger's syndrome, I think I can safely say that it is known to be a disorder which manifests itself across a wide spectrum from slight to severe. For it to form any part of the arguments in this case for not granting an injunction, proper medical evidence of its extent and effect in this case would have been essential, especially given the Respondent's refusal even to provide his medical notes. In the circumstances, despite counsel's creativity, it does not seem to me it can properly form any part of a consideration of the exercise of this discretion.

34. Taking into account all the relevant circumstances and in the light of the conclusions reached by the District Judge on the primary facts and arguments, it seems to me that the appeal must be allowed and the injunction granted. Mediation had been tried and failed and I cannot see what other sensible or reasonable course the Appellant could have taken other than to apply for the injunction which is quite conventional in form and well focused on the mischief complained of. For the same reason I cannot think of any good reason why this court should not grant the injunction.

Lord Justice Lewison:

35. I agree with Coleridge J that the judge's exercise of discretion was vitiated by a number of legal errors. First, he found that Mr Gill had a disability (and hence a protected characteristic) even though that had been neither pleaded, nor alleged nor proven by evidence. It is now conceded on the part of Mr Gill that the judge's conclusion on that question cannot be sustained. The basis of the concession is that without any medical evidence before him it was not open to the judge to find that Mr Gill suffered from a disability falling within section 6 of the Equality Act 2010. That concession is plainly right.

36. Thus second, the judge was wrong to hold that there was any question of Swan Housing (as the manager of premises) having been in breach of its duty under section 35 of the Act not to discriminate, as that expression is defined by section 15 of the Act.

37. Third, the judge was under the misconception that the court itself was subject to the public sector equality duty under section 149 of the Act. But paragraph 3 of Schedule 18 to the Act says in terms that section 149 does not apply to a judicial function.

38. Mr Gill nevertheless seeks to uphold the judge's finding that Swan was in breach of the public sector equality duty. That section provides:

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1)."

39. I will assume that Swan Housing exercise public functions.

40. Mr Manning and Ms Chan contend that the public sector equality duty is nevertheless engaged and that Swan Housing were in breach of it. They have drawn our attention to two passages from previous decisions of this court. The first is that of *R (oao Greenwich Community Law Centre) v Greenwich LBC* [2012] EWCA Civ 496. In that case Elias LJ said that if a characteristic or combination of characteristics is likely to arise in the exercise of public functions they need to be taken into consideration. From that proposition it is argued that the duty is engaged by the mere likelihood of the existence of a disability. I do not read Elias LJ as supporting that proposition for three reasons. First, the list of protected characteristics is such that every human being has at least three (age, race and sex). So the formulation of a general policy takes place against the background that everyone affected by the policy will have at least three protected characteristics. That is a far cry from reliance on the public sector equality duty in a particular case. Second, Elias LJ was looking to the future, rather than dealing with whether a breach had taken place in the past in relation to a particular case. Third, what Elias LJ was dealing with was the likelihood of actual protected characteristics arising in the exercise of public functions, not possible protected characteristics.

41. The second case was *Pieretti v Enfield LBC* [2010] EWCA Civ 1104 [2011] 2 All ER 642. In that case Wilson LJ said that a reviewing officer considering an application by a homeless person was in breach of the public sector equality duty in failing to make further enquiries when the evidence raised a real possibility that the applicants were disabled. But that observation relates to a duty to enquire in a case in which the applicants were in fact disabled and hence did in fact have a protected characteristic. It is wrenching that statement completely out of context to seek to suggest that the public sector equality duty is engaged when on the proven facts there is no protected characteristic.

42. Where, as here, Mr Gill does not have a relevant protected characteristic I cannot see in what respect Swan Housing can be said to have failed to have due regard to the need to eliminate conduct prohibited by the Act; or to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not; or to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not.

43. But for the judge's belief that there had been discrimination and a breach of the public sector equality duty, he would have granted the injunction. Once that misconception has been cleared out of the way, there is no impediment to its grant. For these reasons I also joined in the decision to allow the appeal that we announced at the conclusion of the hearing.

Lord Justice Richards:

44. I am in broad agreement with the reasons given by Coleridge J for allowing the appeal and granting the injunction. In relation to the public sector equality duty under section 149 of the Equality Act 2010, however, I prefer the more specific reasoning of Lewison LJ.