

IN THE HIGH COURT
QUEEN'S BENCH DIVISION

Strand
London

Before

MR JUSTICE ANDREW BAKER

IN THE MATTER OF

SURREY COUNTY COUNCIL

Applicant

V

VAUSE

Respondent

MR COLLETT appeared on behalf of the Applicant
MR TAUSSIG appeared on behalf of the Respondent

JUDGMENT

4th January 2018, 12.30 – 12.52
(AS APPROVED)

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MR JUSTICE ANDREW BAKER:

1. This is a case in which it is plain to me, and I mean no criticism of Mr Collett or those whom he represents by saying this, that the defendant council feels strongly aggrieved by the outcome of the claimant's claim as determined at trial in July of this year by District Judge Smart. However, as of course it is accepted throughout

Mr Collett's very clear and lucid submissions, a sense however strong of grievance that a trial outcome has gone a particular way provides merely motivation not basis for any possible appeal.

2. The suggested basis for an appeal is three-fold. Firstly as to the substantive conclusion that the defendant council was liable for the late Mrs Vause's fall and consequent injuries ultimately resulting in her death, the argument is that that was based upon an approach to the responsibilities of Mrs Cayley as Mrs Vause's care worker, or to give her the exact title her Enablement Assistant, that imposes a degree of micro-management and an unrealistic standard of care for workers in her position, and in any event is unsustainable as a matter of causation.

3. To my mind however District Judge Smart's decision, although his judgment is some 35 pages long because he takes pains to set out in very great detail the evidence given at this two day trial, is straightforward. His conclusion is that Mrs Vause was and had been assessed to be a frail lady at a high risk of falling when mobilising and using her walking frame, and someone who required in order to avoid or minimise the risk of falling the attentive prompting and assistance of a carer or the Enablement Assistant such as Mrs Cayley. Moreover it is clear from the evidence before District Judge Smart that Mrs Vause had been identified specifically as presenting a significant risk of losing her balance and stumbling or falling to the left. In those circumstances it does not seem to me arguably to be a micro-management by the court of Mrs Cayley's responsibilities on the day, or to set an unrealistic standard, to say, as the district judge did, that Mrs Vause ought to have had Mrs Cayley's undivided and undistracted attention positioned to her left. In those circumstances it does not seem to me that there is a real prospect of success in seeking to challenge District Judge Smart's evaluation that there was a culpable, that is to say negligent, failing by Mrs Cayley on the day, even if as regards her being distracted momentarily by Mr Vause, that was indeed a momentary lapse rather than anything more prolonged.

4. As regards causation, it seems to me that the judge's conclusions are clearly enough expressed at paragraphs 119 to 120 of the judgment, namely that positioned to the left and not distracted probably Mrs Vause would not have fallen at all, and if she had it would have been within the ability of Mrs Cayley to manage the fall in such a way as to avoid the injury. It seems to me that those were conclusions which were plainly open to the district judge on the evidence which he has set out at great length in the main section of his judgment, and in relation to which an appellant court would not be in any realistic position to interfere. They will have been conclusions that were derived in significant part from his having actually heard from Mrs Cayley herself, the independent expert witness who gave evidence and Ms Gibbs from the Spelthorne Reablement Team and Ms Prior a leader in that team.

5. It does not seem to me necessary and therefore its absence does not seem to me to give rise to an arguable ground of appeal for the district judge to have articulated in

paragraphs 119-120 precisely the prompting and assistance that in his view would probably have been sufficient that the fall could and would probably have been managed without Mrs Cayley being required actually to catch Mrs Vause or take her weight onto her. For what it is worth however it seems to me that reading in particular paragraph 120 fairly to the district judge, his conclusion was that Mrs Cayley being on the wrong side of Mrs Vause as client and not there to notice – not keeping her focus on Mrs Vause as she should have so as to notice – her continuing to move and starting to lose her balance, she did not intervene orally and with a guiding hand to correct the loss of balance when it occurred. I have no difficulty at all, notwithstanding the criticisms made by Mr Collett, in envisaging, as it seems to me the district judge did, that Mrs Cayley in the position that she should have been in on Mrs Vause's weaker and more stumble prone side, and keeping her focus on her as she should have done, that she would probably have nipped the loss of balance in the bud, in accordance with her training, with a prompt word and a guiding hand, and the fall would never have occurred.

6. It seems to me that this court acting as an appellate court is not in any realistic position to second guess those evaluations on the part of the district judge and the appeal on liability has no real prospect of success.

7. The second and third grounds of appeal relate to costs. The minor costs ground of appeal is that the district judge abridged by two days the 21-day time period for the purposes of qualifying a Part 36 offer made by the claimant for Part 36 consequences. That arises because although the defendant's solicitors had made it clear that they did not accept service of documents within the proceedings by email, the relevant offer was sent to them 21 days before trial only by email and then also by post, so that it was deemed served 2 days later.

8. Mr Collett refers me in that regard to the judgment of Rix LJ giving the only substantive judgment in *French v Groupama Insurance Co Ltd* [2011] EWCA Civ 1119 but it seems to me that case is not in point. That judgment is an interesting analysis and discussion of the approach to be adopted by the court to offers without prejudice save as to costs or the like, but which had not qualified under the Rules as CPR Part 36 offers. This case concerns an offer which by reason of the abridgment of time granted by the district judge qualified as a Part 36 offer, the abridgement of time itself being a discretionary power built into the Part 36 regime. It seems to me, not least because of the absence of any record provided to this court for the purposes of the application for permission to appeal of the district judge's reasons, quite impossible to propose that his decision to abridge time by 2 days in respect of the Part 36 offer in this case, deemed served 19 rather than 21 or more days prior to trial, fell outwith the proper exercise of his discretion to abridge time for the purposes of the Part 36 regime.

9. The major ground of appeal in relation to costs concerns the one significant issue at trial on which the defendant was successful. I describe it as significant, both in the sense that it was as a matter of analysis it seems a substantial but in the event not necessary plank of the case for the claimant as prosecuted through the trial, and also in the sense that it generated both to some extent its own set of costs, including it may well have been the majority if not the entirety of the costs of involving Mrs Amphlett as expert, and also it may be an aggravation of the overall length of and therefore cost of the trial. That issue was the issue whether as the claimant alleged there ought to have been an assessment that Mrs Vause required the assistance of two carers to mobilise rather than that one was sufficient.

10. As I have indicated in describing that issue I can see its significance and the degree to which it may have generated or aggravated costs. That rendered it capable of affecting a judge's discretionary conclusion whether costs should follow the event in full, or instead some different order be made, whether that be way of a separate order as to the costs of that issue or simply a reduction in the proportion of costs recovered by the claimant, or a disallowance of some or all of Mrs Amphlett's costs from those to be recovered by the claimant. At the same time it does not seem to me realistically arguable that the only proper conclusion as a matter of discretion was that there had to be some species of reduction in the claimant's costs recovery to reflect the defendant's success on that issue. Mr Collett if I may say so very fairly and I would say understandably acknowledged that there is a sense in which that is the defendant's real complaint – it is not so much that it says some particular species of costs order other than a full costs recovery by the claimant must necessarily have been the end result, but that on any view there ought to have been some reduction by some means in the claimant's overall recovery to account for his failure to succeed on that issue.

11. Again, not least but not only because I have neither transcript nor even notes of the district judge's reasoning, it is accepted that I can and must proceed on the basis that broadly the submissions now made by Mr Collett as to the impact of that issue as to costs were made to the district judge, and he took into account that the claimant had not been successful in full, on the contrary he had failed on that one issue which in the ways I have described had generated or aggravated costs.

12. It seems to me not possible to say that in those circumstances the district judge has failed to accord proper weight to that aspect of the matter, or that the only way of taking proper account of that factor would be to deprive the claimant to at least some extent of a full costs recovery. To the contrary it seems to me that whether or not other trial judges in the county court would all necessarily have come to the same view, it was certainly a view that could properly be arrived at, that in the particular circumstances of this case, taking everything into account that had been submitted, the claimant should still recover costs in full.

13. In those circumstances it seems to me the proposed an appeal against the costs judgment in this case also does not have a real prospect of a success.

14. I was much assisted by Mr Collett's submissions. If I may say so he put the matter on behalf of the council both fairly as I said at an earlier stage and lucidly, but for all those reasons I am against the application for permission to appeal which is therefore dismissed.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

(This transcript has been approved by the Judge)