Neutral Citation Number: [2024] EWCA Civ 1492

Case No: CA-2024-000639 / 000639-A

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
HER HONOUR JUDGE GENN
Case Number K40CL135

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2024

Before :

LORD JUSTICE LEWISON and
LORD JUSTICE ZACAROLI

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Between :

LONDON BOROUGH OF SUTTON	**Appellant**
- and –	
JADE BETTS	**Respondent**

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- -

Victoria Osler (instructed by **South London Legal Partnership**) for the **Appellant**
Toby Vanhegan (instructed by **Sutton Borough Citizens Advice Bureaux**) for the **Respondent**

Hearing date: 07/11/2024

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Approved Judgment

This judgment was handed down extempore on 07/11/2024
and by release to the National Archives.

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Lord Justice Lewison:

1. On 6 March 2024 HHJ Genn gave an extempore judgment in a homelessness appeal brought under section 204 of the Housing Act 1996. The appellant, Ms Betts, appealed against the decision by London Borough of Sutton that its housing duty had been discharged in consequence of Ms Betts having voluntarily ceased to occupy the accommodation that Sutton had procured for her.

2. The judge found that neither the original decision maker, nor the Reviewing Officer ("the RO"), had considered whether it was reasonable for Ms Betts to continue to occupy the accommodation. That, she said, was a deficiency in the original decision, which ought to have been addressed by the Reviewing Officer. If the Reviewing Officer was minded to uphold the original decision despite that deficiency, a so called minded to find letter should have been given to Ms Betts under the Homelessness (Review Procedure) Regulations 2018. Ground 1 of the Grounds of Appeal therefore succeeded. Ground 3 was closely linked with ground 1 and the judge allowed the appeal on that ground also.

3. Her order therefore allowed the appeal, ordered Sutton to pay Ms Betts' costs and provided for a detailed assessment of Ms Betts' costs for public funding purposes.

4. Sutton applied for permission to appeal ("PTA"). In the statement filed on her behalf under Practice Direction 52C paragraph 19, on 28 May 2024, Ms Betts objected that the appeal was academic because she had found accommodation and no longer needed Sutton's assistance. She also said that she did not agree to the appeal proceeding; and that Sutton had not offered to indemnify her against costs. In addition, it was asserted that public funding would not be available for the appeal and that therefore arguments in support of the judgment would not be advanced. Very regrettably, that statement was not included in our bundle for this hearing.

5. The application for permission to appeal came before Elizabeth Laing LJ. She considered that one of the grounds of appeal was not arguable, but that three of them were. She also rather tentatively concluded that the second appeals' test was satisfied. She noted, however, that the appeal appeared to be academic and adjourned the application to court in order that the court could consider whether to grant permission to appeal despite the fact that, as between these parties, the appeal was academic.

6. The grant of permission to appeal is a discretionary decision as the White Book points out at paragraph 52.6.1. CPR rule 52.7 limits the exercise of the discretion in the case of a second appeal, but it is still a discretionary decision.

7. Where the issues in an appeal have become academic, this court's general approach is set out in *Hutcheson v Popdog Ltd* [2011] EWCA Civ 1450, [2012] 1 WLR 782. Lord Neuberger MR gave the leading judgment. At paragraph 12 he said:

   > " The mere fact that a projected appeal may raise a point, or more than one point, of significance does not mean that it should be allowed to proceed where there are no longer any real issues in the proceedings as between the parties."

8. He went on to say at paragraph 15:

> "Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean "may") be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated."

9. On the facts of that case, he considered that the first and third criteria would be satisfied but the second would not. He also considered that it would be disproportionate to grant permission to appeal merely because a successful appeal might result in a variation of the costs order below. Importantly, however, he made it clear that even though permission to appeal was refused, it could not be safely assumed that the judgment below was right.

10. Where the only live issue between the parties is the question of costs, a court should be even more cautious about exercising its discretion to grant permission to appeal. (See *Hamnett v Essex CC* [2017] EWCA Civ 6, [2017] 1 WLR 1155 at paragraph 37). In that case Gross LJ said at paragraph 41:

> "Thirdly, even if an extant issue of costs is capable of justifying the court proceeding with an appeal which is otherwise academic, we were not presented with any clear evidence as to the costs in issue. With the public interest in mind, there must be real doubt as to the wisdom of and justification for permitting yet more costs to be incurred simply in order to dispute on appeal the incidence of costs below."

11. *R (on the application of MH (Eritrea)) v Secretary of State for the Home Department* [2022] EWCA Civ 1296, [2013] 1 WLR 482 is another example of this court refusing permission to appeal where the substantive issues had become academic, and the only remaining issue was that of costs.

12. In the present case there was no evidence (let alone clear evidence) about the quantum of costs in issue, although in her skeleton argument delivered only yesterday, Ms Osler says that the costs claimed are in the region of £35,000, but she told us this morning that those costs have not yet been assessed.

13. In her order adjourning the application Elizabeth Laing LJ referred to two other decisions of this court, and one at first instance. In *R (on the application of L) v Devon County Council* [2021] EWCA Civ 358 ("Devon"), permission had been granted for judicial review of a decision of the council relating to educational plans. Despite the grant of permission, the judge who heard the substantive application declined to decide it on the ground that the point was, or had become, academic, even though he had heard full argument on the point from both sides. This court held that he was wrong not to have decided the question. Ms Osler relied on what Peter Jackson LJ said at paragraph 65:

> "Whether a claim is academic will, as is said above, depend on the particular circumstances. One reason why the present case is difficult to categorise is because the relationship between the parties is ongoing. The process of review and reassessment is an iterative one and the children are likely to need annual EHC plans throughout their education. There is at least a real likelihood that the issue that arose this year will arise for one or more of the claimants in future years."

14. But that was a case where permission had already been granted and the judge had heard full argument. It is readily distinguishable from a case in which permission has not yet been granted and where it is likely that the court will not hear full argument on both sides. Moreover, *Hutcheson v Popdog* was not cited. Although Ms Osler submitted that there was (at least potentially) an ongoing relationship between Ms Betts and Sutton, the putative existence of that relationship is entirely contingent and speculative.

15. In the course of her judgment in the *Devon* case Elizabeth Laing LJ referred to the decision of Lewis J in *R (on the application of Brooks) v Islington LBC* [2015] EWHC 2657 (Admin), [2016] PTSR 239, which was a homelessness case. But that case too is readily distinguishable because, as Lewis J made clear at paragraph 24, both parties asked him to decide the questions of law even though they had become academic between the parties. In this case, by contrast, Ms Betts objects to the grant of permission to appeal, and *Hutcheson v Popdog* was not cited.

16. The second decision of this court was *R (on the application of SB) v Kensington and Chelsea RLBC* [2023] EWCA Civ 924, [2024] 1 WLR 2613. That appeal concerned a *Merton*-compliant age assessment. By the time of the appeal the claimant had reached adulthood and was no longer living in the local authority's area, so in that sense the appeal was academic. Andrews LJ granted permission to appeal. On the hearing of the substantive appeal this court heard argument from counsel on both sides. One of the issues was whether the court should decline to decide the appeal on the ground that it had become academic. Having referred to *Hutcheson v Popdog* Elizabeth Laing LJ said that the case was of wider general importance than a mere decision on an academic dispute, and that it was an exceptional case in which the court should exercise its discretion to decide the point. Again, it was a case in which permission to appeal had already been granted and the court had heard argument on the substantive point on both sides. Moreover, the appeal was an appeal from a High Court Judge whose decision had been endorsed in a subsequent case and thus carried some precedential value.

17. In her skeleton argument dated 2 July 2024 Ms Osler argued that the appeal was not academic because of the costs order made against Sutton, and that the judge's decision imposed onerous duties on local housing authorities. She went on to argue that even if it was academic, this court should nevertheless hear it. Despite the fact that *Hutcheson v Popdog* had been expressly referred to in the statement under Practice Direction 52C, the criteria in that case were not addressed at all. In her more recent skeleton argument Ms Osler does address those criteria. She says that Ms Betts is an assured shorthold tenant and that her occupation is tenuous. If she becomes homeless again the circumstances in which she left her previous accommodation may become relevant to what duty Sutton owes her. I do not regard that possibility as

directly affecting the parties. It is a contingent possibility which may, at best, indirectly affect them. It may or may not come to fruition. Nor do I consider, as I have said, that there is an ongoing relationship between the London Borough of Sutton and Ms Betts.

18. Elizabeth Laing LJ considered that three of the grounds of appeal (all of which concern statutory construction points) satisfied the second appeals test. Although, in his skeleton argument, Mr Vanhegan argued that the points raised were ill-founded, I do not consider that on this application we can, or should, go behind Elizabeth Laing LJ's order. I accept therefore that the first of the *Popdog* criteria is satisfied (as it was in *Hutcheson v Popdog* case itself).

19. But as regards the remaining criteria, as I see it, we are no further forward. Criteria 2 and 3 in *Hutcheon v Popdog* are not satisfied. Ms Osler referred us to the decision of Nicklin J in *Haringey LBC v Simawi* [2018] EWHC 290 (QB) ("Simawi"). It is important to note the procedural context of that case. It was a claim for possession originally brought in the county court in which the defendant raised the point that certain provisions of the Housing Act 1985 were incompatible with convention rights. The action was therefore transferred to the High Court. It was possible that the point might become academic if the defendant were to be offered a new secure tenancy. But that had not yet happened. The question was whether the incompatibility issue should be determined even though it might become academic in the future. The judge allowed that point to proceed, even though it might become academic. He was satisfied that the first and third of the *Hutcheson v Popdog* criteria were satisfied. So far as the second criterion was concerned, he said that he did not regard that as determinative because otherwise it would give the non-consenting party an effective veto. In *Ismail v Newham LBC* [2018] EWCA Civ 665, however, Patten LJ doubted whether Nicklin J's decision was compatible with *Hutcheson v Popdog* although he recognised that Lord Neuberger had left open the possibility of exceptional cases. *Simawi* was, of course, a fully-fledged action for possession in which the defendant had pleaded a defence. It was not a case of discretionary grant of conditions of appeal. I do not consider that *Simawi* provides any real guidance on whether permission to appeal should be granted in this case. Moreover, it was a case in which the judge was positively satisfied that both sides of the argument would be properly ventilated.

20. It seems, to me, to be highly unlikely that Ms Betts would obtain legal aid for an appeal which, from her perspective, is academic. So far as costs are concerned, as Ms Osler accepts, it seems unlikely that in the event of a successful appeal, Sutton would obtain an enforceable order for costs against anyone. Ms Osler says that the court could impose conditions about costs, but none have actually been offered. At best, it seems to me that a successful appeal would result in the discharge of the costs order below. In practical terms, therefore, Sutton would have to incur its own, probably irrecoverable, costs of an appeal simply in order to discharge the costs order below. It would, in those circumstances, be disproportionate to grant permission to appeal on the question of costs alone.

21. In addition, the decision of a Circuit judge sitting in the County Court does not carry the same precedential value as a decision of a High Court judge, so if the point arises in another case, it can be decided in that one. But like Lord Neuberger in *Hutcheson v Popdog.* I would add that it cannot safely be assumed that the judge's decision was correct.

22. I would refuse permission to appeal.

Lord Justice Zacaroli:

23. I agree and have nothing to add.