



Neutral Citation Number: [2020] EWCOP 49

Case No: 13512882

**IN THE COURT OF PROTECTION**

Royal Courts of Justice  
Strand, London, WC2A 2LL  
Date: 02/10/2020

Before :

**MR JUSTICE KEEHAN**

Re JB (Costs)

Between :

A Local Authority	<b><u>Applicant</u></b>
- and -	
SB	<b><u>1<sup>st</sup> Respondent</u></b>
-and-	
AW	<b><u>2<sup>nd</sup> Respondent</u></b>
-and-	
JB	<b><u>3<sup>rd</sup> Respondent</u></b>
(by his litigation friend, the Official Solicitor)	
-and-	
SG Limited	<b><u>4<sup>th</sup> Respondent</u></b>
-and-	
CCG A	<b><u>5<sup>th</sup> Respondent</u></b>
-and-	
BCUHB	<b><u>6<sup>th</sup> Respondent</u></b>

Ms F Morris QC (instructed by **In House Legal Team**) for the **Applicant**  
Ms K Tayler (instructed by **Irwin Mitchell Solicitors**) for the **1st Respondent**  
Mr J O'Brien (instructed by **MJC Law**) for the **3rd Respondent**  
Hearing dates: on the papers

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
MR JUSTICE KEEHAN

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must

ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**The Hon Mr Justice Keehan :**

Introduction

1. In these Court of Protection proceedings I am concerned with one young man, JB, who has a diagnosis of a learning disability and ADHD. He was accommodated at a specialist residential unit, AH, in August 2017.
2. These proceedings were commenced on 14<sup>th</sup> November 2019. JB's mother, SB, was a party to the proceedings and JB was represented by his Litigation Friend, the Official Solicitor. The application by the local authority invited the court to make the following declarations and orders:
  - i) a declaration under s.15 of the Mental Capacity Act 2005 ('the 2005 Act') that JB lacks capacity to litigate these proceedings and to make decision and his residence and care;
  - ii) an order that JB should reside at AH until July 2020; and
  - iii) a deprivation of liberty order.

The court made various directions and orders and listed the matter for a further directions hearing on 22<sup>nd</sup> April 2020. In particular the local authority was directed to file and serve a statement setting out the local authority's proposals for the future residence and care needs of JB before July 2020 and after July 2020.

3. On 31<sup>st</sup> January 2020, AH gave notice to the local authority that JB would need to leave the placement by 5<sup>th</sup> June 2020.
4. In a witness statement dated 28<sup>th</sup> February 2020, the social worker set out the position of the local authority in respect of JB's future placement after he had left AH. It was noted that a joint approach by social care and health providers would be required to meet JB's behavioural needs.
5. Just prior to the hearing on 22<sup>nd</sup> April 2020, the local authority filed and served a second statement from the social worker setting out that:
  - i) no providers of residential placements had been identified, either locally or nationally, who could meet JB's needs or were willing to offer him a placement; and
  - ii) whilst the local Clinical Commissioning Group (CCG) had accepted a referral in respect of JB it had postponed assessments of him because of the pandemic.
6. At the hearing on 22<sup>nd</sup> April 2020, in addition to giving further case management directions, I declared that JB lacked capacity to conduct this litigation and to make decisions about his residence, care and support, contact with others and his use of the internet and social media. I made interim orders that the placement at AH continued to be in JB's best interests and I continued the deprivation of liberty order.
7. At a further hearing on 11<sup>th</sup> May 2020, I was told that AH had slightly revised its position and that it required JB to leave the placement by late July 2020 and it would

not contemplate any further extension. The local authority indicated that it would seek an injunction against SG, the parent company which owned and operated AH, to prevent JB being required to leave the residential unit until October 2020. SG opposed the making of an injunction. I made SG a party to these proceedings, gave directions for the parties to file and serve skeleton arguments on the issue of whether the court had the power and, if so, should make the injunctive order against SG as sought by the local authority. I listed the matter for a contested hearing on 9<sup>th</sup> July 2020.

8. On 18<sup>th</sup> May 2020, further to a direction I had made on 11<sup>th</sup> May 2020, the local authority filed and served a statement by the authority's director of adult services. In the statement the director asserted as follows:

“The complexities of JB’s needs and therefore the proposed package is way beyond the remit that social care would normally operate in. It identifies that given JB’s complex needs and presentation; these would be more fitting of a specialist placement, which would usually be accessed directly via the CCG or NHSE with the NHS having the clinical expertise to commission and monitor efficacy of specialist and therapeutic intervention and support. This is clearly beyond the role, responsibility and practiced expertise of a local authority”

“The local authority will expect that the responsible CCG to take the lead in commissioning the relevant care package. For JB, as a care leaver, we believe [CCG A] will remain the responsible commissioners for JB. To date, however the CCG are unwilling to accept responsibility and lead on finding and commissioning a placement for JB, with the local authority supporting as required.”

9. It became clear that there was a dispute between CCG A, the CCG for the area where JB had lived before going to live at AH, and CCG B, the CCG for the area where JB lived at AH, as to which of them was responsible for assessing and providing services to JB. At the hearing on 21<sup>st</sup> May 2020 both CCGs were joined as parties to these proceedings.
10. SG, SB and the Official Solicitor all filed and served skeleton arguments in response to the local authority's skeleton argument in support of its application for an injunction against SG. All three submitted that the court did not have jurisdiction to make the injunction sought by the local authority. In response, on 19<sup>th</sup> June 2020, the local authority gave notice that it was going to seek permission to withdraw the application for injunction.
11. At the hearing on 9<sup>th</sup> July 2020, I gave the local authority permission to withdraw its application for an injunction and, by consent, I ordered the local authority to pay SG's costs.
12. CCG A had by this time agreed to take the lead in the commissioning and case management of a future placement.

13. Subsequently SB and the Official Solicitor applied for costs against the local authority in respect of the costs occasioned by:
- i) the local authority's application for an injunction against SG; and
  - ii) the local authority's failure to make an application for CCG A and CCG B to be made parties to these proceedings earlier than 21<sup>st</sup> May 2020.
14. I gave directions for the filing of written submissions by SB, the Official Solicitor and the local authority on the issue of this application for costs. The local authority opposed both SB's and the Official Solicitor's application for costs.

#### The Law

15. The Court of Protection Rules provide as follows:

“Personal welfare – the general rule

19.3. Where the proceedings concern P's personal welfare the general rule is that there will be no order as to the costs of the proceedings, or of that part of the proceedings that concerns P's personal welfare.

Departing from the general rule

19.5.—

(1) The court may depart from rules 19.2 to 19.4 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances including—

- (a) the conduct of the parties;
- (b) whether a party has succeeded on part of that party's case, even if not wholly successful; and
- (c) the role of any public body involved in the proceedings.

(2) The conduct of the parties includes—

- (a) conduct before, as well as during, the proceedings;
- (b) whether it was reasonable for a party to raise, pursue or contest a particular matter;
- (c) the manner in which a party has made or responded to an application or a particular issue;
- (d) whether a party who has succeeded in that party's application or response to an application, in whole or in part,

exaggerated any matter contained in the application or response; and

(e) any failure by a party to comply with a rule, practice direction or court order.

(3) Without prejudice to rules 19.2 to 19.4 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.”

“Procedure for assessing costs

19.10. Where the court orders a party, or P, to pay costs to another party it may either—

(a) make a summary assessment of the costs; or

(b) order a detailed assessment of the costs by a costs officer;

unless any rule, practice direction or other enactment provides otherwise.”

“55 Costs

(1) Subject to Court of Protection Rules, the costs of and incidental to all proceedings in the court are in its discretion.

(2) The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives.

(3) The court has full power to determine by whom and to what extent the costs are to be paid.

(4) The court may, in any proceedings—

(a) disallow, or

(b) order the legal or other representatives concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with the rules.

(4) "Legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf.

(5) "Wasted costs" means any costs incurred by a party—

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or

(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.”

16. Bad faith or flagrant misconduct are not conditions precedent to justify a departure from the normal principle: *Re AH* [2001] EWHC 276 (COP). In *Re M* [2015] EWCOP 45 it was noted that:

“The court retains a residual power, which it exercises occasionally, where one or other party has been found [guilty] of...conduct that can be described as "significantly unreasonable.”

#### Submissions

17. In support of the Official Solicitor’s application for the costs occasioned by the local authority’s application for an injunction against SG, Mr Joseph O’Brien, for the Official Solicitor, made the following submissions:

“The application for an injunction in the terms of an order that JB should remain at AH and no steps shall be taken to remove him to alternative accommodation without the permission of the court and the order of the court until 1 October 2020 was an application doomed from its inception and flawed.

The application was doomed because the court’s power was limited to making decisions on behalf of JB, which he could make if he had capacity. This proposition of law is clear from the decision of Baroness Hale in *RE: M (An Adult) (Court of Protection: Jurisdiction)* [2017] AC 459. It should not be controversial.

Beyond the 24 July 2020, which was the date SG Limited/AH had agreed that JB could remain residing at AH, AH was not an available option for the court to consider in determining JB’s best interests. SG Limited/AH had given valid notice under the contractual arrangements between it and the local authority to terminate the placement with effect from that date. The court had no power to make any orders under section 16(2) of the MCA 2005. The court had no power to make an injunction order against SG Limited/AH compelling AH either to keep JB at AH beyond the 24 July 2020 or preventing JB from being removed from there. In its skeleton argument AH/SG Limited/AH asserted, correctly, 15.7 rather, “It is the conduct of the local authority which is improper and impermissible in making and/or maintaining its application for injunctive orders in the Court of Protection which seeks to circumscribe a

contractual relationship between itself and AH SG to which P, JB, has no involvement.”

Reliance by the local authority on the decision of Keehan J. in Re: SF (Injunctive Relief) [2020] EWCOP 19 was misconceived. This case concerned the proper use of the Court of Protection’s powers pursuant to section 16(2) and (5) of the MCA 2005. It did not involve the creation by the court of an option where none existed.”

18. I entirely agree.
19. The force of these submissions is underscored by the fact that having received the skeleton arguments of SG, SB and the Official Solicitor, the local authority elected, after instructing alternate leading counsel, to not pursue the application for an injunction.
20. Ms Morris QC, the newly instructed leading counsel for the local authority, submitted in response that:
  - i) no injunction was sought against SB or the Official Solicitor; and
  - ii) that the skeleton arguments filed and served on behalf of these two parties added nothing to the skeleton argument filed and served on behalf of SG.
21. With respect, these submissions are flawed for two reasons. First, the application for an injunction was made in these proceedings to which both SB and the Official Solicitor were parties. Furthermore, they both had a legitimate interest to support or oppose the making of the injunction sought in the context of the impact of making, or of not making, an injunction upon the residence, care and best interests of JB.
22. Second, the mere fact that the skeleton arguments of SB and the OS reached the same conclusions as those in the skeleton arguments of SG (and I note these were not filed and served sequentially) is irrelevant to the issue of whether the local authority should bear their costs occasioned by the injunction application. Moreover, this submission ignores the fact that I ordered SB and the Official Solicitor, along with SG and the local authority, to file and serve skeleton arguments on the issue of the application for an injunction.
23. In support of the application for costs on the basis of the failure to join the CCGs at an earlier stage of the proceedings (i.e. by February 2020) the Official Solicitor, supported by SB, submitted that:

“In summary the chronology and the evidence set out above (taken from the witness statements filed by the local authority) confirms that by February 2020 the local authority was aware:

- (a) That there was a real urgent need to identify an alternative placement for JB given the increase in his



challenging behaviour which was causing many problems for AH. [Paragraph 6 (b) and (c) above]

(b) The local authority did not have the expertise to identify an alternative provision for JB and regarded his needs as being primarily health based [Paragraph 6 (b) above]

The witness statement of [The Director] confirms the lack of expertise in the local authority in investigating and assessing prospective placements and the need for health input into the process, a situation which was clearly known to the local authority in February 2020 but brought into sharp focus in the witness statement of [The Director]. Given what the local authority knew about its limited expertise in identifying a suitable placement and the limitations on doing this without health, it was clear that it should have joined the relevant CCG or Health Board by the end of February 2020.”

#### Analysis

24. The local authority’s application for an injunction against SG was seriously flawed. For the reasons set out in Mr Joseph O’Brien’s submissions, at paragraph 17 above, I am satisfied that the application was totally without merit. The local authority’s conduct in making and pursuing the application, in my judgment, amounts to unreasonable conduct which justifies a departure from the usual rule of no order for costs. I will order the local authority to pay the costs of SB and the Official Solicitor occasioned by the injunction application.
25. I am not in a position to identify which elements of the costs of SB or the Official Solicitor were occasioned by the injunction application and accordingly I will direct that the order for costs should be the subject of a detailed assessment in the absence of the parties reaching an agreement on the quantum of costs.
26. In relation to the second limb of the costs applications by SB and the Official Solicitor, I accept that it may have been prudent to join CCG A and CCG B to these proceedings at an earlier stage and had this been done it may have resulted in identifying a suitable placement for JB at an earlier time: but I have my doubts. Accordingly, I am not persuaded that I should depart from the usual costs rule and order the local authority to pay any costs which may have been occasioned by the failure to join the CCGs at an earlier stage of these proceedings.
27. Furthermore, and in any event, I am not persuaded that the failure to join the CCGs prior to 21<sup>st</sup> May 2020 in fact occasioned any significant amount of additional costs to be incurred by either SB or the Official Solicitor. Accordingly, the applications for costs against the local authority on this ground are refused.

Conclusion

28. I shall order the local authority to pay the costs of SB and the Official Solicitor occasioned by the application for an injunction against SG. In the absence of agreement on the quantum of costs, this costs order shall be the subject of a detailed assessment.