IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
SITTING AT BRISTOL CIVIL AND FAMILY JUTSICE CENTRE

Case No. AC-2022-CDF-000089/CO/2569/2022

[2024] EWHC 3345 (Admin)

Courtroom No. 19

Bristol Civil and Family Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

Tuesday, 26th November 2024

Before:
THE HONOURABLE MR JUSTICE KERR

B E T W E E N:

THE KING (ON THE APPLICATION OF DA, A CHILD, ACTING THROUGH HIS LITIGATION FRIEND MA)

and

BRISTOL CITY COUNCIL

MA appeared in person on behalf of the Claimant
MR JOSEPH EDWARDS appeared on behalf of the Defendant

JUDGMENT
(Approved)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part, other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

This judgment was delivered in public. In any published version of the judgment the anonymity of the children and members of their family must be strictly preserved.

KERR J:

Introduction

1. The claimant, DA, appears by his father and litigation friend, known as "MA", under an anonymity order. He may not be named because of that order but I will refer to him as "Mr A". The defendant is Bristol City Council, which appears by its counsel, Mr Joseph Edwards. The issues before the court today arise in an application made by Mr A to set aside a consent order made by Steyn J on 25 November 2022, sealed on 29 November 2022.

2. The underlying challenge was a judicial review claim brought in July 2022 seeking permission to challenge the "failure by the defendant to discharge its… duty to secure **SEP** [special educational provision] for the disabled child". Steyn J's order was a Tomlin order made in settlement of that claim. The claimant seeks to set it aside on the ground of misrepresentation and fraud.

Background

3. DA is a child born in May 2007 who has severe autism. He is now aged 17 and will turn 18 in May 2025. He is being educated at Ruskin Mill College near Stroud in Gloucestershire. MA is his father and litigation friend. The defendant is the local authority responsible for special educational needs and disability (**SEND**) provision in the Bristol area.

4. The claimant was excluded from his former special school in June 2021. An appeal was brought in August 2021 to the First-Tier Tribunal Special Educational Needs and Disability Chamber (**FTT**) concerning the content of his education, health and care plan (**EHCP**).

5. The result of those proceedings was that DA was to be educated otherwise than at a school, i.e. home education with a programme of applied behaviour analysis (**ABA**). The FTT's decision and reasons were issued in June 2022 and the defendant issued the final EHCP in July 2022. That same month, these proceedings commenced.

The first judicial review claim

6. This claim was brought on 18 July 2022. In it, the claimant alleged that he was not receiving full-time education, that the defendant was in breach of its duty under section 175(1) of the Education Act 2022 and section 42(2) of the Children and Families Act 2014 to secure SEP for DA, that the defendant was in breach of its duty to take account of the wishes and views of the child and his parents under section 19 of the 2014 Act and, finally, that the defendant was in breach of its public sector equality duty under section 149 of the Equality Act 2010.

7. The defendant filed an acknowledgement of service and summary grounds. It contended that the claim was totally without merit and that the litigation friend had not complied with the duty of candour by failing to produce the FTT's decision.

Brief procedural history

8. The procedural history is quite complex. I need to mention some of it, not all, as it provides the context for the settlement in November 2022. On 19 July 2022, Poole J, as "immediates" judge, gave directions as to anonymity, abridged time for service of the acknowledgement of service and summary grounds; and directed that the issue of permission and interim relief be referred to a judge or deputy judge. The anonymity order concerning both the claimant, DA, and the litigation friend, Mr A, remains in place and they may not be named.

9. The claimant sought reconsideration of Poole J's decision at an oral hearing. He refused to direct an oral hearing. In August 2022, HHJ Keyser KC, sitting as a judge of the High Court, refused permission to apply for judicial review and another application. The claimant lodged a notice of renewal. sOn 2 September 2022, Tipples J, as the immediate judge, refused an application for expedition by the claimant and refused to transfer the claim to London.

10. In September 2022, emails were sent by staff working for the therapy provider, a company called Skybound. In those emails, complaints were made that Mr A was acting in a "passive-aggressive" way, was interfering with the therapy sessions, using cameras to film them and making the providers feel uncomfortable. Those emails were not put before the court at the time but were later produced by Mr A as part of his application to set aside the consent order.

11. On 10 October 2022, Chamberlain J considered the renewed application for permission. He granted it and gave directions in relation to case management. He said in his judgment granting permission that he hoped the substantive hearing might prove unnecessary if appropriate provision was being made by the time it was to take place.

12. On 12 October 2022, Mr A filed an application seeking an order for cross-examination of the defendant's witnesses. That was refused by Steyn J on 14 November 2022. Witness evidence was produced from staff at Skybound, to the effect that it supported the defendant's case; and Ms Solomon, the CEO, made a witness statement on 1 November 2022 about difficulties that had been encountered in providing the ABA for the claimant.

13. The litigation friend, Mr A, had by about mid-November 2022, instructed specialist solicitors and counsel. The solicitors were Watkins of Bristol, acting through Mr Keith Lomax. Counsel was Ms Alice de Coverley of 3 Paper Buildings. On 14 November 2022, a further witness statement was filed by Mr A, responding to the evidence the defendants had produced. On the same day, Ms de Coverley prepared a skeleton argument on behalf of the claimant for the substantive hearing which was listed for (on or about) 25 November 2022.

14. On 21 November 2022, Mr Rhys Hadden of Serjeants' Inn Chambers, then counsel for the defendant, prepared a detailed skeleton argument on the defendant's behalf. The nature of the defence was (a) that from 7 November 2022, the defendant was delivering the programme of ABA compliance with the EHCP (b) that the claim was or alternatively would shortly become academic (c) that any remedy should be withheld because judicial review is a remedy of last resort and there was an alternative remedy under the defendant's complaints

procedure and (d) reference was also made to the conduct of Mr A, which was said to have contributed to the delay in putting full ABA provision in place.

15. On 21 November 2022, the defendant applied for permission to rely on further witness evidence from staff at Skybound in response to Mr A's statement. The claimant's solicitors did not object to that application and it was granted by Steyn J on 23 November 2022.

16. On or about 25 November, i.e. about the day fixed for the substantive hearing, Watkins Solicitors, on behalf of the claimant, filed a draft consent order and schedule for the approval of the court, which included vacating the imminent substantive hearing. That order had been agreed by the parties and the defendant's solicitors were copied into the email. The order had been agreed in email correspondence between solicitors on 24 and 25 November 2022. The emails passed between Mr Lomax of Watkins for the claimant and Mr Toby Kippax, solicitor for the defendant. The two were negotiating on a "without prejudice save as to costs" basis.

17. On 25 November 2022, Steyn J approved the consent order which was sealed four days later on 29 November. By that order, she ordered that the claim be stayed save for the purpose of giving effect to the terms of the annexed schedule, for which purpose there would be liberty to apply. The hearing was vacated, costs would be determined later, and the case was closed.

18. The terms in the schedule were that the defendant agreed to certain specific actions with express references in italics to the claimant's EHCP. There was a specified amount of (i) outdoor activities (ii) occupational therapy (**OT**) and payment for OT equipment (iii) ABA of three specific kinds to be supplied by an ABA provider (iv) speech and language therapy (**SALT**) and (v) multi-agency meetings twice a term. I add in parentheses that it was later agreed there would be no order as to costs.

19. Certain disagreements between the defendant and DA's parents became live in certain Court of Protection proceedings, which I understand were first intimated in December 2022. A child protection order was to be sought. In those proceedings, on 19 January 2023, DA was made subject to a child protection plan, and it was said that there was some neglect on the part of the parents. Mr A was, as DA's father, involved in those proceedings but was not DA's litigation friend in those proceedings.

20. Mr A was by this time very dissatisfied with Skybound, the therapy provider. The dissatisfaction was indeed mutual, as shown by communications from mid-February 2023 and thereafter. Various issues were aired and Skybound reported, although Mr A would disagree strongly, that DA had missed out on some provision due to absence of parental consent.

The application to set aside the consent order (the set aside application)

21. On 4 August 2023, Mr A filed an application seeking an order to set aside Steyn J's consent order. He contended that the set aside application was made on the basis that the consent order was procured by misrepresentation and concealment of material information, actions that materially affected the outcome of the litigation.

The second judicial review claim

22. On 5 September 2023, Mr A filed a fresh judicial review claim, AC-2023-CDF000101, which I will call the second judicial review. In it, DA (known in the second judicial review as **DWL**) sought permission, through Mr A who is known in the second judicial review as **MNP**, to challenge decisions of the defendant, Bristol City Council, in December 2022 to refuse direct payments from the claimant's educational personal budget; asserting an ongoing unlawful act starting in July 2022; namely, the failure to provide necessary full-time education for the claimant DWL and to secure the SEP provided for in his EHCP.

23. In the second judicial review, DWL (i.e. DA) also asserted a failure to specify certain social care provision to help DA prepare for adulthood and independent living. He also complained of a decision made in March 2023 to cut his OT provision and of a departure from his legitimate expectation that there would be flexible use of the SEP during holiday periods.

Further orders in the set aside application and in the second judicial review

24. On 25 September 2023, the defendant emailed the court confirming that the set aside application was opposed. Eyre J then made various directions orders in relation to the set aside application during the period from December 2023 to February 2024. I need not set them out save to say that the judge was seeking to elicit clarification of the issues from the parties and to manage the resolution of the application.

25. In the second judicial review, Eyre J made a detailed order with reasons granting permission in part in that judicial review to proceed; refusing to join it with the set aside application; and giving standard case management directions.

26. Also in the second judicial review, Eyre J ordered on 18 June 2024 that Mr A (MNP in that case) may not act as litigation friend for his son, DA (DWL) because "MNP's conduct was put in issue in the defendant's defence", in that judicial review. The Official Solicitor was invited to step in and MNP was ordered to pay assessed costs.

27. I do need to mention Eyre J's order in this judicial review on 24 June i.e. in the set aside application. He directed the listing of the application before a High Court judge for one day at a hearing at which the court should determine:

    - first, whether the claimant needed to file a separate application in recission brought in relation to the alleged misrepresentation and concealment; and

    - second, whether the set aside application should be dismissed on the basis that no benefit would enure to the claimant if the consent order was set aside because he would no longer be receiving provision under the EHCP and recission *ab initio* was no longer possible because the claimant had received benefits under the terms of the schedule to the consent order.

28. Eyre J further directed that were the court not to dismiss the set aside application on one or more of those bases, the court would need to give directions for the further conduct and resolution of the set aside application.

29. In September 2024, after the summer break, DA started attending Ruskin Mill College. There are no documented issues in the litigation suggesting that the placement is unsatisfactory. He has, accordingly, since September 2024, ceased to be educated otherwise than at a school.

30. In the second judicial review, the Official Solicitor had replaced Mr A by the start of October 2024. Eyre J made another order on 3 October refusing Mr A's application to be joined as an interested party, refusing his application to file evidence in that judicial review but allowing him to attend the hearing and make representations at the substantive hearing. That substantive hearing is listed for February 2025 with a time estimate of two days, to be heard by a High Court judge.

31. That rather complicated history sets the scene for today's hearing before me. Mr A applied for an adjournment, but I refused that application for reasons I gave briefly earlier today. The upshot of the torturous history is that we now have two judicial review applications arising out of DA's educational provision, or lack of it, one listed for substantive hearing in February 2025 with the Official Solicitor as his litigation friend; the other settled via a Tomlin order, which Mr A, the litigation friend as he still is, seeks to have set aside.

Submissions of the defendant

32. Mr Edwards says, first, that the underlying proceedings have become academic; that permission would not be granted now for a judicial review that is water under the bridge; and that there is no properly pleaded claim for damages in that judicial review. Ms de Coverley in a skeleton argument had said she would seek to amend to plead a claim for damages for breach of article 2, First Protocol to the European Convention of Human Rights and section 8 of the Human Rights Act 1998. However, permission of the court was never given for that plea to be added. The application for permission to amend was not ruled upon.

33. Mr Edwards referred me to the judgment of Peter Jackson LJ, at [62] in *R (L) v. Devon County Council* [2021] ELR 420, CA, and said that this was a case that kind alluded to there where the outcome will not affect the rights and obligations of the parties. He referred me also to Silber J's celebrated judgment in *R (Zoolife International Limited) v Secretary of State for Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin) at [36], where he said two conditions must be met if the court is to hear a claim that has become academic:

> "The first condition is in the words of Lord Slynn in *Salem* (supra) that 'a large number of similar cases exist or anticipated' or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive".

34. Secondly, Mr Edwards submitted that setting aside the consent order would confer no benefit on the claimant and might be contrary to his interests. He relied on so-called *Jameel* abuse, see *Jameel (Yousef) v Dow Jones & Co* [2005] EWCA Civ 75, [2005] QB 946, per Lord Phillips MR, at [70]. Mr Edwards also relied on the overriding objective and submitted that it would be a waste of the court's precious resources to permit the claim to be reopened.

35. Thirdly, he reproached Mr A with unreasonably delaying the making of the set aside application over the period from February to August 2023 and contended that Mr A had all the information he needed by February 2023 to make the application and should have done so promptly.

36. Fourthly, Mr Edwards submitted that recission *ab initio* was not possible because the claimant had already received benefits under the terms agreed in the Tomlin order. According to his skeleton argument:

> "Should the LF [Mr A] succeed in showing that his consent to the settlement on the Claimant's behalf was vitiated by misrepresentation or duress, the remedy would in effect be a rescission of the consent order. As Snell's Equity [*34th edition*] states at §15-001, 'Rescission properly so-called involves the extinction of a contract and the restoration of the parties to their original positions'."

37. Although Mr Edwards did not cite a further passage, I draw attention to it anyway, at paragraph 15-014, omitting the footnotes:

> "Recission will be barred where *restitutio in integrum* is impossible; *restitutio in integrum* will only be possible where the party seeking recission, 'is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into'".

Submissions for the claimant

38. Mr A complained that he had not been able to see the full email trail passing between Mr Lomax and Mr Kippax, the parties' respective solicitors, in the run up to the settlement agreement. He said that he had collated video footage which contradicts the contents of Ms Solomon's third witness statement in particular and would, if viewed against the defendant's evidence, establish fraud or misrepresentation.

39. He asserted bluntly that passages in the defendant's evidence recited events that did not happen and that the video footage, if he were able to deploy it, would demonstrate that. He contended that the correction of historical mistakes in the defendant's evidence would have an ongoing beneficial effect on DA's future because the Court of Protection remains currently seised of issues concerning DA's care and residence.

40. Mr A further submitted that just satisfaction required that in the ongoing proceedings in the Court of Protection, there should be correct and not wrong evidence put before that court. He said that this forum is the only one in which he could present his video footage. He accepted that his previously instructed lawyers could not have settled this first judicial review application except on his instructions; but, he said, he agreed to the settlement because he was unable to deal properly with the video evidence.

41. Mr A further contended that full provision under the EHCP was not being made from 7 November 2022 and that the terms in the schedule of the Tomlin order did not match perfectly with the EHCP. The schedule did not include reference to outdoor activity but the EHCP did.

42. As for delay, he submitted that he could not have brought the set aside application in February 2023 because, at the time, he was mired in child protection proceedings and, in the period between February and August 2023, he was busy on several fronts with numerous ongoing litigious processes.

43. He disputed the proposition that the proceedings would be academic if reopened, saying that at the heart of the set aside application is the harm that could still impact on DA's future. The claim for damages, he submitted, would go some way towards enabling DA to catch up with the provision that Skybound should have made, but did not make.

44. Procedural fairness, he argued, is fundamental. If the consent order was made based on fraud and misrepresentation, it should be set aside, he said; but if it is not and the case is not resurrected, his son could continue to experience less than adequate education, which could have adverse long term consequences for his social, academic and emotional development.

45. Finally, he submitted that reopening the case would acknowledge past errors and uphold the rule of law.

Reasoning and conclusions

46. Under the terms of Eyre J's order, I am required to determine first whether the application to set aside the order should be dismissed on the basis that a separate application seeking recission would need to be brought in relation to alleged misrepresentation and concealment. Therefore, the first question is whether the claimant should have made an application in separate proceedings i.e. a fresh claim for recission of the bargain set out in the schedule to the Tomlin order.

47. I have doubts about whether bringing a fresh claim would be the correct procedure, having considered certain of the authorities relied on by Mr A: namely, *Sharland v Sharland* [2015] UKSC 60 and *Takhar v Gracefield Developments Limited & Others* [2019] UKSC 13. Baroness Hale's judgment in *Sharland* suggests that, at any rate in family proceedings, the correct procedure is to make an application in the proceedings.

48. Mr Edwards pointed out that the stayed proceedings could only be "unstayed" for the purpose of enforcing the terms of the schedule. The stay would, paradoxically, need to be lifted for the purpose of applying to set aside the very order imposing the stay. That would be at odds with the learning of the Court of Appeal in the discussion about stays and proceedings in Ward LJ's judgment in *Wagstaff v Colls (Wasted Costs Order)* [2003] PNLR 29.

49. However, in his skeleton argument - see paragraphs 11 and 19 - Mr Edwards did not press the point that the claimant should have brought a fresh claim in separate proceedings. That was because Eyre J's interim directions orders suggested that in February 2024, after the set aside application was brought, he was treating it as having been properly made by means of an application to set aside the consent order.

50. Mr Edwards' client, self-evidently, would not welcome a fresh claim. I propose to assume in the claimant's favour, without formally deciding, that the Administrative Court is

competent to entertain the set aside application. It is certainly the most convenient way of determining the issues which Eyre J has required me to determine.

51. Turning to the next issue, I am required to decide whether the set aside application should be dismissed on the basis that no benefit would enure to the claimant if the order were set aside; that there had been delay in bringing the set aside application; that it would not affect the claimant one way or the other if it was set aside because he is no longer receiving provision under the consent order terms; and because recission *ab initio* is no longer possible because the claimant has received benefits under the terms of the schedule to the consent order.

52. The first question there arising is whether the application to set aside the consent order must be dismissed because the underlying proceedings are academic. I have no doubt whatever that they are and that this is not a case where, applying the dual *Zoolife* criteria, the court would entertain the claim anyway.

53. There are several reasons why the present judicial review claim is academic. One is that the claimant, DA, is no longer receiving the education otherwise than at a school provided for in the schedule to the Tomlin order. The terms set out in that schedule have effectively fallen away. Performance of the obligations of the parties under those terms, whether it was good performance or defective performance has already occurred and is finished.

54. Since September 2024, DA has been attending college. The terms in the schedule have no application to his attendance there. I agree with Mr Edwards that the claimant could not possibly obtain permission now to make a complaint of past failure to make adequate educational provision, if such claim were brought afresh now.

55. It is no answer to say that the claimant should be able to set aside the consent order because he can still pursue his damages claim. That claim was never pleaded with the permission of the court and was settled along with the whole of the first judicial review claim. The claimant's then solicitors and counsel, with instructions from Mr A, agreed the terms of the Tomlin order without pursuing any damages claim. It was forgone, on Mr A's instructions.

56. This judicial review claim is also academic and moot because it has been overtaken by the second judicial review in which various assertions of failure to make full and proper educational provision are live and due to be heard at the substantive hearing listed in February 2025. If any issues remain live as to provision of education to DA before he went to Ruskin Mill College, it must surely be in those proceedings and not in the "water under the bridge" that is this first judicial review, that those issues will be aired.

57. The next point is whether the set aside application should be dismissed now on the basis that it would confer no benefit to the claimant if it were allowed. This is closely linked to the first issue and the answer is the same: since the claim is academic, resurrecting it would confer no benefit on the claimant.

58. That is subject to the theoretical possibility that the claimant could obtain the benefit of damages if the claim were resurrected and then amended to plead damages for breach of the education right conferred by article 1, First Protocol to the Convention. I discount that possibility as fanciful and, in any case, I see no reason why I should take that notional possible benefit into account when the putative, so far unpleaded, damages claim has been

settled with the litigation friend's informed consent along with the first claim for judicial review.

59. I reject the submission of Mr A that the claimant may obtain collateral benefits in the Court of Protection proceedings if the record is set straight by him being allowed to deploy his video evidence in this first judicial review claim. I do not think that point is open to him. He does not represent his son, DA, in the Court of Protection proceedings. He is a party in his own right in those proceedings, with an interest that potentially conflicts with his son's, as he is accused of neglect.

60. Mr Edwards' next point is that the litigation friend has unreasonably delayed before making the application to set aside the consent order. I do not think there is much force in that point. It is true that Mr A had his video recordings, which he says demonstrate fraud and misrepresentation, back in February 2023 and that he did not make the set aside application until August 2023; but I accept he had to go through the process of collating the video evidence and setting it against the written evidence from the provider, Skybound; and he was very busy litigating or being proceeded against on other fronts. I would not have dismissed the set aside application on delay grounds alone.

61. Next, it is said by Mr Edwards that the proper remedy is recission of the contract terms set out in the schedule to the Tomlin order, that *restitutio in integrum* is impossible because DA has received benefits under the contract terms and that recission is therefore barred.

62. I have some doubts as to whether recission is indeed the appropriate or only remedy on the hypothesis that the consent order had been obtained by fraud or misrepresentation. The benefits DA has received were not just contractual; they comprised educational provision which the defendant was obliged under the statutory scheme to provide to DA to the extent that they were provided for in his EHCP, the content of which was determined by the FTT.

63. It may be the case, as Mr Edwards submits, that the terms of the schedule included provision that was not part of the EHCP. I am not suggesting that the EHCP and the provision in the schedule to the consent order were perfectly matched and mirrored each other, but I am inclined to the view that the appropriate remedy would be non-contractual. If, hypothetically, the consent order was vitiated by fraud or misrepresentation and on the assumption that it can be and were set aside by an order made in these proceedings, notwithstanding the stay, then the upshot would, I think, be live judicial review proceedings in which the claimant would be fighting anew for his educational rights under the statutory scheme and his ECHP.

64. I would therefore not have dismissed the set aside application on the basis that recission is the appropriate remedy and is impossible. Recission is a private law remedy in equity. Orders made in judicial review proceedings are a public law remedy. The two do not easily mix. For completeness, I would add that I would not have dismissed the set aside application on the basis of what is called *Jameel* abuse of process, where the litigation is too trivial to justify the court's resources being expended on it. The education of DA is anything but trivial and it is only because it is no longer affected by this claim that it has become academic.

65. It follows that the application to set aside Steyn J's consent order must be dismissed for one of the second of the two sets of reasons advanced by the defendant and ordered by Eyre J to be determined at today's hearing: namely that the claim for judicial review is now completely academic and moot. I therefore dismiss the application to set aside the consent order and would ask the defendant's representatives please to prepare a draft order and send it to the Court associate and my clerk with a copy to Mr A and a copy to the Administrative Court office in Cardiff. I will deal with any further matters now if that is possible.

End of Judgment.

Transcript of a recording by Acolad UK Ltd

291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

Acolad UK Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof