Neutral Citation Number: [2020] EWCA Civ 1466

Case No: C1/2019/1881

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
BIRMINGHAM DISTRICT REGISTRY
His Honour Judge David Cooke (sitting as a Judge of the High Court)
CO/2600/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2020

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON LORD JUSTICE COULSON
and
THE RT HON LADY JUSTICE CARR DBE

- -

Between:

THE QUEEN ON THE APPLICATION OF CLARKE	**Appellant**
- and -	
BIRMINGHAM CITY COUNCIL	**Respondent**

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- -

The Appellant appeared in person and was not represented
Mr Jonathan Manning and **Mr Gavin McLeod** (instructed by **Birmingham Legal and Governance Department**) for the **Respondent**

Hearing date: 21 October 2020

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30am 6 November 2020."

The Lord Burnett of Maldon CJ:

Introduction

1. This is the judgment of the court to which we have all contributed.

2. The issue for decision in this appeal is whether Birmingham City Council failed to take account of legally relevant matters when on 24 May 2018 it confirmed its decision to retrofit sprinklers in its tower blocks following the fire at Grenfell Tower in London.

3. The appellant, Mr Robin Clarke lives on the 20th (top) floor of a tower block owned by the respondent, Birmingham City Council. He appeals against the order of HHJ David Cooke (sitting as a Deputy High Court Judge) dated 4 July 2019 dismissing his claim for judicial review of a decision by the Council's Cabinet taken on 24 May 2018 ("the May 2018 Decision"): [2019] EWHC 1728 (Admin). By that Decision the Cabinet confirmed its earlier decision of 27 March 2018 approving an amended capital investment budget that included provision of some £19m (out of anticipated total expenditure of £31m over three years) to fund the retrofitting of sprinkler systems to all tower blocks owned by the Council ("the March 2018 Decision"). The decisions in 2018 followed a decision taken by the Cabinet on 27 June 2017 in principle to install such systems in the wake of the Grenfell Tower fire ("the June 2017 Decision").

4. Mr Clarke considers that the decision to fit sprinklers is a waste of public money that could be better spent elsewhere. He believes that the improvement in safety does not justify the expense and what he sees as other disadvantages, especially disruption to tenants. He complains that the Council has not investigated in any detail whether or not its tower blocks are subject to any material risk of catastrophic fire, sufficient to justify the cost of an additional contribution to reduction of risk of such a fire that might be achieved by fitting sprinklers ("the value for money issue"). In his view, the decision to fit sprinklers was a panic response by politicians, keen to be seen to be doing something in response to the tragedy at Grenfell Tower. A more considered evaluation would have shown that the fitting of sprinklers was not necessary or justified.

5. The sole issue before us is whether, in reaching the May 2018 Decision the Cabinet unlawfully failed to take into account:

    a) the value for money issue;

    b) certain additional specific matters identified by Mr Clarke.

6. At the commencement of the appeal hearing, Mr Clarke applied for permission to rely on his witness statement dated 3 July 2020. We dismissed that application. The witness statement was materially identical to an earlier statement for which permission to rely had been refused by Phillips LJ. Like that earlier application, it satisfied none of the tests applicable to introducing fresh evidence in an appeal and additionally was an abuse of process.

The relevant facts in summary

7. The relevant facts are set out at [4] to [7] of the judgment below. We do not need to repeat them in any detail for present purposes. The key timeline is as follows:

   i) On 27 June 2017, just under a fortnight after the fire at Grenfell Tower, a public 12-page report was presented to the Cabinet setting out a proposed response. The Council's Director of Housing summarised existing fire protection measures and risk evaluation procedures at Birmingham's tower blocks. It recommended that the Cabinet note and endorse the addition of water sprinkler systems in tower blocks through a rolling programme of sprinkler installation and fire prevention measures from capital receipts (and whether or not the Government was willing to pay). It referred to expert consideration by the Fire Brigade. The Cabinet endorsed the action referred to in the report;

   ii) On 27 February 2018 the Council adopted a revised overall budget for the financial year 2018/2019 including provision for that year's element of the total spending of £31 million on sprinkler installation;

   iii) On 27 March 2018 the Cabinet approved a revised capital investment budget to include the additional spending, noting that this involved an increase in the budgeted expenditure of the 2017-2018 financial year of some £7.2 million;

   iv) Two members of the Housing and Homes Overview and Scrutiny Committee requested a call-in of the March 2018 Decision. That is a procedure under which the Scrutiny Committee reviews a Cabinet decision and can require it to be reconsidered by the Cabinet. The Scrutiny Committee acceded to that request and referred back to the Cabinet in the following terms:

   > "3.1 The Committee resolved to call in the decision for reconsideration by Cabinet on the grounds that: 5. The Executive appears to have overlooked some relevant consideration in arriving at its decision.
   >
   > 3.2 The Committee therefore formally asks the Cabinet to reconsider its decision; in particular that Cabinet carefully considers all the information and evidence available to assure itself that this large expenditure is wholly justified. An alternative approach might be to consider each case individually, and ensure each tower block has its own particular needs met in terms of safety and saving lives.";

   The reference to 'some relevant consideration' does not confine itself to legally relevant considerations.

   v) On 24 May 2018 the Cabinet met and considered the Scrutiny Committee's request with the benefit of a six-page "Executive response to "Call In" of the [March 2018 Decision]" accompanied by background papers ("the Executive Response"). There was then a public discussion at the conclusion of which the Cabinet unanimously resolved to confirm the March 2018 Decision.

The judgment below

8. In addition to the alleged failure to take into account legally relevant matters, Mr Clarke also challenged the decision on the basis of inadequate reasons. He had been refused permission to challenge the decision itself as irrational. His second ground is not the subject of an appeal. The Judge concluded that the proposition that the Council was obliged as a matter of law to enter into a more detailed analysis before proceeding to approve the budgeted expenditure was unsustainable. The Cabinet addressed the question asked of it by the Scrutiny Committee. It was entitled to decide, as it did, against further delay. As for a suggested failure on the part of Cabinet to give adequate reasons, it was doubtful that there was any obligation at all to provide reasons but in any event sufficient reasons could be identified. He dismissed Mr Clarke's challenge.

Discussion

9. We have referred above to various decisions taken by the Cabinet before the May 2018 Decision as "decisions". Mr Clarke does not accept that the June 2017 Decision was a formal (as opposed to an informal) decision to proceed with the retrofitting works. He submits that all that the Cabinet was doing by the June 2017 Decision was noting the proposal for the retrofitting works. Like the Judge, we consider it to be clear that the June 2017 Decision was a formal decision. That did not prevent further discussion on the merits and value of the proposed expenditure or, most relevantly, mean that there should not be proper consideration of the Scrutiny Committee's request following the call-in. However, in assessing the adequacy of that consideration, the earlier decisions are relevant context to the question of whether or not there was an unlawful failure to take relevant matters into account. The in-principle decision to retrofit the sprinklers had been taken almost a year before the May 2018 Decision, and the budgetary and accounting formalities required to accommodate the installation programme had all been completed. It was not therefore necessary for all those matters to be repeated in the May 2018 Decision.

10. It is not incumbent on a decision maker to take account of all arguments that might be raised for and against a decision. As the Judge said (at [22]) it is generally for a decision maker to determine what matters are potentially relevant to be considered and what weight is to be given to each of them. In particular, it is part of Mr Clarke's complaint that the Cabinet failed to consider and discuss all the various points he thought told against the various decisions. There was no legal obligation to do so.

11. The parties and the Judge referred to the judgment of Carnwath LJ (as he then was) in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin); [2010] 1 P & CR 19 (at [17] to [28]) which brought together the law on "relevant considerations". It is founded on the statement of principle by Cooke J (as he then was) in *Creed NZ v Governor General* [1981] 1 NZLR 172 at 182 to 183 (and referred to at [25] to [27] in *Derbyshire Dales*), himself applying passages from the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (at 228); [1947] 2 All ER 680 (at 682):

> "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority

> exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters".

Cooke J continued:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision…"

12. The approach was approved by the House of Lords in *Re Findlay* [1985] AC 318 where Lord Scarman added (at 334) that "in certain circumstances there will be some matters so obviously material to a decision on a particular project that anything other than direct consideration of them …would not be in accordance with the intention of the Act." In summary, therefore, when exercising a statutory power, a decision maker must take into account factors identified in the statute itself as relevant (and disregard those the statute identifies as irrelevant). Otherwise, at least in cases which do not raise issues under the Human Rights Act 1998, the standard by which to judge a failure to take something into account is *Wednesbury*.

13. There was no statutory obligation on the Council or its Cabinet to take the value for money issue or any other specific matters into account. The power to decide to alter or improve its own housing stock is conferred by statute in the broadest and most permissive of terms (see ss. 9 and 21 of the Housing Act 1985). The Council points to the fact that under the Regulatory Reform (Fire Safety) Order 2005 it was obliged as a local authority landlord to consider what fire precautions were necessary. The Council had reached the stage of deciding to undertake the works. It had made budgetary provision, but at the time of the May 2018 Decision had not entered into contracts to do so.

14. Mr Clarke must therefore identify something which the Council failed to take into account that was so "obviously material" that it can be implied that the Cabinet was bound to take it into account. The starting point is the need to demonstrate that the matter was not taken into account.

15. There is no basis for suggesting that the Cabinet failed to consider the value for money issue, in the broad sense described, or to meet the Scrutiny Committee's request for reconsideration. It considered the value for money issue, and from the very outset. Thus, in June 2017 the Cabinet was clearly balancing its desire to "ensure that residents in [the Council's] tower blocks had the best possible protection in the event of a fire" against the estimated cost "in excess of £31 million to retro-fit".

16. Later in 2018 the Executive Response expressly addressed the Scrutiny Committee's suggestion of an alternative approach by reference to individual tower blocks. That was a suggestion that rather than retrofitting all tower blocks, an individual assessment of each should be undertaken with a discrete decision on each. It addressed the fact that under current Building Regulations only new tower blocks

were required to have sprinkler systems. It set out the expert advice received, including an updated position from the West Midlands Fire Service. The official advice, including from the fire service, was to maintain the decision.

17. At the meeting on 24 May 2018 the relevant Cabinet member (the Councillor for Homes and Neighbourhoods) addressed her colleagues, endorsing the reasons why the retrofitting programme was considered beneficial and, indeed, necessary, having regard to safety concerns, as set out in the Executive Response. She recommended upholding the March 2018 Decision. The Cabinet discussed the expert advice received; it discussed the possible lack of justification for a distinction between new and existing tower blocks in respect of fire safety measures. The Cabinet acknowledged that central government funding would not be available but continued to support the programme. In short, the Cabinet assured itself that the significant expenditure was justified. The chair then put the matter to a vote with the concluding remarks that the advice from the West Midlands Fire Officer and the Fire Commissioner in London was "crystal clear" and that there could be no further delay. It is not appropriate to pick over the language used in debate to divine the thought processes of individual members or collective reasoning of a decision-making body. It is nonetheless clear from the evidence leading to the May 2018 Decision that a balance between costs and benefits was always in mind.

18. As for the failure to take account of other specific matters identified by Mr Clarke, those matters can be summarised as follows: calculations showing "trivially minimal low risk"; the fact that he himself as a tenant strongly opposed the retro-fitting; the "concrete compartmentation" greatly reducing fire risk in the Council's tower blocks; the arrangement of the rooms relative to exit routes greatly reducing the fire risk; the huge disruption to tenants; the associated stress "causing infinitely more deaths than miniscule difference that the difference of fire risk could"; the permanent "gross uglification" of residents' homes; the diversion of public funds that could be better used to tackle crime and security cuts.

19. There was no express debate around these issues in these terms (though that is not to say that issues such as disruption to tenants may of course have been in the minds of individual Cabinet members). There was from the outset detailed fire safety evidence which considered risk. The written materials before the Cabinet as part of its consideration over almost a year did not deal with all the points that Mr Clarke now raises. That said, there was no legal obligation to do so. We reject the submission that the Council was under any implied duty to consider factors beyond those that it did (or that any failure to do so was irrational). There is no basis for criticising the reasoning behind the May 2018 Decision, set against the background of the earlier considerations and decisions in 2017 and 2018, let alone interfering with it.

Fiduciary duty

20. When granting permission Lewison LJ remarked that the Judge did not appear to have taken into account the (arguable) fiduciary duty owed by a local authority to council tax payers and business rate payers from whom it obtains moneys needed to carry out its statutory functions, including a duty not to expend those moneys thriftlessly but to deploy the full financial resources available to it to the best advantage. He referred to *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768).

21. Aligning himself with those remarks, Mr Clarke complains that the Council failed to take its fiduciary duty into account when making the May 2018 Decision (but not that the Council acted in breach of fiduciary duty).

22. That a local authority in certain circumstances owes a duty of a fiduciary character - or a duty akin to a fiduciary duty - to its council tax and business ratepayers from whom it obtains its funds has been considered and accepted in various authorities, commencing with *Roberts v Hopwood* [1925] AC 578 followed by *Prescott v Birmingham Corporation* [1955] Ch 210 (at 235 - 236); *Bromley* (supra) (at 814H-815D); *Pickwell v Camden London Borough Council* [1983] QB 962 (at 986G; 987D-G; 998A; 990D-G; 998A-B; 1003H-1004D; 1004F; 1004H-1005B). Where a local authority owes a duty to another class of persons, such as transport users, it has to balance the duties to each fairly against each other. A failure to do so can amount to a breach of fiduciary duty.

23. Notably, the examples of where such a breach has been established are extreme on their facts. In *Roberts* (supra), in the context of setting minimum wages in the 1920s, the House of Lords referred to the application by the metropolitan borough council of "eccentric principles of socialistic philanthropy" and "flagrant violation" of legal duty (at 594 and 596). Other examples include where the effect of the decision in question was to double the burden on the tax payer (*Bromley* (supra)); or to give travel to particular classes of persons on benevolent or philanthropic grounds at the expense of the general body of taxpayers, described as a "gift or present" (Prescott (supra)). On the other side of the line, the suggestion that a local authority had breached its fiduciary duty for failing to have regard to market rents before agreeing terms of leases was rejected roundly in *Charles Terence Estates Ltd v Cornwall Council* [2012] EWCA Civ 1439; [2013] 1 WLR 466.

24. There are limits to the effect of this duty in the context of a public law challenge. As Ormrod LJ said in *Pickwell* (supra) at 1005B:

> "Some reliance was also placed on the fiduciary duty owed by Camden to its ratepayers, but this line of attack must have a very limited application, if any, in a case in which the local authority had ample authority to determine wage rates, were genuinely acting on that authority, and on their appreciation of the problems and conditions with which they were confronted. The fiduciary duty…arises because councillors are entrusted with ratepayers' money to use it for duly, that is legally, authorised purposes and not otherwise…."

25. Ormrod LJ had earlier (at 1004A) commented that there was no general proposition that the existence of the fiduciary duty "open[ed] up a route by which the courts can investigate and, if thought appropriate, interfere with any exercise of their discretionary powers by local authorities. This would completely undermine the principles of the *Wednesbury* case…." Such caution was echoed by Maurice Kay LJ in *Charles Terence Estates* (supra) (at [21]): there is a need for a court not to justify intervention by adopting an expansive approach to (vires and) fiduciary duty.

26. There are a number of reasons why the fiduciary duty line of authorities (identified in paragraph 20 above) do not advance Mr Clarke's position:

i) The Council as landlord cannot be said to have owed Mr Clarke as tenant any fiduciary duty (or duty akin to a fiduciary duty);

ii) In so far as the Council is to be treated as owing a fiduciary duty to council taxpayers and business rate payers on the analysis above, the May 2018 Decision did not engage that duty. As confirmed by a witness statement from Mr Martin Tolley, one of the Council's local government officers, there are strict rules of local government finance as to how works such as the retrofitting of sprinklers to Council housing stock, held under Part II of the Housing Act 1985, can be funded. Those rules are principally to be found in Part VI of the Local Government and Housing Act 1989. Their effect is that council tax payers and business rate payers cannot fund any of the works in question. Nor could the Council increase rent levels to cover any additional costs (because of s. 23 of the Welfare Reform and Work Act 2016). In so far as there has been a recent change permitting the Council to increase rent levels from April 2020, that was not a change known in May 2018 and the Council has in any event not sought to fund the retrofitting works from rental payments. In short, at the time of the May 2018 Decision, there was no material conflict between the interests of those residents benefitting from installation of the sprinklers and council taxpayers, business rate payers or tenants. It is true that council tax and business ratepayers could be liable for the Council's borrowing to fund, in part, the retrofitting works if the ring-fenced Housing Revenue Account ran into difficulties in meeting interest and capital payments in the future, given the terms of s.13 of the Local Government Act 2003. But that is entirely theoretical and does not bear on a fiduciary duty argument. In the result, there was no balancing exercise by reference to those interests to be carried out;

iii) There is no basis for a finding that the Council acted in the arbitrary manner required to establish a breach of fiduciary duty and, as already indicated, Mr Clarke does not contend for one;

iv) The complaint that the Council failed to take account of a hypothetical fiduciary duty adds nothing to the 'value for money' argument. Lewison LJ was doing no more than flagging a possible relevant line of authority in connection with this issue when he mentioned 'fiduciary duty'.

Conclusion

27. For all these reasons we dismiss the appeal.