Neutral Citation Number: [2018] EWHC 1136 (Admin)

Case No: CO/5365/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Sitting at Birmingham

Date: 26/03/2018

Before:

MR. JUSTICE GARNHAM

- -

Between:

THE QUEEN ON THE APPLICATION OF WOLVERHAMPTON COUNCIL	**Claimant**
- and -	
(1) SOUTH WORCESTERSHIRE CLINICAL COMMISSIONING GROUP	**Defendants**
(2) SHROPSHIRE CCG	

- -

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MR. JONATHAN AUBURN (instructed by the Solicitor to Wolverhampton City Council) appeared for the **Claimant**
MISS JENNI RICHARDS QC (instructed by Weightmans LLP) appeared for the **First Defendant**
MR. DAVID LOCK QC (instructed by Mills and Reeve LLP) appeared for the **Second Defendant**

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JUDGMENT (as corrected on 9 May 2018)

MR. JUSTICE GARNHAM:

Introduction

1. This case concerns a dispute between three public bodies: The City of Wolverhampton Council; South Worcestershire Clinical Commissioning Group ("CCG"); and Shropshire CCG.

2. It is most regrettable that this dispute was not resolved without the parties having to come to court. The Court of Appeal and this court have repeatedly indicated how much they deprecate this sort of litigation, where substantial amounts of public money are spent by public bodies arguing about which of them is responsible for the performance of a particular public duty. A total of £75,000 has been spent so far by the parties on legal fees and costs in this case. All of that money would be much better spent on providing the services which these bodies were established to provide, than on expensive teams of lawyers.

3. Nonetheless, I am grateful for the assistance which Mr. Jonathan Auburn for the claimant, Miss Jenni Richards QC for the first defendant and Mr. David Lock QC for the second defendant have provided. It is inevitable that on occasions those advising local authorities and CCGs will take different views on the complicated legal structures governing their operation but the NHS and the Local Government Association ought urgently to work together to devise a mechanism by which such disputes can be resolved without resort to expensive legal proceedings.

4. I heard argument yesterday. I am grateful to those representatives of the parties who attended this morning.

The Nature of the Claim

5. This case concerns the care to be provided to a patient, who I will refer to as VG. It is common ground that VG is a person with very considerable care and health needs. The question is who is to pay for that care. For some years now the claimant council have footed the bill. They assert that it should be the relevant CCG who meet the costs. Its primary case is that that is the first defendant; if not, they say it is the second defendant CCG.

6. The first defendant says that they have had no significant involvement in the obtaining of VG's care at all, that that was the work of the claimant at the time when the second defendant was the relevant CCG. They also point out that the second defendant repeatedly acknowledged that the responsibility was theirs. The second defendant says that they cannot be the responsible party because to have funded VG's care would have been ultra vires their statutory powers.

The Preliminary Issue

7. The primary issue raised in these proceedings is which is the NHS body responsible for VG. However, there are many potential issues which have been identified in the voluminous documents produced by the parties. There seems to me to be justifiable complaint about provision of documents by the second defendant, which documents are necessary for the resolution of many of the potential issues. However, having expressed my dismay that three public bodies should be litigating over this matter, I indicated at the beginning of the hearing yesterday morning that the issue of vires was, in my view, both

critical to the future management of the case and an issue which was capable of resolution on this occasion.

8. If I hold for the second defendant on the issue of vires, then their involvement in this case will fall away. I would then stay the claim to enable the first defendant and the claimant to attempt to compromise the claim. If, on the other hand, I were to reject the second defendant's vires argument, then their entire approach would have been held to be flawed and a stay would be appropriate to enable all the parties to reconsider their respective positions. Counsel representing all three parties agreed that it was appropriate therefore for me to determine the vires question as, in effect, a preliminary issue.

The Statutory Scheme

9. As to that critical issue, the relevant statutory background is as follows. Section 2 of the NHS Act 2006, as amended, provides:

> "(1) The Secretary of State, the Board or a clinical commissioning group may do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any function conferred on that person by this Act.

10. Section 3 provides:

> (1) A clinical commissioning group must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility—
>
> (a) hospital accommodation,
>
> (b) other accommodation for the purpose of any service provided under this Act,

(c) medical, dental, ophthalmic, nursing and ambulance services,

(d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as the group considers are appropriate as part of the health service,

(e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the group considers are appropriate as part of the health service,

(f) such other services or facilities as are required for the diagnosis and treatment of illness.

(1A) For the purposes of this section, a clinical commissioning group has responsibility for—

(a) persons who are provided with primary medical services by a member of the group, and

(b) persons who usually reside in the group's area and are not provided with primary medical services by a member of any clinical commissioning group.

(1B) Regulations may provide that for the purposes of this section a clinical commissioning group also has responsibility (whether generally or in relation to a prescribed service or facility) for persons who—

(a) were provided with primary medical services by a person who is or was a member of the group, or

(b) have a prescribed connection with the group's area.

(1C) The power conferred by subsection (1B)(b) must be exercised so as to provide that, in relation to the provision of services or facilities for emergency care, a clinical commissioning group has responsibility for every person present in its area.

(1D) Regulations may provide that subsection (1A) does not apply—

(a) in relation to persons of a prescribed description (which may include a description framed by reference to the primary medical services with which the persons are provided);

(b) in prescribed circumstances"

> (1E) The duty in subsection (1) does not apply in relation to a service or facility if the Board has a duty to arrange for its provision"

11. Section 3A provides:

> "3A(1) Each clinical commissioning group may arrange for the provision of such services or facilities as it considers appropriate for the purposes of the health service that relate to securing improvement—
>
> (a) in the physical and mental health of the persons for whom it has responsibility, or
>
> (b) in the prevention, diagnosis and treatment of illness in those persons.
>
> (2) A clinical commissioning group may not arrange for the provision of a service or facility under subsection (1) if the Board has a duty to arrange for its provision by virtue of section 3B or 4.
>
> (3) Subsections (1A), (1B) and (1D) of section 3 apply for the purposes of this section as they apply for the purposes of that section.

12. Section 256 provides:

> (1) The Board or a clinical commissioning group may make payments to–
>
> (a) a local social services authority in England towards expenditure incurred or to be incurred by it in connection with any social services functions (within the meaning of the Local Authority Social Services Act 1970 (c. 42)), other than functions under section 3 of the Disabled Persons (Employment) Act 1958 (c. 33)…
>
> (3) The Board or a clinical commissioning group may make payments to a local authority towards expenditure incurred or to be incurred by the authority in connection with the performance of any of the authority's functions which, in the opinion of the Board or (as the case may be) the clinical commissioning group –
>
> (a) have an effect on the health of any individuals,
>
> (b) have an effect on, or are affected by, any NHS functions, or
>
> (c) are connected with any NHS functions."

13. Regulation 4 of the NHS Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standard Rules) Regulations 2012/2996:

> "(1) Subject to paragraphs (2) to (4), for the purposes of sections 3 and 3A of the 2006 Act (which relate respectively to a CCG's duty to commission services and its power to do so), a CCG has responsibility for the persons listed in paragraph 2 of Schedule 1 (in addition to those mentioned in section 3(1A) of that Act).
>
> (2) In the case of a person listed in paragraph 2(a), (b), (d), (e) or (f) of Schedule 1, a CCG has responsibility only in relation to the provision of accommodation or services specified in the sub-paragraph of paragraph 2 which relates to that person.
>
> (3) The responsibility for a person listed in paragraph 2(c), (g), (h), (i) or (j) of Schedule 1, does not apply in relation to the provision of ambulance services or accident and emergency services, whether provided at a hospital accident and emergency department, a minor injuries unit, a walk-in centre or elsewhere (but excluding any services provided after the person has been accepted as an in-patient, or at an out-patient appointment).
>
> (4) The responsibility for persons listed in paragraph 2(b) to (j) of Schedule 1 does not apply where the person is detained in—
>
> (a) an immigration removal centre;
>
> (b) a secure training centre; or
>
> (c) a young offender institution.

14. Regulation 20 (2) provides:

> For the purposes of this Part a relevant body has responsibility for a person if the body is responsible—
>
> (a) in the case of a CCG, by virtue of—
>
> (i) section 3(1A) of the 2006 Act, except where the person is a person for whom another CCG is responsible by virtue of paragraph 2(b), (d), (e) or (f) of Schedule 1 to these Regulations, or
>
> (ii) paragraph 2, other than paragraph 2(a), of Schedule 1 to these Regulations; or

> (b) in case of the Board, by virtue of regulation 7 (secondary care services and community services: serving members of the armed forces and their families) or regulation 10 (services for prisoners and other detainees).

15. Regulation 21 provides:

> (1) In exercising its functions under or by virtue of sections 3, 3A or 3B of the 2006 Act, insofar as they relate to NHS Continuing Healthcare, a relevant body must comply with paragraphs (2) to (11).
>
> (2) A relevant body must take reasonable steps to ensure that an assessment of eligibility for NHS Continuing Healthcare is carried out in respect of a person for which that body has responsibility in all cases where it appears to that body that—
>
> (a) there may be a need for such care; or
>
> (b) an individual who is receiving NHS Continuing Healthcare may no longer be eligible for such care…
>
> (5) When carrying out an assessment of eligibility for NHS Continuing Healthcare, a relevant body must ensure that—
>
> (a) a multi-disciplinary team—
>
> (i) undertakes an assessment of needs, or has undertaken an assessment of needs, that is an accurate reflection of that person's needs at the date of the assessment of eligibility for NHS Continuing Healthcare, and
>
> (ii) uses that assessment of needs to complete the Decision Support Tool for NHS Continuing Healthcare issued by the Secretary of State and dated 28th November 2012(37); and
>
> (b) the relevant body makes a decision as to whether that person has a primary health need in accordance with paragraph (7), using the completed Decision Support Tool to inform that decision.
>
> (6) If a relevant body decides that a person has a primary health need in accordance with paragraph (5)(b), it must also decide that that person is eligible for NHS Continuing Healthcare."

16. Paragraph 2 of Schedule 1 to the Regulations provides:

> "2. The list of persons referred to in regulation 4(1) is as follows—

> (a) every person present in the CCG's area, in relation to the provision of ambulance services or accident and emergency services, whether provided at a hospital accident and emergency department, a minor injuries unit, a walk-in centre or elsewhere (but excluding any services provided after the person has been accepted as an in-patient, or at an out-patient appointment);
>
> (b) every person aged 18 or over who falls within paragraph 3, in relation to the provision of the accommodation or services referred to in paragraph 3(b)...

17. Critically, paragraph 3 provides:

> A person falls within this paragraph if—
>
> (a) the CCG has made an arrangement in the exercise of its commissioning functions (by itself or jointly with a local authority) by virtue of which the person is to be provided with services to meet his or her continuing care needs,
>
> (b) those services consist of or include the provision of the following accommodation and services to meet the person's continuing care needs—
>
> (i) accommodation in a care home or independent hospital situated in the area of another CCG, and
>
> (ii) at least one planned service (other than a service consisting only of NHS-funded nursing care) which is connected to the provision of such accommodation (whether or not the accommodation is arranged by the CCG referred to in sub-paragraph (a)),
>
> (c) the person is resident in that accommodation and continues to need that planned service (or those planned services), and
>
> (d) the person would not be a person for whom the CCG is responsible under section 3(1A)(a) of the 2006 Act."

18. In my judgment, this case turns primarily on the application of section 3 of the Act and paragraph 3 of Schedule 1 to the Regulations to the facts of this case.

The Facts

19. VG has profound learning difficulties as well as other disabilities. He originally resided with his parents in Penn, Wolverhampton. In September

2011 the claimant council made a decision that he should attend a school called Higford School in Shropshire. On 21st September 2011, VG was registered with the Shifnal and Priorslee NHS GP practice which was close to the school. That was a practice in the area of Shropshire Primary Care Trust which was the relevant NHS Commissioner at the time. VG continued to be registered with this practice until 1st April 2013 when the PCT was replaced by the CCG and D2 and then the second defendant came into existence.

20. The claimant requested the then Wolverhampton PCT to assess VG to determine his eligibility for what is called Continuing Healthcare ("CHC"). The PCT concluded that VG was ineligible for CHC. The PCT was asked by the council to review that decision. On 8th May 2013 Wolverhampton CCG, the successor body to Wolverhampton PCT, wrote to the Shropshire CCG to inform them that Wolverhampton CCG had taken over the review but it had come to light that VG had, by then, been registered with a Shropshire GP and, hence, under the new rules which applied after 1st April 2013, responsibility for commissioning NHS services for VG had transferred to Shropshire CCG. The second defendant agreed to undertake that review and put the necessary steps in motion.

21. In the summer of 2013, the second defendant embarked on the exercise of determining whether VG was eligible for CHC. For them to do so was entirely appropriate because there was obvious evidence of need and VG was, at that time, a patient at a Shropshire GP's practice. There is a supervision note dated 8th August 2013 in the claimant's file (at C90) which reads as follows:

> "Case supervision recording. Ongoing CHC process. Assessment done at Higford (sic) on 5 August 2013 with Liz Matthews, CHC nurse, Shropshire. During assessment became evident that VG scored for eligibility for CHC. However, during process one of the support workers informed (Liz Matthews) that VG moving to AALPS Midlands in Worcester in September 2013. LM acknowledged this. The hypothetical situation is if LM puts forward VG for CHC, Shropshire CCG will be responsible for funding VG at AALPS for the foreseeable future. Given his move to Worcester in 3-4 weeks this may or may not be an issue for Shropshire CCG…"

22. The exercise involved, as is usual practice, the employment of what is called a Decision Support Tool ("DST") for NHS CHC. The document containing that tool indicates on its cover sheet that in VG's case it was "completed" on 19 August 2013. The document records VG's diagnosis, at internal page 18, and then notes the following:

> "He has been on a 52 week placement at Higford Hall School. His placement at the school has come to an end and has to move on. He will be moving to another placement in September 2013. He has delayed verbal language and communication with a low cognitive ability. He displays physical challenging behaviour and this has been historical as well as present."

An undated, handwritten annotation has been added after that passage which reads as follows:

> "Moving to AALPS residential specialist home for autism with psychology nursing team, consultant OT team."

There is an update at page 24 of the DST which reads:

> "VG has now moved to a new placement and whilst at this placement has displayed historical behaviour in the form of physical injury…"

23. At page 58 of the DST is the recommendation of the nurse and social worker. They recommended that VG "is judged eligible for NHS CHC". The conclusion on the following page reads as follows: VG

> "does present with a primary health need. Therefore (VG) does meet the continuing health care criteria and is judged eligible for NHS Continuing Healthcare."

Below that passage is a section of the document headed "signatures of MDT (which I take to mean "multidisciplinary team") making the above recommendation" and then it is signed by Liz Matthews, nurse assessor, and is dated 23rd September 2013. I note in passing that, on 29th August 2013, during the process I have just described, the second defendant sought further time to obtain additional information about VG relevant to the CHC assessment.

24. On 21st October 2013 Ms. Wendy Richardson, the second defendant's interim CHC lead, wrote a letter to VG. That letter read, as is material:

> "You were recently assessed in order to determine your level of health needs. This information was then presented to Shropshire Clinical Commissioning Group on 27th September 2013. Your needs have been carefully considered against the national criteria and the outcome is that you are eligible for NHS Continuing Healthcare funding and therefore Shropshire CCG will be responsible for the payment of your care costs…"

Discussion

25. It is to be noted that the letter of 21st October 2013 to which I have just referred, like the signing off of the DST to which I have referred above, occurred after the date when VG was transferred to the AALPS residential specialist home, after VG had enrolled on the list of a GP practice in South Worcestershire and, accordingly, after VG had ceased to be a person who received medical services from a member of the Shropshire CCG.

26. The effect of the statutory scheme which I have set out in detail above can, for the purposes of the present case, be summarised in this way. A CCG must

arrange for the provision of medical facilities for persons for whom it has responsibility (s3(1) of the NHS Act 2006). Those persons include persons who are provided with GP services by a member of the CCG (s3(1)(a)). Regulations may provide that a CCG has responsibility for certain other identified classes of person (s3(1)(b)). Those other classes of person are listed in paragraph 2 of Schedule 1 to the 2012 Regulations (see Reg 4(1)). That list includes every person over 18 who falls within paragraph 3 of Schedule 1 in relation to the provision of the accommodation and services identified in paragraph 3(b) (paragraph 2 of Schedule 1 of the 2012 Regulations). A person falls within paragraph 3 if, and these words are critical and are better not summarised:

> "The CCG has made an arrangement in the exercise of its commissioning functions… by virtue of which the person is to be provided with services to meet his or her continuing care needs."

27. Mr. Lock for the second defendant argued that "made an arrangement" in paragraph 3(a) means entered a contract with the supplier of the service. Miss Richards and Mr. Auburn argue that if that is what the drafters of the Regulation had meant, they would have said so and that I should adopt a much more nuanced, less legalistic, approach to the construction of that expression in paragraph 3.

28. I agree with Mr. Auburn and Miss Richards that there is no requirement for proof of a contract. The court must look instead to see whether, on the facts, it can properly be said that the CCG has effected an arrangement. In my judgment, however, that involves a degree of finality. It is not enough, in my view, that the CCG had begun the process of determining what arrangement

would be appropriate. The words in paragraph 3 "*by virtue of which the person is to be provided with services…*" contemplates a concluded arrangement which makes provision for certain services to be provided at some time in the future.

29. It is plainly the case that during the period whilst VG was on the list of the Shropshire GP practice, staff of the second defendant had decided to recommend that a decision be made that VG was eligible for CHC. But by the time VG moved GP practices, the DST process had not been completed and no final decision had been made either to declare him eligible for CHC or to make the arrangements that were consequential on that decision. Before that could happen, the claimant council had decided to transfer VG to AALPS, outside the second defendant's area.

30. It follows that there was no "arrangement" in place, by virtue of which the claimant was to be provided at some time in the future with the identified services. It is right to say that the second defendant continued to conduct themselves on the basis that they would assume responsibility for the costs of VG's care at AALPS. In fact, they continued to acknowledge their liability in respect of VG from August 2013 to May 2017. It was only then that, following advice, they adopted the stance now advanced by Mr. Lock.

31. There was some suggestion that the defendant might deliberately have delayed making a decision on CHC for VG until after he had moved to Warwickshire with the intention of avoiding responsibility for the cost of AALPS. The file note of 8th August 2013 at C90 in my papers, which I have set out above, was referred to by Miss Richards in this regard. I reject that submission. The fact

that the second defendant regarded themselves as liable for the costs of AALPS for a further three and a half years militates against the conclusion that there was any deliberate strategy in this. The one thing that could be said with confidence is that the second defendant had not thought through the intricacies of the statutory scheme in the summer of 2013.

32. In my judgment, paragraph 3 of Schedule 1 requires the arrangement to have been concluded if it is to have the effect contended for. That had not occurred here. Accordingly, VG was not a person falling within paragraph 3 and he was not a person referred to in Regulation 4(1). As a result, he is not a person for whom the second defendant had the additional responsibility provided for by section 3(1)(b). Since VG was not at the time arrangements were made for his care at AALPS, at the beginning of September 2013, a person provided with GP services by the second defendant, he is not a person for whom the second defendant must arrange to meet the requirement under section 3. Accordingly, VG is not a person for whom the second defendants was obliged to provide services.

33. It is true that section 2 of the 2006 Act provides a general power to a CCG to do anything which is calculated to facilitate the discharge of any of its functions. But those functions do not include the provision of services to persons falling outside section 3, except to the extent indicated in the Regulations to which I have referred.

34. Nor does section 256 of the Act save the claimant's argument. That provision empowers a CCG to pay a social services authority for expenditure it incurs for the purposes listed in subsection (3) but, in my judgment, the second

defendant was not purporting to exercise any such ancillary power here. It thought, wrongly as I find, that it was instead contemplating the exercising of a power under section 3. In my judgment, any such exercise would have been ultra vires because this case fell outside section 3 and the associated Regulations.

35. Furthermore, I reject the suggestion that the second defendant's conduct before or after September 2013 had the effect of investing them with powers not given them by the Act. The officers of the second defendant were in error in their approach to VG and the claimant council in the summer of 2013, and it took three and a half years for them to realise that they were in error. But that fact does not impact on the question whether, as a matter of law, they had the power contended for. In my judgment, they did not.

Conclusion

36. In those circumstances, Mr. Lock's argument must succeed. I rule that the second defendant has, and had, no power to make the payment to the claimant in respect of VG's care at AALPS.

37. I indicate finally that I have come to that conclusion with some considerable regret. In my judgment, the moral "merits" of the case lay with the claimant council who have endeavoured throughout to do the right thing by VG, and with the first defendant who has had little or no involvement in the making of the arrangements now being considered. Wherever my sympathies may lie, however, I am driven to the conclusion that, as a matter of law, the second defendants had no power to fund AALPS and therefore cannot be acting unlawfully in declining so to do.

(Discussion re order follows)