Neutral Citation Number: [2020] EWHC 779 (Admin)

Case No: CO/4415/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 2 April 2020

Before :

Hugh Mercer QC sitting as a Deputy High Court Judge

- -

Between :

THE QUEEN (ON THE APPLICATION OF GLYNIS MCKEOWN)	**Claimant**
- and -	
LONDON BOROUGH OF ISLINGTON	**Defendant**

- -
- -

LINDSAY JOHNSON (instructed by **Hopkin Murray Beskine**) for the **Claimant**
CATHERINE ROWLANDS (instructed by **Islington Legal Services**) for the **Defendant**

Hearing dates: 5 March 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 2nd April 2020 at 10am.

Hugh Mercer QC sitting as a Deputy High Court Judge:

1. This is a claim brought by the Claimant seeking a mandatory order compelling the Defendant to approve the Claimant's application for a disabled facilities grant ("DFG") under the Housing Grants, Construction and Regeneration Act 1996 ("the Act") and a mandatory order compelling the Defendant to commission expeditiously the works approved pursuant to the grant.

The Factual Background

2. The Claimant is 63 years of age and lives with her husband and adult son in a garden maisonette in Islington ("the home"). She is a secure tenant of the Defendant. Another adult son lives across the road from his mother. The Claimant has had health difficulties since the age of 38 years and, in April 2019, her right leg was amputated above the knee leaving the Claimant dependent on wheelchairs for mobility as she decided in consultation with her consultant not to proceed with a prosthetic leg. However, prior to the amputation, the Claimant had chronic pain from her right leg which has improved since the operation. The Claimant has an outdoor wheelchair which she keeps in the cupboard under the steps outside her home and gets around in her property with a smaller indoor wheelchair. The Claimant's husband also has health difficulties which have frequently necessitated stays in hospital.

3. The home has been subject to various improvements and adjustments (carried out as I understand matters by or on behalf of the Defendant) in order to facilitate the Claimant's living there, including rails in the toilet and two stair lifts to permit the Claimant to access the upper floor of her home which occupies the ground and lower ground levels of a period house. As a garden maisonette, the Claimant has access to and the use of a garden to the rear of the property which, it appears, plays an important part in her well-being as she has a dog and her husband also in the past constructed a fish pond which is in the garden and is stocked with goldfish. The particular importance of the garden lies in the fact that, apart from the garden which is accessed via a ramp, the Claimant's sole means of access to and exit from her home is for her sons to carry her up/down steps to her lower ground front door.

4. To date it has not been possible to make other arrangements for the Claimant to enter/exit her home. That is what gives rise to this claim. The Claimant applied for a DFG in order to finance a platform lift from her front garden to street level. This would enable the Claimant and her husband to access/exit their home without needing to call on their sons. It is common ground that a stair lift would not be adequate due to the fact that two steps would remain to be negotiated after any such stair lift.

5. In essence the Defendant's response in their letter dated 22 November 2019 ("the Decision") has been to refuse the application for a DFG pointing out various respects in which it finds the home unsuitable for the Claimant's circumstances, to say that the works are not reasonable or practicable and to offer to make arrangements to offer the Claimant and her family a more suitable property. For example, the Claimant was invited to visit a newbuild property owned by the Peabody Trust just under two miles from her present home. I was told that the three bedroom property being visited was designed for the disabled and has two lifts to the third and fourth floors where possible flats are situated. Though I have not seen the Defendant's housing scheme, if one were seeking today to allocate local authority housing to the Claimant, it seems improbable

for the reasons cited by the Defendant in the various reports referred to below that one could determine the home to be "suitable" accommodation for the Claimant but an issue arises as to whether that is the question which is to be asked in response to an application for a DFG.

6. The Claimant is emotionally attached to her home. She has not applied to the Defendant for reallocation of another more suitable property given her disability. Her son lives on the opposite side of the road in the same street, she is a secured tenant with the legal protection that that entails, her friends are nearby, she keeps a dog at home and goldfish in the pond in the garden and she feels at home there. The garden is important for her to enjoy, in particular given her mobility issues and her current inability otherwise to leave her home without her sons' help. The Claimant acknowledges that arrangments are not perfect in her home with regard for example to bathroom and kitchen facilities for a disabled person but she emphasises that none of the matters raised by the Defendant in terms of the shortcomings of her home are matters about which she is "concerned" or has "made complaint". She therefore maintains her DFG application and her counsel makes certain criticisms from a legal perspective of the Decision which I will come to after setting out the law.

The law

7. The key sections are sections 23 and 24 of the Act which provide as far as material as follows:

> **"23. Disabled facilities grants: purposes for which grant must or may be given**
>
> (1) The purposes for which an application for a grant must be approved, subject to the provisions of this Chapter, are the following:
>
> (a) facilitating access by the disabled occupant to and from – (i) the dwelling
>
> …
>
> **24. Grants: approval of application.**
>
> (1) The local housing authority shall approve an application for a grant for purposes within section 23(1), subject to the following provisions.
>
> …
>
> (3) A local housing authority shall not approve an application for a grant unless they are satisfied –
>
> (a) that the relevant works are necessary and appropriate to meet the needs of the disabled occupant, and
>
> (b) that it is reasonable and practicable to carry out the relevant works having regard to the age and condition of – (i) the dwelling …"

8. "Dwelling" is defined in section 101 as: "a building or part of a building occupied or intended to be occupied as a separate dwelling …".

The Claimant's criticisms of the Decision

9. Paragraph 21 of the Claimant's Reply to Summary Grounds contains the material criticisms as the Decision post-dates the issue of proceedings. The criticisms may be summarised as follows:

   i) Misinterpretation of "necessary and appropriate";

   ii) Decision on "necessary and appropriate" unlawful because based on incorrect findings of fact/insufficient evidence; based on irrelevant considerations; and/or was irrational;

   iii) Decision on "reasonable and practicable" is unlawful because based on incorrect findings of fact/insufficient evidence; based on irrelevant considerations; irrational; failed to take account of public sector equality duty under section 149 Equality Act 2010; and/or amounts to discrimination on grounds of disability.

10. Mr Johnson for the Claimant amplified in submissions the basis on which he criticised the analysis of the facts in the Decision but I shall go through these criticisms in the discussion below.

Discussion

11. It is common ground in this case that the gateway in section 23(1) is satisfied in this case. The Claimant cannot currently access/exit her home as she is unable to negotiate the steps up from lower ground level. Thus, a grant for facilitating access (the relevant purpose) must be approved. That means that the Claimant has "established [her] grant eligibility in principle" (Sedley LJ in *R(B) v. Calderdale MBC* [2004] EWCA Civ 134 [2004] 1 WLR 2017 at §28) under section 23(1)(a).

12. The only means of facilitating the Claimant's access to her home is to install a platform lift. In order to determine whether this is "necessary" or "necessary and appropriate", it is necessary to determine what "needs" are referred to in section 24(3)(a). The Claimant contends that the relevant needs are to access/exit the home. The Defendant argues that this is too narrow, that any disabled person has a range of needs, that none can be taken in isolation and that reference must be made to the Care Act 2014 definition of "needs" which I was told is much broader than the meaning which the Claimant would like to attribute to that term.

13. My starting point is the words of Lord Mance in the Supreme Court in *Bloomsbury International Limited v. Sea Fish Industry Authority*, [2011] UKSC 25 at §10:

> "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood. In this area, as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful … and certainly not as a starting point, before identifying the legislative purpose and scheme."

14. Ms Rowlands for the Defendant took this point on board in argument and proceeded to outline the broader statutory duties of the Defendant outside the field of DFGs, arguing that this formed part of the wider context. An authority such as the Defendant does have a significant raft of duties, in particular where a person is disabled as the Claimant clearly is. Mention was made of the Care Act 2014, the Equality Act 2010, the Housing Act 1996 and the Local Government Act 1999 section 3 which I am told imposes an obligation on local authorities when carrying out any function to carry out the function in a manner which is economic, effective and efficient. I have little doubt that there are likely to be more. However care is also needed in seeking to juxtapose duties derived from different statutory schemes. For example, I was told that whether a dwelling is "suitable" for a person in a housing sense requires the application of a statutory definition and of criteria set out in relevant guidance. In the same way that one cannot import a test of "necessary and appropriate" into the field of housing (unless the statute says so), so too one cannot import the notion of suitability of housing into the statutory test for DFGs. I see that this runs the risk of the Defendant (which has evidently made significant efforts over the years to assist the Claimant with her disability and care needs) feeling as though it cannot win but Parliament designs and makes provision for different statutory schemes in different fields and in my judgment each statutory duty has to be applied according to the statutory purpose and general context of the relevant statute and the terms of the duty.

15. My starting point for interpreting the provisions on DFGs is to determine the purpose of the relevant legislation which is helpfully summarised by Dyson J as he then was in *R v. Birmingham City Council ex p Mohammed* [1999] 1 WLR 33 (paragraph III):

> "The overriding purpose of the DFG is to make the dwelling or building suitable for the accommodation welfare or employment of the disabled occupant …"

16. Mr Johnson for the Claimant drew my attention in the same case to the legislative history of DFGs which Dyson J describes in paragraph I of his judgment at pp. 36-37 and which I may summarise as follows:

    i) Grants for housing works (renovation grants, common parts grants, DFGs and HMOs) were originally in the Local Government and Housing Act 1989;

    ii) In certain cases, approval of all four grants was mandatory;

    iii) The 1996 Act made all grants discretionary save for DFGs if they related to purposes within section 23(1).

17. Accordingly, Mr Johnson stresses that Parliament decided to maintain the mandatory nature of DFGs and of no other grants. This is indeed a strong pointer in favour of not diluting the mandatory nature of the section 23(1) duty.

18. In terms of the wider context of the Act itself, many provisions have been repealed by later statutes but one feature of the Act is relevant for present purposes. This is sections 21 and 22 which make different provision in respect of certificates of ownership and of

tenancy. The relevant point from those provisions is that the statute is making clear that DFGs are not restricted to local authority tenants or tenants more generally but extend to disabled persons whether they are owner occupiers, tenants or simply occupiers (section 22A). The reason for that seems self-evident when one examines the list of purposes in section 23(1) which include facilitating access to *the* dwelling, making *the* dwelling safe, facilitating access to the living room, bedroom, bathroom etc. These are very basic needs which persons who are not disabled take for granted and Parliament has decided that grants in respect of such matters will be mandatory.

19. The fact that different forms of tenure at the relevant property are included within the terms of DFGs means that in principle the interpretation of sections 23 and 24 must be capable of accommodating not only local authority tenants but tenants generally and indeed owner occupiers. This is important in relation to one of the main planks of the Defendant's case which is that the Claimant's home is not suitable for her, that the Defendant will look for a new alternative home and rather than carrying out expensive and not straightforward works to the Claimant's home, the grant should be refused and the Claimant should move to a new home. But the fact that the terms of sections 23 and 24 must be applicable to all, including owner occupiers, is a strong indication against the Defendant's position. Had the Claimant exercised her right to buy, it would not in my judgment be open to the Defendant to refuse the grant on the basis that she must sell up and move elsewhere. The structure of the Act, the legislative history and its purpose which relates, according to section 23, to "the dwelling", i.e. the person's home for the time being, exclude such an approach. When this point was put in argument, no reason of principle was advanced for a difference in approach for local authority tenants.

20. Moreover, the need to avoid differential treatment of owner occupiers and council tenants is reinforced by a guide provided by the Home Adaptations Consortium which was originally commissioned by the Department for Communities & Local Government in 2010, drafted by the Housing Consultancy Partnership in 2011 and amended by members of the broad consortium of stakeholders which constitute the membership of the Consortium. The guide is entitled *Home Adaptations for Disabled People – A Good Practice Guide* ("the Guide"). It was referred to in the Defendant's Grounds but I was not taken to it in argument and the Defendant refers to it as "Guidance" in its post hearing submissions. In response to the Claimant's solicitors pointing out in correspondence that there seemed to be no policy of the Defendant with regard to DFGs for council tenants, the Defendant stated that it "will follow the process and guidance [in the Guide]". Relevantly for (and supportive of the conclusions in) the previous paragraph, it states at §14 on page 95 that:

> "Council tenants and housing association tenants are eligible to apply for DFG and should be assessed for needs on the same basis as private owners and tenants."

21. Section 23 fixes the purposes for which an application for a grant must be approved. The first such purpose is for facilitating access by a disabled occupant to and from the dwelling. It is common ground that the platform lift requested by the Claimant would facilitate such access. Thus section 23 is satisfied because the works are within the scope of the specified purpose. That is the basis on which the Claimant has "established [her] grant eligibility in principle" (*Calderdale* at §28 per Sedley LJ).

22. I turn then to the relationship between section 23 and section 24. In the *Calderdale* case, Lord Justice Sedley stated that section 23(1) and section 24(3) "should be applied sequentially" (ibid, §29). "Section 23(1) is a gateway provision. Section 24(3) is a control for those applications which get through the gateway" (ibid, §29).

23. The first aspect of the section 24(3) control to note is the term "relevant works". As with section 23, the opening words of section 24 can only be applied if the proposed works have been identified. It is only if the works further a specified purpose that the mandatory obligation to approve the works arises. Thus, in being satisfied that the "relevant works" are necessary and appropriate, what is being examined are the works which are the subject of the application for the grant and which are contended to be within one of the purposes specified in section 23.

24. As indicated (§12 above) there was debate in argument over the meaning of the term "needs of the disabled occupant". Given that the works being considered are those which for example in this case facilitate access to and from the home, the appropriateness of the works must be judged by reference to the needs which they are designed to serve. This does not leave it open a housing authority to assess whether the works are "necessary and appropriate" by a holistic view (as it was submitted by the Defendant) of a claimant's needs based on what is deemed by the Defendant to be suitable or unsuitable (see Ms Nicholls' witness statement at §21). True it is that an external platform lift will do nothing to improve the suitability of the Claimant's kitchen or bathroom for a disabled person but that is in my judgment the wrong question on three counts. First and very obviously a platform lift is confined by its nature to the Claimant's needs to access/exit her home because that is what brings the application within section 23; second because suitability is a housing test which may well be the correct test for selecting suitable accommodation but is not one which is to be found in section 24(3); third because this is the Claimant's application for monies to do works for a narrowly defined purpose, not a request to the Defendant to do works to her home as might be the case under other legislation applied by the Defendant to the Claimant's or her husband's needs.

25. Accordingly, the Claimant's relevant needs in this case are to access/exit her home. This does not equate "purposes" with "needs" as the Defendant argued because the purpose of the application for a grant is the *facilitation* of access to/exit from the home whereas the Claimant's needs are to access/exit her home.

26. I turn then to the meaning of "necessary and appropriate". At first instance in the *Calderdale* case cited above ([2003] EWHC 1832 (Admin)), Mr Justice Burnton said the following (at §32):

> "To take a straightforward example, if a physically disabled person is unable to negotiate stairs, and therefore unable to get to or from his first floor bedroom without assistance, and he applies for a grant for the installation of a lift to enable him to get to and from his bedroom, paragraph (d) of section 23(1) applies. If, however, the relevant works involve the installation at great expense of a lift shaft and lift cage, and the required access can be provided at significantly less expense by installing a stair lift, the local authority may lawfully conclude that it is not satisfied that the more expensive works are necessary and appropriate to meet the needs of the disabled person. Similarly, if the local authority concludes that the proposed works will not be effective to provide the necessary access (for example,

> because one or more stairs have to be negotiated in order to reach the lift cage), it will not be satisfied that the works are appropriate. Again, safety measures that go beyond the necessary and appropriate will be liable to fail the test under section 24(3) although their purpose falls within section 23(1)(b) of the Act."

27. The Defendant posited in argument three possible interpretations of "necessary and appropriate": "necessary" and "appropriate to meet her needs"; "necessary to meet her needs and appropriate to meet her needs"; necessary and appropriate to meet the purpose set out in the gateway, section 23 (which the Defendant contends is the Claimant's reading). The first in my judgment cannot be correct because the essence of the term "necessary" is that it must be judged by reference to something and here it is plainly by reference to the needs. For the reasons already given in the consideration of the meaning of "needs", the second and third interpretations amount to the same thing. As already set out above, the purpose of the grant is to facilitate access to/from the dwelling whereas the relevant needs are to access/exit the dwelling. In my judgment the second interpretation is that which is adopted by Burnton J in the extract above and which I gratefully adopt because it seems to me to be correct.

28. Applying that approach here, it is common ground that the platform lift is necessary in the sense that a stair lift will not do the job (due to additional steps after the main run of steps). It also does not appear to be in dispute that a platform lift is "appropriate" in the *Calderdale* sense that it would permit the Claimant to enter and exit her property using her wheelchair. However, the Decision dated 22 November 2019 (after these proceedings were commenced) gives five reasons why the Claimant's application fails the "necessary and appropriate to meet the needs of the disabled occupant" test.

29. I should add that, in applying that test, a local housing authority which is not a social services authority "shall consult the social services authority" (section 24(3). Here there was both a Care Act assessment dated 2 April 2019 (a matter of days before the Claimant's amputation operation) and a draft occupational therapy assessment dated 4 October 2019. It is not suggested that this was not adequate consultation. However, it is not because information is found within such assessments that it is necessarily a relevant consideration for the grant or refusal of a DFG.

30. The first reason given in the Decision is that on "bad days" the Claimant cannot use the internal stair lift and remains isolated on the lower floors of the property. For the Claimant, it is argued that I should reject this as a conclusion based on incorrect findings of fact as there is no evidence to support it or it is plainly wrong. This criticism is not made out. The draft occupational therapist report which was before the decision maker dated 4 October 2019 is clearly a sufficient basis for the finding. Though the Claimant's first witness statement which was before the decision maker states "I can manage to get myself on and off the stair lifts independently" and, although this should have been before the decision maker and there is no reference to it, even had it been before the decision maker, she (Ms Nicholls, Housing Options Manager of the Defendant) would still have been entitled to make the finding in the decision as the two pieces of evidence can in my judgment be read consistently.

31. It is necessary to go on to consider whether an inability on "bad" days for the Claimant to go upstairs within her home is capable of making the relevant works not appropriate to meet the Claimant's needs to access/exit her home. In my judgment this is not a matter for the decision maker under section 24. It is not uncommon for example for an

elderly person to live in a house with stairs but because of mobility issues to cease to use the upper floor at all. On a suitability assessment by a housing authority, the home may be deemed unsuitable on that ground but that is not the issue under section 24(3)(a) (as suitability goes to needs other than those to which the statute directs consideration to be given) and is not a lawful basis for refusing an application for a DFG to install a stair lift to access the front door of a property from the street. The same reasoning applies here. The need to climb the internal stairs of the dwelling on bad days is not a relevant consideration under section 24.

32. That reasoning does not of course prevent a housing authority from proposing that the Claimant moves to alternative and more suitable accommodation or even, as the Guide suggests, offering assistance to move to other accommodation. I refer for example to §8.13 on page 55 of the Guide relied on by the Defendant which prefaces this consideration with: "If the service user is willing to consider this option ..." (see also §8.28 on page 60 under the heading "Support to move home"). It is not suggested in the Decision that the option of the Claimant moving to alternative accommodation is a lawful ground for refusing a DFG.

33. The second ground relied upon in the Decision is that Ms Nicholls took into account future likelihood with regard to the Claimant's health and that there was insufficient evidence on which to base the alleged future state of the Claimant's health which was relied on in any event. The likelihood of transfers from her wheelchair to a stair lift becoming more difficult was said to be "In line with concerns raised by Dr Imad Sedki …". The relevant letter is dated 25 June 2019 and does refer to increased weight gain since the amputation but does not express any view with regard to the future likelihood of transfers to the chair lift. The letter concludes with a primary recommendation that access to and from front door be arranged "as a matter of priority due to safety concerns". The letter provides direct support for the application for a DFG and provides slight support for the ground relied on. It seems that in essence Ms Nicholls put together the evidence of chronic arthritis with weight gain and increased dependence on her left lower limb and formed the view that transfers from wheelchair to stair lift "are likely to become more difficult in the future". On balance it seems to me that there was sufficient material on which a reasonable decision maker may found such a view but the fact that it is the decision maker's view and that the decision maker claims no expertise with regard to such an issue leaves the question of whether it was legitimate to take it into account and whether it was a sufficient basis to reject the application. The Claimant's starting point was that future considerations are irrelevant but later accepted in argument that cogent evidence as to the near future would be a relevant consideration in so far as they formed part of an applicant's needs. The problem is however that the assessment by Ms Nicholls was directed at whether difficulties accessing the internal stair lift "may result in her current accommodation becoming increasingly unsuitable for her long-term needs". In my judgment that is not a relevant consideration on the issue of "necessary and appropriate to meet the needs" of the Claimant in section 24(3)(a) given my conclusion on the needs being referred to, i.e. the needs to access and exit the home. Moreover, even if were considered a relevant consideration, I do not consider that the view of a person professing no expert knowledge and unsupported by expert input on the long-term prospects for the Claimant is a sufficient basis on which to ground a finding that the grant is not necessary and appropriate to meet the Claimant's needs, in particular as the Act does not ask for both the present and future needs to be taken into account. However I must return to this

point when considering "reasonable and practicable" to examine whether suitability for long-term needs is a relevant consideration for that heading.

34. The third, fourth and fifth considerations in the Decision relate to the unsuitability of the toilet (no wheelchair access/limited space should Claimant need assistance), kitchen (no wheelchair access for Claimant to increase her kitchen tasks) and bathroom (no room for a shower chair) such that the Claimant's home has been assessed as not meeting the Claimant's "current or long-term mobility needs". Again these are not the relevant needs to be considering but I will return to these issues in relation to "reasonable and practicable".

35. Section 24(3)(b) requires the Defendant to be satisfied "that it is reasonable and practicable to carry out the relevant works having regard to the age and condition of the dwelling". Previously section 24(4) (now repealed) added to consideration of the age and condition of the dwelling whether it was fit for human habitation. Dyson J in *ex p Mohammed* cited above expressed the following view:

> "No doubt, the reason for these conditions was an appreciation of the fact that it was not a sensible use of resources to make a DFG to improve an old, dilapidated building …"

36. Now, the considerations taken into account by Ms Nicholls do not relate to the age or condition of the dwelling but rather to the suitability of the dwelling for the Claimant's care needs. The reference to the age and condition of the dwelling as criteria for assessing whether it is "reasonable and practicable to carry out the works" indicates, in accordance with Mr Justice Dyson's view, that this sub-paragraph is focused on reasonableness and practicability by reference to age and condition. Thus, a dwelling may be too old or dilapidated to merit improvement. But the statutory test does not in my judgment permit the decision maker to test "reasonable and practicable" by reference to the general suitability of different aspects of the dwelling for the disabled person's general needs. To do so would be indirectly to widen very significantly the "needs" being referred to in section 24(3)(a) and in effect to modify the statutory scheme. Whether there is wheelchair access to a toilet, space for a shower chair or wheelchair accessibility to the kitchen are not in my judgment within the meaning of the term "condition" in section 24(3)(b). Nor can it be said that the lack of suitability in various respects of a person's home excludes such a person from access to a grant in order to facilitate the basic need of accessing/exiting the home. It follows that in my judgment the second to fifth numbered considerations in the Decision are not relevant considerations.

37. Before going on to consider the reasons given on page 2 of the Decision for the works not being "reasonably and practicable" it is necessary to examine the structure of the Act as regards the decision on the grant and payment of grants.

38. Section 34(2) requires an authority approving an application to determine the eligible works, the expenses which in their opinion are properly to be incurred in the execution of the works, the amount of the costs which in their opinion are properly to be incurred with respect to preliminary or ancillary services and charges and the amount of grant they have decided to pay. There must communication of these matters to the applicant with a breakdown of the assessment of the said expenses and costs. Moreover there is limited provision in section 34(5), in circumstances beyond the control of the applicant,

for the estimated expense and amount of the grant to be re-determined. Section 34(6) provides that no conditions can be imposed on the making of a grant save as provided for by the provisions of the Act.

39. Section 35 permits payments in instalments and section 37 imposes a deadline of twelve months from the date of approval for the works to be carried out with a facility for extension. Section 37(3) also permits a local housing authority to require as a condition of payment of the grant that the eligible works are carried out in accordance with "such specifications as they determine" and section 37(4) makes the payment of a grant conditional upon the eligible works being executed to the satisfaction of the authority. Section 38(1) makes it a condition of payment of every grant that, unless the local housing authority directs otherwise, the eligible works are carried out by the contractor whose estimate accompanied the application which does not follow standard local authority obligations when authorities commission their own works, such as competitive tendering and best value, because the approach of the Act is that the local authority role is to decide whether or not to make a grant and for the applicant to commission the works.

40. I considered whether section 52 might in principle provide a further basis for the imposition of conditions but I agree with the Defendant that the application of the section is subject to the consent of the Secretary of State and that there is no relevant general consent for the imposition of general conditions on the making of a grant in a case such as this.

41. Oral submissions were made on the basis that conditions could not be imposed by the Defendant had it decided to make a grant and I was not referred to sections 34-38 of the Act. Therefore an opportunity was given to counsel to address in writing after the hearing the issue of conditions being placed on approval.

42. The relevance of sections 34-38 is in my judgment clear. The mechanism for dealing with planning approval about which there was much debate is that this is capable of being dealt with as a "preliminary or ancillary service": Housing Renewal Grants (Services and Charges) Order 1996, Regulation 2 made under section 2(3)(b) of the Act. At all events, there is no provision for a grant to be refused on the basis that "it is likely that" planning permission must be obtained and there is no suggestion in this case that a planning application would necessarily be refused. As was clarified at the oral hearing of this matter, any planning application would (subject to any policy of the Defendant to proceed otherwise) be a matter for application by the Claimant or on her behalf to the planning department of the Defendant, which operates independently of the housing department, and the "impact of the works on the neighbourhood" which Ms Nicholls took into account cannot therefore be a relevant consideration in refusing the grant nor can the likelihood that planning permission would be required. Again, if it were assessed to be technically necessary, a structural survey is also a "preliminary or ancillary service" and not a ground of refusal of the grant. I note that, contrary to Ms Nicholls' evidence and to the Decision, Ms Suzanne Mitchell's note of her conversation with Terry Lifts on 3 January 2020 does not state that a structural survey "would be required" – the reference to a structural survey is clearly conditional, "if indicated". This aspect of the Decision is founded on a view of the facts which cannot reasonably be entertained.

43. The Defendant argues however that the application was not "complete". That mistakes the process under consideration. The position under the Act is that the application is for grant assistance in order to carry out works. There may well be additional costs in order to implement the relevant works approved for a DFG. The position in respect of the application already made for a DFG appears potentially to have been that there was no application to deal with the cost of planning permission, survey (if one is required) and other preliminary or ancillary services. If there were, in the light of this judgment, to be a revised application those would be matters for the Claimant or its solicitors to consider (see further §38 of Annex 3 of the Guide). The fact that necessary costs are not included within the grant application is a ground for not awarding those costs within the grant (i.e. they would fall on the Claimant) but is not a ground for rejecting the application for a grant.

44. The fact that the quotation of Terry's Lifts does not take into account "other necessary adaptations to enable wheelchair access into the property" is not a decision for the grant awarding authority. If the applicant has decided to continue with a powered outdoor wheelchair and a smaller indoor wheelchair and not to apply for modifications to the entry to their property, possibly (although it is not for this court to enquire into the Claimant's motives) in order to remain below the threshold for the maximum grant and to prioritise access/exit from their property over other possible improvements, in my judgment the grant cannot be refused on the basis that more modifications could have been made and/or applied for.

45. With regard to the additional points relied on in the Decision from the report of the independent occupational therapist, Dee Hetherington, compliance with building regulations is plainly required as a matter of general law and payment of the grant is in any event conditional on the works being executed to the satisfaction of the authority (section 37(4)(a)). There is also scope in section 37(3) for the works to be carried out in accordance with such specifications as the housing authority may determine. The removal of earth from the site is not cited as a possible additional cost in the Terry Lifts quotation or in the conversation which the Defendant's occupational therapist, Suzanne Mitchell, had with Terry Lifts on 3 January 2020 about possible extra costs and which notes that the quotation is "for excavation of the raised garden and installation" of the lift. The evidence before the Court does not support a finding that removal of earth would be an additional cost.

46. The Decision states, with regard to the Terry Lifts quotation, that the estimate "was not fixed and could likely exceed the quote given". The basis of this is Suzanne Mitchell's conversation on 3 January 2020 which records that "the figure provided is fixed as far as possible" but then goes on to say:

> "however, it is not known what might be under the raised garden area – eg drainage, gas and electrical services – and addressing any issues that arise could increase the costs. [Terry Lifts] noted cabling travelling into the area; he also raised uncertainty about the route of the pipework from the soil pipe."

47. In so far as those uncertainties concern costs, they are, as the Claimant submitted, the inevitable aspects of uncertainty connected with any building project of this nature. For Terry Lifts to provide a 100% inclusive quotation would increase the quotation to account for the risk of problems and would be payable whether or not problems arose. The statutory scheme takes account of this in section 34(5) which incorporates a limited

possibility for costs to be re-determined and the amount of the grant to increase. And as Terry Lifts indicates in the same conversation, there may be records held by the Defendant with regard to the routes of services entering the property. There are also likely to be relevant records of the routes of pipework/cables held by utilities.

48. No estimate is provided by the Defendant of any possible additional costs whether of planning permission or survey, if required, or of possible additional works with regard to services entering the property. Terry Lifts quotation is in the sum of £23,270 and the Defendant's counsel helpfully stated in argument that value added tax should not be payable. It would be a condition of any grant that the works be carried out by Terry Lifts as it was their quotation that accompanied the application (section 38(1)). In those circumstances, and bearing in mind both express requirement for reasons for refusal in section 34(4) and the fact that the statute clearly contemplates a breakdown being provided of the Defendant's opinions as to costs in the event of a decision in favour of a grant (section 34(3)(b)), in my judgment a financial breakdown of the basis for believing that the works would exceed £30,000 must be stated. This is, in particular, the case because a further ground given in the Decision for the refusal is the absence of any assurance by the Claimant that she would meet the additional costs. No one can write a blank cheque and in any event the position is that the applicant for a grant has an obligation to carry out the works and therefore it is the applicant who must ensure that he/she has sufficient funds over and above the grant to complete the works. If there are extras such as planning permission, structural survey, the Dee Hetherington report etc, they cannot be approved as part of the grant unless they form part of the application and it is unclear from the papers whether this is the case. Accordingly, the aspect of the Decision which states that it is anticipated that the matters listed "would take the costs … beyond £30,000" is not adequately reasoned. It is to be noted that the Claimant has, since the Decision, stated that she would be able to make some contribution.

49. Finally, I return to the point which I described earlier (in §19) as one of the main planks of the Defendant's case. This is the point that the Claimant's need to leave her home would be more suitably met by a move to wheelchair accessible accommodation. For reasons which will be apparent from §§18-20 with regard to my conclusion that the application for the DFG for a council tenant must be considered on the same basis as an application from an owner occupier and that what is being considered is the need to access the dwelling which the applicant occupies as his/her home, in my judgment it is not lawful to refuse a DFG on the ground that the Claimant must move her home.

Conclusion

50. For the above reasons, I grant the application for judicial review.

51. There remains the question of remedy. Section 7 of the Claim Form seeks a mandatory order compelling the Defendant to commission the works approved pursuant to the grant expeditiously. Subject to the fact that I was told in argument that the Defendant's policy is to commission DFG works on behalf of Council tenants which I take to be an arrangement between the Defendant and its tenants although I do not have further details of this policy, the relief sought is based on a misapprehension of the nature of DFGs. In principle the Claimant applies and, if the grant is approved, would commission any necessary survey or planning permission and the works themselves in accordance with the terms of the grant. But this confusion between the role of the Defendant as landlord of council housing and as decision-making authority for DFGs

has permeated not only the submissions in this case but also the decision-making of the Defendant as concluded in the discussion above. Be that as it may, in accordance with the Act, it is the Claimant who would do the commissioning unless the Defendant's policy as referred to above provided otherwise. More fundamentally, it is the local housing authority in section 24(3)(a) which "shall not approve an application for a grant unless they are satisfied" of the requisite matters. In my judgment the Court has no power to substitute its own appreciation of the facts for the housing authority being satisfied and counsel for the Claimant in argument could not suggest a basis on which the Court could have such a power.

52. It follows that the relief will be an order to quash the Decision. As indicated in the judgment, it would have been open to the Claimant following this judgment to have resubmitted its application for a DFG but the Claimant has indicated that she is content for any redetermination of her application to be made on the basis of the information already before the Defendant.

53. The question of the timing of any reconsideration of the Claimant's application remains. The Claimant points out that the effect of the Decision has been effectively to imprison her in her own home and asks for a redetermination within six weeks. The Defendant prays in aid the statutory deadline for a decision to be made "not later than six months after the date of the application concerned" in section 34(1) of the Act. The Defendant argues that the Claimant's needs must be updated and that there must be a fresh occupational therapist assessment with physiotherapist input together with clarity as to clarity over the proposed "excavations" on (i) services and (ii) the structural integrity of the building. Taking first the need to update the Claimant's needs, what I have determined to be the Claimant's relevant needs are the need to access/exit her home. I have seen no suggestion that there has been or even may have been an evolution in this need. As regards the risk that the decision be taken on the basis of "old" information, I have noted above my concern in §30 above that the Claimant's first witness statement was not before the decision maker when it should have been. Clearly, on standard public law grounds, the Defendant must take account of that information which is relevant to the issues in section 24 and not simply that which is contained in the Care Act assessment prepared by its own services. Relevant information would certainly include that part of the information in the witness statements in these proceedings which goes to the section 24 issues.

54. As regards the works themselves, the reference to "excavations" must be examined carefully. As is apparent from the quotation from Terry Lifts the works contemplated are not primarily works of "excavation". Currently there are two large steps in the Claimant's front garden which form a sort of buttress to the street. They are to be partially removed and replaced by a "plumb vertical wall minimum 1400 mm wide with alternative fixing min 200mm deep to fix Melody 3 lift at upper level as per specification guide". However, part of the spoil would no doubt be used in building up by 180 mm the rest of the floor area of the front garden to bring it level with the internal floor area of the Claimant's home. This is the opposite of excavation as regards the part of the garden which is closest to the house. I note further in this regard that the Defendant has already made direct contact with Terry Lifts, the Claimant's chosen contractor. If the Defendant intends to make an objectively justified request of Terry Lifts that it carry out a trial excavation and commission a structural survey of the building (though I note that there is no evidence before me which would come close to

justifying a structural survey of the building), subject to its own policy as to how DFGs are implemented, it can either request the Claimant to ascertain the cost of such additions or contact Terry Lifts direct and then require that the works are carried out in accordance with such specification as they shall determine subject of course to the proviso of Wednesbury unreasonableness.

55. I come then to the timing of the reconsideration. First of all, in my judgment the deadline of six months does not apply to a redetermination where it is not suggested that the judgment overturning an unlawful refusal of grant is within six months of the date of application. Furthermore, in this case it is common ground that the Claimant cannot exit her home and her need is urgent. Against that, I acknowledge that corona virus and associated restrictions complicate matters but there is a significant difference between carrying out a reassessment of the Claimant's general care needs which in my judgment is not required for a DFG (given that there is already a Care Act Assessment) but would have required access to the Claimant's home and any assessment of the necessary building works or resolving a planning issue which, it is not suggested would require access to the Claimant's home. Reg 6(2)(f) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 permits movement for the purposes of work and it not suggested that decisions are not continuing to be made either on DFGs or on planning issues. In common with the court system, where the Lord Chief Justice has been clear that the rule of law must continue to exist and hearings are continuing to take place, it is also not suggested that most aspects of consideration of grant applications other than necessary visits are not capable of being carried out remotely. In normal circumstances, six weeks would be more than adequate but I can see that this can take a little longer due to present circumstances. The real lesson of the movement restrictions for corona virus for this case is in my judgment to place in stark relief the degree of deprivation of freedom for the Claimant which is involved in continued delay over the lawful consideration of a DFG. The UK population has been prevented from leaving their homes subject to a significant list of reasonable excuses for just over one week at the time of this judgment. In contrast the Claimant has been almost entirely prevented by her disability from leaving her home for at least one year. In those circumstances and on the basis of the facts as known to me today, in my judgment the reconsideration should not exceed a period of ten weeks.

56. I would add that I am troubled by the bald assertion in the Defendant's submissions that a new six month period for redetermination would run from judgment without any attempt to justify the basis on which a new six month period runs and also by the wholly unreasoned suggestion that removing a buttress in the Claimant's front garden which may provide support for the wall to the street may have structural implications for the house in which the Claimant's home is situated. As I understand matters in the light of the arguments in this case, the existence of mandatory grants is extremely rare and that rarity illustrates that the mindset of the decision-making authority must not be to search for grounds to refuse the grant but in good faith to limit its examination to the relevant matters set out in section 24 in determining whether it is satisfied as to the relevant matters. In that regard, I would expect the Defendant's solicitor first to advise the Defendant on the implications of this judgment for decision-making on DFGs. I would also expect the Defendant's solicitor to maintain a clear and accurate record of the timeline and of the reasons for the different steps to be taken in the reconsideration of this application for a DFG.

57. Costs are to be determined separately pursuant to the directions set out in the Order.

Claim No. CO/4415/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
Hugh Mercer QC, sitting as a Deputy High Court Judge
BETWEEN

THE QUEEN
(on the application of
GLYNIS MCKEOWN)

Claimant

- and -

LONDON BOROUGH OF ISLINGTON

Respondent

ORDER

UPON hearing counsel for the claimant and counsel for the respondent

AND UPON the Claimant indicating that she is content for any redetermination of her application to be made on the basis of the information already before the local authority.

IT IS ORDERED THAT:

1. The claim for judicial review is allowed.

2. The decision dated 22 November 2019 to refuse a Disabled Facilities Grant is quashed and remitted for reconsideration within ten weeks.

3. Permission to appeal is refused.

4. The question of costs shall be determined on the papers following written submissions (not to exceed five pages in length) in accordance with the following timetable –
    a. the Claimant shall file and serve any submissions on the appropriate order by 4pm on 6 April 2020;
    b. the Defendant shall file and serve submissions on the appropriate order by 4pm on 16 April 2020;

c. the Claimant shall file and serve any reply by 4pm on 22 April 2020.

5. There shall, in any event, be detailed assessment of the Claimant's publicly funded costs.

Hugh Mercer QC

Sitting as a Deputy High Court Judge