Manchester City Council v Muir [2006] APP.L.R. 03/20

CA on appeal from Manchester County Court (HHJ Armitage QC) before May LJ; Keene LJ; Walle LJ. 20th March 2006.

LORD JUSTICE MAY:

1. The case before the court this morning is concerned with, or ought to be concerned with, alleged anti-social behaviour of a young boy born in September 1994 and now aged about 11½. He was obviously aged around 10½ in March 2005. I shall refer to him as N. The alleged anti-social behaviour has, however, regrettably become submerged in a sea of procedural argument, not helped by an overload of paper. There have been:

   (1) Two county court hearings and judgments on 30 March 2005 and 27 May 2005. At the second hearing the judge was, in my view, materially misinformed about what had happened at the first by counsel then acting for the respondent, who had appeared at the first hearing;
   (2) A notice of appeal, grounds of appeal, and skeleton argument in support dated 3 August 2005;
   (3) A skeleton argument on behalf of the respondent dated 28 September 2005;
   (4) An appellant's reply to this skeleton argument dated 5 December 2005;
   (5) Further submissions of the respondent dated 17 January 2006;
   (6) A statement by counsel dated 27 January 2006;
   (7) An appellant's reply to the respondent's further submissions dated 6 February 2006; and now,
   (8) Additional submissions of the respondent dated 13 March 2006.

2. There is the suggestion of a wasted costs order. Chadwick LJ directed that this would not be entertained upon the appeal. If that direction has been interpreted as a direction that it would not be entertained at all, I think that is wrong. Virtually none of this, what I would refer to as paper spoiling, is about the alleged anti-social behaviour. It is about technical objections taken on behalf of the respondent, none of which have much merit and all of which, in my judgment, are wrong. The appellants presented some initially discordant evidence, but HHJ Holman sorted that out on 30 March 2005 and that should have been an end of the matter that is now before this court.

3. Anti-social behaviour orders appear in Part I of the Crime and Disorder Act 1998 as subsequently amended on at least two occasions. They may be made in respect of any person aged ten or over if the person has acted in an anti-social manner and an order is necessary to protect relevant persons from further anti-social acts by him (section 1(1)). An application for an anti-social behaviour order may be made by a relevant authority, which may include the council for a local government area (section 1(1A)). The claimants are such an authority. An application for an anti-social behaviour order unrelated to other proceedings has to be made by complaint to a magistrates' court (section 1(3)). An anti-social behaviour order is an order which prohibits the defendant from doing anything described in the order (section 1(4)). It has effect for a period of not less than two years, specified in the order, or until further order (section 1(7)). A person who without reasonable excuse does anything which is prohibited by an anti-social behaviour order is guilty of an offence (section 1(10)).

4. Under section 1B an order may also be made in county court proceedings, but orders in the county court cannot be applied for on their own. There are specified circumstances in which a relevant authority may make an application. These include if the relevant authority is a party to proceedings in the county court, referred to as *"the principal proceedings"*; that they consider that a person who is not a party to the principal proceedings has acted in an anti-social manner; and the person's anti-social acts are material in relation to the principal proceedings (sections 1B(3A) and (3C)). In these circumstances the relevant authority may make an application for the person to be joined in the principal proceedings to enable an order to be made against them. If the person is joined, the relevant authority may apply for an order under section 1B(4), the reference for which is section 1B(3B).

5. That is what happened in this case. Mrs M, the first defendant, is a tenant of the claimants. On 18 March 2005 the claimants applied for an injunction against her under section 153D of the Housing Act 1996. They applied for her young son, N, to be joined in these proceedings and applied for an order against him under section 1B(4). Section 153D of the 1996 Act enables a *"relevant landlord",* including a local authority, to apply for an injunction against actual or threatened breach of a tenancy agreement when the tenant is engaging in anti-social behaviour or *"allowing inciting or encouraging any other person to do so"*. The alleged anti-social behaviour in this case, in the round, was that of N. The case was that his mother was allowing him so to behave by failing to prevent him. The nature of the allegations against N (and I should say that they have never been finally determined, and whether these are correct allegations or incorrect allegations is not a matter of decision), was that he had been causing a good deal of trouble from the age of eight, including alleged racial abuse of neighbours, threatening other children with a knife, vandalism and fire setting.

6. HHJ Armitage QC, the county court judge at the second hearing on 27 May 2005, held on a preliminary issue that allegations of conduct before a person is aged ten cannot support a case for an anti-social behaviour order against him or her. There is no appeal before this court against that finding.

7. Section 1D of the 1998 Act enables the court to make an interim order if it considers it is just to do so, pending the determination of a main application for an anti-social behaviour order in the magistrates' court, or an application in the county court for an order under section 1B. An interim order under section 1D is an order which prohibits the defendant from doing anything described in the order.

8. The matters which came before HHJ Holman on 30 March 2005 were first, the application for an injunction against N's mother; and second, an application for an interim order against N himself. The application against N's mother was disposed of by her giving an undertaking. The terms of the order included that the proceedings

against her were to stand dismissed if no application to restore the application for an injunction was made before 30 September 2005. Putting it in the vernacular, if N's mother succeeded in controlling her son for six months that was to be an end of the proceedings against her, and that, so far as she is concerned, is what in fact happened. The proceedings against her did not return to court by 30 September 2005.

9. As for N himself, on 30 March 2005 HHJ Holman made an interim order under section 1D of the 1998 Act and gave directions for a full hearing.

10. Section 1E of the 1998 Act is headed "Consultation Requirements". It provides :

"1) This section applies to (a) applications for an anti-social behaviour order and (b) applications for an order under section 1B.

"2) Before making an application to which this section applies the council for the local government area shall consult the chief officer of the police force maintained for the police area within which the local government area lies."

11. Civil Procedure Rule 65.25 provides that an application for an order under section 1B(4) of the 1998 Act must be accompanied by written evidence, which must include evidence that section 1E of the 1998 Act has been complied with. The application for the interim order which HHJ Holman made was accompanied by such evidence. The evidence of such compliance is in paragraph 17 of the witness statement of Ojuade Egbe made on 15 March 2005. Paragraph 17 reads: *"A Case Conference was held on 19 January 2005, with all relevant agencies working with the second defendant and her family. Having discussed the case with GMP [which I take it stands for Greater Manchester Police] a Certificate of Consultation was signed in relation to applying for an Anti-Social Behaviour Order for the second defendant. A copy of the Certificate of Consultation can be found in the bundle marked and exhibited as 'OE5'."*

12. On the day before the hearing on 30 March 2005 solicitors acting for N questioned whether the evidence of consultation with the chief officer of police was sufficient. There was a muddle about which of two officers had signed the Certificate of Consultation, and the heading of the document referred to proceedings in a magistrates' court whereas these proceedings were in a county court. This matter was raised at the hearing before HHJ Holman and he was asked to decide, as a preliminary issue, whether there was sufficient evidence of consultation. He did so, and gave a formal judgment deciding that the appropriate consultation requirements had been satisfied. We have an approved transcript of his judgment. We also have a transcript of the proceedings and submissions which he heard. The transcript of the judgment says that the preliminary point was raised by Mr Fullwood, counsel then acting for N. Mr Fullwood was, of course, present in court and heard HHJ Holman's judgment. He should, I think, have made a note of it, although at the subsequent hearing he told HHJ Armitage that he had no such note. Ms Thompson then appeared for the council.

13. Mr Fullwood's skeleton argument for the main hearing before HHJ Armitage was received by the claimants only the day before the hearing on 27 May 2005. Notwithstanding that HHJ Holman had already decided the consultation point, this skeleton sought to raise it all over again. The council were not represented on this occasion by Ms Thompson, but by Miss Short. She had obviously not appeared before HHJ Holman and there was at that stage no transcript. I am satisfied that HHJ Armitage was misinformed about what HHJ Holman had already done.

14. The first point to refer to is in the submissions that were made to HHJ Armitage. On page 49 of the bundle before us there is the following:

"Mr Fullwood said, *'Now on that occasion* [that was the occasion before HHJ Holman], *as you can see, the court was primarily concerned with whether or not to grant an interim order.*

'Yes', said the judge.

Mr Fullwood: *'The test being whether it is just in all the circumstances to do so. That, as you know, does not involve any findings of fact. It is just an exercise of judgment on the part of the court, and HHJ Holman, as you can see, exercised his judgment in order to grant such a matter. He then ordered that skeleton arguments be prepared to deal with the matters that were canvassed on that occasion. Unfortunately, my learned friend was not there on that occasion but I think her colleague, Zoë Thompson, was there, along with somebody instructing her from the local authority. The issues, for example of consultation and of doli incapax were ventilated on 30 March, but it was really a matter put over for today's hearing for proper argument on those issues.'"*

15. There are, as it now appears, at least two inaccuracies in that statement. First of all, HHJ Holman did not order skeleton arguments to be prepared to deal with matters that were canvassed on that occasion. Secondly, so far as the record now before the court goes, issues including the issue of consultation were not really a matter put over for today's hearing for proper argument on those issues. It might have been a matter of debate whether it was or was not open to the defendant to raise those issues again, but certainly that was not what HHJ Holman ordered.

16. The matter proceeded before HHJ Armitage up to a point where Miss Short received instructions to the effect that she understood that the matter had previously been dealt with and decided by HHJ Holman, and she addressed the judge in these terms, on page 103 of the bundle before us. She said this: *"Two points: the first is whether or not it is open for the court to consider that issue today and secondly, submissions on the merits. This morning, when I appeared, I stated I had not attended on 30 March. I have since spoken to counsel who did. Mrs Thompson stated*

that that issue was specifically raised. It was fully argued in front of HHJ Holman and he made a ruling that the certificate was in compliance and he did not accept the argument that the discrepancy between the witness statement and the actual certificate was such as to render the certificate a nullity."

17. As has subsequently been shown, that was materially entirely accurate. Mr Fullwood, for his part, on page 109 said this to the judge: *"Well, I should be able to assist the court more, but I am afraid I do not have a note and I have a real difficulty in remembering what has happened. However, what I can say is that there was not anything like the ventilation of issues that we have had today. Mrs Thompson may remember it as being a full argument. Certainly one thing we can say is that further evidence has now been produced in relation to the consultation process, which was not available before HHJ Holman. HHJ Holman was concerned that an application for an interim order and at that stage he was looking at a different test. My recollection, as far as it goes and I am sorry that I cannot be of more assistance, is that he found that the certificate was at least evidence of some consultation, but certainly not the meaning of consultation or what consultation actually took place."*

18. When it came to HHJ Armitage's judgment, he noted in paragraph 9 the consequences of Miss Short not having appeared on the previous occasion and Mr Fullwood raising the issue of consultation very shortly before the second hearing. HHJ Armitage said the consequence of that is that until yesterday morning, 26 May, the claimant was not aware of all the issues which the defendant intended to raise, both in terms of facts which were an issue and, more importantly for these purposes, the full range of what we would call for these purposes procedural issues raised against them. And he noted in the next paragraph that there was a difficulty because the counsel had had little time to consider both the statute law and the authorities upon which the defendant relied, but also to arrange, if it were possible, for relevant witnesses to attend.

19. His judgment dealt with one or more preliminary points. One of them was the question of consultation. In paragraph 57 of his judgment, he said this:

> *"57. Leaving aside any question of the apparent failure to certify a consultation in relation to the action which was, on the face of it, decided by the city council to be taken, a further difficulty arises here. Although this was not apparent at the time, I embarked upon hearing argument in relation to this point, because that argument extended over the short adjournment, Miss Short, on behalf of the city council, had had an opportunity to discuss this case with Mrs Thompson, who was counsel who appeared on behalf of the city council when the application came before HHJ Holman on 30 March. The information which Mrs Thompson was able to give to Miss Short and which Miss Short gave to me, indicated that HHJ Holman may have decided the issue that I am considering at the hearing on 30 March. That came, in a sense, like a bolt out of the blue, because if that was right, and there had been a decision on the merits, then what Mr Fullwood was asking me to do was effectively to re-hear something which could have been made the subject of an appeal, but which was not and which if it had been decided by a court of competent jurisdiction, was not possible to appeal to me.*
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> *58. Mr Fullwood, although he had attended the hearing before HHJ Holman on behalf of N, was not able to say, with certainty, what had occurred on 30 March in relation to the resolution of this issue, although it must be quite apparent from his elaborate written skeleton argument that when he was preparing it, he certainly was not of the view, for what that is worth, that he issue had already been decided and decided against him.*
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> *59. The difficulty I am in is this, that whilst I am content ordinarily to accept what I am told from the Bar, even though it comes second hand, the difficulty is to know what weight to attach to it. Is it decisive? There is no other evidence that the matter was decided finally by HHJ Holman. There is no judgment before me from him. There is no mention of this matter in the order which was drawn at the end of and as a result of the hearing on 30 March. The conclusion that I have reached is this, that although there is a risk that what I am being asked to do here is, effectively, re-hear a matter which has already been determined, it is not clear to me that is the case and it seems to me, in the context of the application now made and its importance, that it is right that I should deal with it on the basis of the evidence before me."*

20. This court now knows that HHJ Armitage was indeed being asked to re-hear a matter which had already been determined, and he proceeded on an inaccurate basis. Mr Fullwood, who no longer appears for N in these proceedings, has made a statement which seeks to deal with some things but which does not, as I read it, seek to say that HHJ Holman had not decided the matter formally on 30 March, which he plainly had, nor how it came about that he misinformed HHJ Armitage and, being the one person who had, at the time at least, known what HHJ Holman had done, allowed HHJ Armitage to proceed on an erroneous understanding. He does explain that at least to some extent in what he said to HHJ Armitage himself, that is to say that he had not got a note and he could not entirely remember. Whilst he utterly refutes a suggestion that he misled HHJ Armitage, it is quite apparent to me that HHJ Armitage was in fact and for whatever reason misinformed.

21. HHJ Armitage decided the consultation point against the council. He held that absent sufficient consultation for the purpose of section 1E of the 1999 Act an application for an order under section 1B(4) could not properly be made. So he dismissed the application. He also decided, wrongly in my view, that there is nothing in section 1D of the 1998 Act which required HHJ Holman to decide the consultation issue. That point is taken again, partly in writing and partly orally, by Mr Stark in opposition to this appeal. It is said that section 1E, by its terms in sub-section (1), only applies to applications for an anti-social behaviour order or applications for an order under section 1B. Applications for interim orders under section 1D are not mentioned. That overlooks the obvious fact that section 1D itself applies to an application for an anti-social behaviour order and an application under

section 1B. So, a necessary pre-condition to an application under section 1B for an interim order was, in this case, an application under 1B. By section 1E(2), before such an application might be made the necessary consultation has to have taken place. Accordingly, a judge hearing an application for an interim order under section 1D not only has jurisdiction to decide whether there has been sufficient consultation, but is obliged to do so if the issue is raised, as it was before HHJ Holman. The fact, as Mr Stark submits, that when it comes to considering whether to make an interim order under section 1D, the test is whether it is just to do so does not alter the fact that a necessary pre-condition of considering that matter is that there should be a valid application under section 1B in existence. As Kennedy LJ said in ***B v Secretary of State for Constitutional Affairs and the Lord Chancellor*** [2003] 1 AE 531 at paragraph 39, the court on an application for an interim order must consider whether the application for a final order has been properly made.

22. The ground of appeal against HHJ Armitage's decision is that the issue whether there had been sufficient consultation under section 1E had already been decided by HHJ Holman and that there had been no appeal against his decision. This was accordingly a decision binding on HHJ Armitage. We now know that it is correct that HHJ Holman had decided the issue, and I would allow the appeal on that ground. I would also – and separately if it were necessary – allow the appeal on the ground that there was a serious procedural irregularity in HHJ Armitage being misinformed about what HHJ Holman had or had not decided. This was compounded by HHJ Armitage's error in thinking that HHJ Holman was not concerned, for the purposes of section 1D, to determine the question of consultation made under section 1E.

23. The following further points have been taken, in writing or orally, by Mr Stark in opposition to this appeal. First, he submits that the application before HHJ Holman was an application for an interim order only; that the test under section 1D is whether it is just to make the order; that findings in relation to that interim order were not binding on a final determination; and that that, accordingly, applies also to the question of consultation. I would reject that submission for reasons which I have already indicated. Quite simply, the question of jurisdiction depends upon there being a proper application for a final order, and that applies just as much when an interim application is made as when a final application is made. If the issue of jurisdiction is raised in the matter of consultation at the hearing of an application for an interim order, it is, as I have said, both within the court's jurisdiction to decide it, and indeed the court would in those circumstances be obliged to do so.

24. Secondly, Mr Stark submits that it was for the council to establish a question of *res judicata* before HHJ Armitage. The burden was on them to prove it. They could have asked for an adjournment; they did not, and HHJ Armitage decided the matter properly, as Mr Stark would say, on the evidence before him. I would comprehensively reject that submission on the facts of this case. What had happened before HHJ Holman is not a matter of evidence. It is a matter of court record. Whatever HHJ Armitage may or may not have been told, and whatever evidence was before him, this court now knows what the true state of affairs is, and in my judgment we should decide appropriately in those circumstances.

25. Next, it is said that those acting for N were not precluded from raising the issue of consultation before HHJ Armitage because there was then further relevant material. As I have said, there was a muddle about which of two police sergeants had signed a certificate of consultation and by the time of the second hearing, there was a second statement from one of them correcting a previous error. This is no answer to the fact that HHJ Armitage was misinformed about HHJ Holman's hearing. Nor would it have been if the correct information had been given. The correct technical course was to seek to appeal HHJ Holman's decision. I say technical because, in my view, there would have been no substantial merit in this case in seeking to do so. Further, HHJ Holman had been told by counsel at the hearing on 30 March that the sergeant's first statement was incorrect, and he considered this point. The subsequent statement from the sergeant simply confirmed what HHJ Holman had been told. Yet further, although a certificate of consultation is mentioned in Home Office guidance on the statute, such a certificate is not a statutory requirement. All that is required by the statute is evidence that the council had consulted the chief officer of police.

26. Next, it is said that the appeal has become academic. The first submission here is that since the principal proceedings against N's mother have been dismissed, the joined proceedings against N himself cannot continue. That, in my judgment, is simply wrong. It is true that applications under section 1B of the 1998 Act have to be attached to other proceedings, but once a person is properly joined to principal proceedings to enable an order to be made under section 1B(4) in relation to him, that person is a party to those proceedings. Once the person is joined, the continued active existence of the principal proceedings is not a pre-condition of continuing the proceedings against the person joined. That I see as the plain construction of the relevant part of section 1(B). It seems to me that examples of what might or might not happen in some circumstances are not really useful to determine that quite straightforward point of construction.

27. That is not to say that it would be a proper use of this statutory procedure to start county court proceedings against a principal defendant for the sham purpose only of joining another person, to enable an order under section 1B(4) to be made in relation to that person. Stand-alone applications for anti-social behaviour orders have to be made in a magistrates' court, but there is no suggestion that the present proceedings against N's mother were a sham; indeed, they resulted in her giving a substantive undertaking.

28. Next, it is said that the appeal is academic in practice because by all accounts N has been behaving himself during the past ten months or so. That, if I may say so, is very encouraging news and may result in a welcome stop

to lawyers spoiling paper over statutory technicalities; but it is not a ground for resisting this appeal. Rather, it may affect any order which the court may make, having allowed the appeal.

29. The plain fact remains that HHJ Armitage should not have been induced to dismiss the application against N on the ground on which he did. I would only add this: that although the question whether HHJ Holman's decision was wrong is not before us on this appeal, there is in my view every indication that it was not wrong. In saying that I take into account the fact that HHJ Armitage reached a different conclusion; but the whole question seems to have got bogged down with discrepancies about the certificate of consultation. There was, as I have said, unchallenged witness statement evidence of a case management conference with all relevant agencies on 19 January 2005, and HHJ Holman had a certificate of consultation signed not only on behalf of the chief constable of Greater Manchester Police but also on behalf of the city council. Discrepancies in the first of these were explained. It looks to me as if HHJ Holman was entitled to find as he did, that the appropriate consultation requirement had been substantially satisfied. I trust that I have made my view plain that that should have been an end of the matter of consultation and those involved should have got down to what mattered, namely the question of N's behaviour.

30. For these reasons, I would allow this appeal.

31. **LORD JUSTICE KEENE**: I agree.

32. **LORD JUSTICE WALL**: I also agree.

Order: Application allowed.

MS Z THOMPSON(instructed by Manchester City Council Nuisance Strategy Group, Town Hall, Albert Square, Manchester M60 2LA) appeared on behalf of the Appellant

MR J STARK (instructed by Messrs Stephensons, 99 Corporation Way, St Helens, WA10 1SX) appeared on behalf of the Respondent