GLOUCESTER COUNTY COURT G1302701

Gloucester County Court

Kimbrose Way

GLOUCESTER

Thursday, 12th February 2004

Before:

DISTRICT JUDGE THOMAS

LYDBROOK PCC CLAIMANT

V.

FOREST OF DEAN DISTRICT COUNCIL DEFENDANT

DRAFT JUDGMENT

(As Approved)

Thursday, 12th February 2004

JUDGMENT

1. DISTRICT JUDGE THOMAS: This is an application by the Forest of Dean District Council dated 30th September for a number of orders. Firstly, that the claim be struck out pursuant to CPR 3.4 and/or that there should be summary judgment pursuant to CPR 24 on the basis that there is no real prospect of succeeding on the claim. Secondly, that the matter should have been dealt with by way of an application for judicial review. Thirdly, that the case is suitable for ADR or another method of mediation, and that there be a stay of proceedings under CPR 3.1.
2. Dealing with the first two parts of those by way of the provisions under the CPR: CPR 3.4 gives the Court power to strike out a statement of case if it discloses no reasonable grounds to bring or defending the claim, or otherwise there is an abuse of the Court's process or it is likely to obstruct the just disposal of the proceedings or there has been a failure to comply with a rule, practice direction or a Court order. CPR 24, gives the Court the power to give summary judgment against a claimant if it considers that a claimant has no real prospect of succeeding on the claim or issue. The Court's powers to stay a claim are well known. I deal with this matter under various headings.

3. I next deal with the proceedings themselves. There is a claim and particulars of claim dated 1st August last year and as at present there is no defence because of this application. The particulars of claim puts the case on a number of alternative or cumulative bases. In particular, first, it asks for an order by injunction that the defendant carry out work in accordance with the schedule of Ruth Nichols of 9th June 2003. Secondly, it asks for damages based on paragraphs 5 and 6 and alleges a tortious duty, although I have to say, that at this stage, it does not say what that tortuous duty is; in other words, whether it is nuisance, breach of statutory duty, negligence or whatever. I shall return to that.

4. Next the evidence. On behalf of the claimant, I have received a detailed statement from Mr B A Morgan dated 25th November 2003, together with 39 exhibits. Included in those exhibits are certain schedules from the church architect. The second statement is from Mrs P A Moore, a local resident, dated 26th November, thirdly from Mrs Meredith, again a local church member, of 28th November, fourthly, Mrs Harvey of 4th December, and finally, from the Venerable Arch Deacon of Gloucester dated 5th December 2003.

5. On behalf of the defendant, I have two statements, both from the same lady, Tonia Meers. The first dated 1st September which was submitted in support of the application, and secondly, 9th December which consists of photographs of the churchyard.

6. Turning now briefly at this stage to the arguments. I have a skeleton argument from Mr Adams consisting of seventeen paragraphs and from Mr Wightwick on behalf of the defendant, another detailed skeleton argument. Both of those have helpfully provided me with detailed authorities which I will refer to later on in this judgment. I have also had the benefit of detailed oral submissions made on the hearing of this case on 15th December which have expanded upon and considered further the respective skeleton arguments.

7. I now turn to deal with what I call the legal context and background relating to churchyards. 1. Churchyards are open or closed. 2. A closed churchyard is one closed for burials by an Order in Council; Lydbrook Churchyard is one such. 3. Who then is responsible for the upkeep and maintenance of a closed churchyard? Historically under the Common Law it was the church wardens who were responsible. This was confirmed, or to put it another way, put on a statutory basis, by Section 1 of the Burials Act 1855, which provided that the church wardens should maintain a churchyard "in decent order and also do the necessary repairs of the walls and other fences thereof." 4. This obligation has now been transferred to the PCC by the Parochial Church Council Powers Measure 1956. I should add that Section 1 also provided that the church wardens could recover the costs out of the poor rate upon certifying their expenses. That has subsequently changed as a result of the statutory provision. From 1st April 1974, Section 2 (1) (5) of the Local Government Act 1972 in

effect altered the law. It confirmed - and I will come to the details of that in a moment - that the PCC was liable for upkeep of a closed churchyard and it also provided a simple procedure whereby the PCC could serve a written request on the local authority on three months notice to take over its responsibilities to maintain the churchyard. That is what Lydbrook PCC did and the defendants are now legally responsible. The effect, therefore, is to transfer the liability of the PCC - and I use those words advisedly - with respect to the repair and maintenance to the local authority. For completeness, I should add that the ownership of the churchyard is not transferred to the local authority but remains with the incumbent, and the PCC either together or solely the PCC, if there is no incumbent as I understand there is not at the present time here. I next deal with Section 2 (1) (5). What it does is to transfer the liability of the PCC. In Section 2 (1) (5) (1), it says: "The Parochial Church Council shall maintain it (that is the churchyard) by keeping it in decent order and its walls and fences in good repair." So that puts the liability on to the PCC. In (2) it goes on to say in terms that a parochial church council which is liable under (1) to maintain a closed churchyard may, and then in effect it says, serve a notice, and I do not need to go into that in any more detail. What I do note is that in Section 2 (1) (5) (1) it uses the words, "shall maintain." That, in my judgment connotes a mandatory type of view. It does not, for example, use the word "may." "Shall", I think, given its normal meaning is of

a mandatory nature. It also uses the words "keeping it", that is the churchyard, in decent order. It does not say "put it," It says "keeping it," so that connotes a continuing obligation.

8. I now turn in rather more detail to the submissions of counsel. In Mr Adams' skeleton argument he deals first, specifically with the issue of whether these proceedings should be private law or public law. He defines the first issue as being whether the PCC can bring the action by ordinary private action. He relies on the approach of Lord Woolf in the case of **The Trustees of the Dennis Rye Pension Fund V Sheffield City Council [1998] 1. WLR 840** which I shall return to in more detail, and he asks the Court in effect to conclude that the proceedings were properly brought as private proceedings. That is paragraph 3 of his skeleton argument. And as he rightly says in paragraph 4, that requires the Court to consider the nature of the defendant's obligation to maintain the churchyard. He then deals with historical matters which I have already dealt with in the background. He submits that there can be no question that the PCC is the appropriate body to take proceedings and I deal with that at this stage because there is no dispute about that. The defendants accept that and it follows from the case of **St Edmondsbury v Clark [1973] WLR 11572.** Mr Adams says that the defendants do not have a discretion as to whether or not to put the churchyard in repair; rather in his terms, (paragraph 16), they owe an absolute duty to do so and I will return to

that later. Those are broadly his submissions which he amplified in his oral submissions to me, and in those oral submissions he emphasised that the obligation is a continuing obligation, and as it is accepted by the defendants that the churchyard is out of repair, it is arguable that that is a continuing breach, and that the defendants have therefore not complied with their obligation. There were some submissions towards the end of Mr Adams' oral submission with regard to mediation which I will refer to later.

9. The defendants' submissions started with the proposition that the Court ought to stay or strike out the action because the claimant has refused to use alternative dispute resolution or similar mediation. And there are sections relating to the alternatives to litigation and Mr Wightwick relied on the cases of **Cowl v Plymouth City Council [2002] 1. WLR 803** and **Shirayama Shokuson Danovo [2001] CHD** For that argument. He dealt with that section first and then submitted that if the Court was not with the defendants on that point, then the Court had to consider whether on the merits of this action, it ought to be struck out because the case ought to have been brought by judicial review rather than private law. I pause there to say that in paragraph 20 of his submission, Mr Wightwick referred to the case of **Dennis Rye v Sheffield County** Council and agreed that the approach in that case was the correct approach to be adopted. He did, however, go on to say that the general rule is that it is contrary to public policy and abuse of process to permit a person who

is seeking to establish that a decision of a public authority infringesrights to which he was entitled under public law to proceed by way of ordinary action. He suggested that by this means, the protection of order 53 could be evaded. He further submitted that in this particular case, judicial review was the correct procedure and he relied so far as that is concerned on two particular areas of law: The first was Leaders Ecclesiastical Law, paragraphs 8.27 to 8.28 and the Judicial Opinions. I will come back to those later. He also referred to Halsbury's Laws; vol. 14 1109.

10. In his oral submissions, he expanded on those arguments. He did accept in those submissions that the council agreed that work needed to be done but submitted that "when" "how" and "in what time " that they should be done was a matter for the local authority entirely. In particular, he submitted that where finance was concerned, the local authority could not do it without considering finance and that meant that they were entitled to decide the terms on which and when they would do the work. He did, in his submission, concede "that if it is a simple surveying matter, then it might be all right for the County Court to deal with it."

11. I turn now to a more detailed consideration of the law and my findings, and I do it in this way.

12. In Section A, I deal with certain preliminary findings:

    1. In relation to paragraphs 5 and 6 of the particulars of claim, those in

my judgment are private matters based on tortious damage to the church which is owned by the PCC. In my judgment, those paragraphs of the particulars of claim are not capable of being public law matters and are clearly matters for a private law claim. Those are the matters relating to the damage to the church by way of dampness penetrating the vestry. Those claims, can in my judgment quite clearly continue as private law claims. They will need, however, amending to provide the exact legal basis of the claim and the particulars of claim will have to set out that matter in more detail. I propose to give leave at the end of this judgment to amend the particulars of claim. It is, I think, a proportionate way also of dealing with those two paragraphs.

2. The PCC is clearly the correct body to bring any proceedings. The defendants concede that point and there is no dispute about that.

3. As I have said, the PCC retains ownership of the church and the churchyard.

4. I think it is right that the duty on the local authority cannot be any greater than that of the PCC under the wording of Section 2 (1) (5) and (2).

13. Section B of this part of the judgment. What is the duty of the local authority? Is it an absolute duty? In other words, can the PCC say to the local authority, you must do whatever we want, when and where we want it. Alternatively,

can the local authority decide what, when, how and by whom the work is done at their discretion? I put those two points in that way because those are the two extremes. If I go back to Section 2 (1) (5) and the wording of Section 1, I wish to underline that in my judgment, the wording, including the word "shall" gives an element of a mandatory nature. I therefore conclude from the wording of section 2 (1) (5) (1) that it is not a discretionary decision on the part of the local authority.

14. The next point is that as I conclude the duty is no greater than the PCC, what then is it? The PCC and formerly the church wardens have the duty "so far as they had funds to do so to maintain the churchyard in decent order." So that prior to the Act there was an element of funding which came into the decision. It was only an element and was not decisive. It seems to me that the local authority are entitled to take finance into account but only as one of the factors and not as a deciding factor. In my judgment, the local authority must "keep" the churchyard maintained which as I have said suggests an element of continuity, that is regular maintenance and repair. Also as the PCC is the owner of the churchyard, I think they have to be entitled to be consulted and have a say in the work required, when it should be done and how it should be done. I think to decide otherwise would be to derogate from the responsibility and rights of a landowner over their own property. There is, I think here, a similarity between the relationship of the PCC and the local authority and a

landlord and tenant. Although the relationships are different, there is a similarity because in the landlord and tenant relationship, a landlord has the responsibility to maintain and ultimately the responsibility to pay for it in consultation with and/or payment by a tenant. These are all matters which must be taken into to account when a local authority considers its duty under Section 2 (1) (5).

15. I am not attracted by the local authorities argument that if they have not got the money to do so, then they need not carry out the work. It seems to me that the responsibility to maintain under Section 2 (1) (5) overrides that absolute requirement in relation to finance for which the local authority were contending. So that although they can take that into account, it must be only one matter, it is not overriding and it must be applied reasonably.

16. I now turn to the effect of the Legal Opinions and Leader's Ecclesiastical Law which I have considered in some detail. I deal first with Leader. In the latest edition, paragraphs 8.27 and 8.28 deal with this matter. In paragraph 8.28, the final paragraph on page 299, it says, "if they (that is the PCC) are dissatisfied with the standard of care being exercised, the incumbent and PCC can apply to the High Court for judicial review if they consider the local authority is failing in that duty." That has a footnote. The footnote says this: "Legal Opinions, page 6 ." So that it is clear that Leader has obtained that reference from the Legal Opinions. There is no other reference or authority given by Leader, so

that in my judgment, the opinion of Leader is not an opinion which is other than that taken from the Legal Opinions. So that I therefore do not give that paragraph in Leader any weight greater than that which is in the Legal Opinions.

17. I then turn to the Legal Opinions and before dealing with the specific paragraphs, I deal with the nature of those Legal Opinions and the standing which they have. What they amount to is a Legal Advisory Commission that consists of various Chancellors, Registrars and other people well versed in Ecclesiastical Law. There are Circuit judges and one High Court judge. What has happened is that this Advisory Commission has prepared opinions but of course they are no more than that. I do have to take considerable notice of them because they are prepared by people who have considerable knowledge of Ecclesiastical Law but I do not consider myself bound by these opinions, although as I have said, I take judicial notice of them. The two paragraphs which are important in relation to this matter are firstly paragraph 19. It deals with the practical effect of the transfer of functions and liabilities of the PCC with regard to the maintenance and repair of a closed churchyard. It says, "it is for the local authority to decide how and when and by whom the work shall be done." I pause there to say it does not say what work is to be done; it says "how,", that is the method of doing it, "when", the timing and "by whom," the person. I think that is important.

18. The second relevant Section is Section 24 on page 6 . The final sentence of that says this: "Decent order will be a matter for the local authority to decide but if the PCC considers the authorities standard is too low, the incumbent PCC can apply to the High Court for judicial review." I move on from those two authorities to say that in my judgment neither of those bind me for the reasons I have given. It seems to me that there is a duty on the local authority to consult the PCC as to what work is required and for the PCC to do likewise. There is what I would call a mutual interest which requires discussion and agreement, and that, in my judgment, relates to what work is to be carried out, when it is to be done and who is to do it. In particular, however, I think, what work and the extent of the work is that which is vital that the parties discuss.

19. I then turn to Section C of this judgment. What then happens if the parties disagree or fall out as they have here? This then brings into focus the argument as to whether the claimant is entitled to bring private law proceedings or should have issued judicial review proceedings; that is apart from paragraphs 5 and 6 of the particulars of claim. Both parties agree that the correct approach to this question is set out in the judgment of Lord Woolf in particular in the case of **Dennis Rye Pension Fund v Sheffield City Council.** Of all the cases to which I have been referred, I think this is the most useful . I propose to review it in a moment, but I want to consider it in relation to the Judicial Opinions for a moment. The Judicial Opinions are

dated April 1997. The decision of Lord Woolf was on 31st July 1997 and reported in the Weekly Law Reports on 15th May 1998 . Therefore, when the various authors considered and wrote the Judicial Opinions, they did not have the benefit of the **Dennis Rye** decision. If they had, I think that they might have given certain different opinions than they did in relation to paragraph 24.

20. Turning then to the case of **Dennis Rye Pension Fund v Sheffield City Council:** It was a decision of the Court of Appeal and the facts briefly were that the claimants owned property in Sheffield and were served with a notice of disrepair. They then applied, as they were entitled to, for grants. The grants were approved in principle but not paid because the City Council said that the work had not been carried out to their express satisfaction. The Pension Fund therefore, sued for the money. The Court considered whether it was appropriate for this to be a public matter or a private matter, and at length, the Master of the Rolls considered the relationship between judicial review and private law. In the particular case, he concluded, and I read from the judgment, "that the challenge to the council's refusal to express satisfaction with repairs, depended largely on issues of fact which were more appropriately determined in the course of ordinary proceedings than on an application for judicial review." Lord Woolf went on to say, and I quote from this part of his judgment: "In considering whether proceedings should have been brought by

way of judicial review or an ordinary action, the Court should look at the practical consequences of the choice made, rather than just technical questions of the distinction between private and public rights. If the choice made has no significant disadvantages for the parties, the public or the Court, it should not normally be regarded as constituting an abuse of the Court." In his detailed judgment, he is clearly concerned that the parties have turned to the Court on these "tactical issues" as he describes them, before turning to the actual merits of the dispute. He sets out various tests and I refer to those in this way. He says, "what is most important when considering what is the correct procedure to adopt, is that in both situations any challenge to an authorities refusal to express satisfaction will depend on examination of issues largely of fact which are more appropriate examined in the course of ordinary proceedings than on an application for judicial review." In the particular case he says, (this is page 47 paragraph (b) to (c)) "this (that is the instant case) is the class of issue which if it cannot be resolved by mediation, is ideally resolved by a Court with the assistance from a report from a surveyor jointly instructed by both parties. Such an approach would be infinitely more in the interests of the tax payers of the authority, the landlord and the Courts than an application for judicial review." He makes a further strident comment on page 4 at Section (b) and (c) he says, "what can be done to stop this constant unprofitable litigation over the divide between public and private law proceedings?" Then

after considering some previous cases, he sets out various steps for practitioners to consider. He says, "having established the foundation of the general rule, it seems to me that there will be a reduction in the difficulties which are apparently being experienced at present by practitioners and the Court, if it is remembered (1) that if it is not clear whether a judicial review ordinary action is correct, it would be safer to make an application for judicial review." He says, "normally it should not be necessary for purely procedural reasons to become involved in arid arguments as to the correct forum." (2)" If a case is brought by ordinary action and there is an application to strike out the case, (in other words, as here) the Court should ask itself whether, if the case had been brought by judicial review when the action was commenced, it is clear leave would have been granted: if it would, then that is at least an indication that there has been no harm." He goes on to say, "it is easy to transfer cases between the various sections of the court." But he also goes on, (page 849) in considering these various matters, to say "that they do not involve only considering the technical questions of the distinctions between public and private rights, but also looking at the practical consequences of the choice of procedure which has been made." At paragraph D, he says, "if the choice has no significant disadvantages for the parties, the public or the Court, then it should not normally be regarded as constituting an abuse." Those words were similar to the ones I read out at the beginning. He concluded in

that particular case that it was obvious that the issues can be more conveniently dealt by way of an ordinary action. I find those words of Lord Woolf of considerable assistance in this case. I conclude these matters from applying those principles to this case. If the council in this case had refused to do any work at all, then it is probable that judicial review would have been the appropriate course of action. However, the Council quite rightly and properly accepts that certain work is required.

21. The dispute, therefore, is as to (1) the extent of the work that is required, and (2) the time within which it should be completed. If we then look at the dispute as to the work or the extent of the work, that falls fairly and squarely within the consideration that Lord Woolf was setting out in **Dennis Rye Pension Fund v Sheffield City Council**. In that case, the principle of the grant was agreed. The argument was, whether the work had been carried out properly or not. That is very similar to the case we have here. What Lord Woolf was saying there, was that that is exactly the sort of matter that should be dealt with in a local County Court either by a surveyor on each of side or a joint expert. That is exactly the situation in this case. There are two experts. They disagree about the extent of the work. That is the sort of thing that a County Court judge deals with every day of the week. Secondly, I have applied the second of Lord Woolf's tests, as to whether, if the Court asked itself the question, whether leave would have been granted if an application

had been made for judicial review. In my judgment, it would have been granted. Accordingly, it passes that test set out by Lord Woolf. The dispute here is not one of principle as to whether any work should be carried out or not, it is one of detail, and it seems to me, would be wholly disproportionate to make an application for judicial review in a case such as obtained here. There are cases, of course, when it is important to do so for the local authority to have the protection of Section 53 and then the **Wednesbury** considerations of unreasonable behaviour come in, but I do not think that is appropriate in this case. Accordingly, in my judgment, it is appropriate for the proceedings to have been brought as private law proceedings and for them to continue on that basis.

22. Having dealt with the issue of the judicial review and public\private rights, I now turn to the issue of mediation or ADR. It is correct that the Court has a wide discretion to manage cases according to the overriding objective under CPR 1 and that includes staying cases for the purposes of ADR mediation or whatever. That principle, as Mr Wightwick rightly said, was set out in the case of **Cowll V Plymouth City Council** and in a wider context in the **Shirayama case.** The Court has a duty to consider alternatives to litigation. There is considerable merit in a case such as this of the parties trying to reach agreement rather than risking expensive legal costs. There are two points that I have to consider in relation to that. The first, is whether I should strike out the

claim or grant order 24 judgment against the claimant because the claimant has not agreed at this stage to go to any ADR or mediation. Dealing with that, it was suggested, certainly in the statement of Mrs Meers, that the claimant ought to take the opportunity of making a formal complaint against the authority or going to the ombudsman. I do not think there was any responsibility on the claimant to take either of those courses of action. So far as mediation or ADR is concerned, I do, however think, that there is a good argument for saying that in a particular case such as this, that is a course of action which ought to be tried before the these matters come to court or at least at a stage in the proceedings before substantial costs have been incurred. Therefore, looking at the second point, I do not think it appropriate to strike out or grant summary judgment, and I reject those submissions by Mr Wightwick. But I do think it is appropriate to stay the case for a period on which I will hear counsel in due course to enable the parties to take such serious steps as they may be advised to resolve the dispute and I will come to the precise wording of that at a later stage. If I then summarise the order that I propose to make subject to certain matters on which I will hear counsel, they are as follows: 1. The application to strike out the claimant's case for either it being an abuse of the Court through not applying by judicial review, or, (b) not going to ADR is dismissed. 2. The application for summary judgment under CPR 24 for the same reasons, is dismissed. 3. There will be a stay of

those proceedings and I have adopted the wording of the Commercial Court for the wording of the stay, subject to any submissions that are made to me, and the wording of the Commercial Court is, "for the parties to take such serious steps as they may be advised to resolve this dispute" and I have added the words, "and in particular (a) to agree a schedule of work and (b) a timetable for such work. 4. I propose to give leave to the claimant to amend the particulars of claim in relation to paragraphs 5 and 6 and to reserve that pleading. I will hear counsel as to the time that is appropriate, and of course, there will be also leave to the defendant to file and serve an amended defence. I will now hear counsel as to whether there are any other submissions on those or other matters.