Neutral Citation Number: [2024] EW Misc 20 (CC)

Case no: GOOLS529

IN THE COUNTY COURT SITTING AT BRADFORD

Date: 4 July 2024

Before :

HHJ MALEK

- -

Between :

EXE	**Claimant**
- and -	
CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL	**Defendant**

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- -

Mr. Justin Levinson (instructed by **Enable Law**) for the **Claimant**
Mr. Steven Ford KC (instructed by **Kennedy Law**) for the **Defendant**

Hearing date: 20 May 2024

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APPROVED JUDGMENT

HHJ Malek :

Introduction

1. The Claimant was born on 28 October 2004. At all material times, the Claimant lived within the Defendant's area. She brings a claim for damages on the basis that during her childhood the Defendant's social services department was aware that she was suffering cruel, inhuman and degrading treatment such as contravened her rights under Article 3 of the European Convention on Human Rights 1950 ("Article 3") and that the Defendant should have taken reasonably

available measures which could have had a real prospect of altering the outcome or mitigating the harm.

2. The Defendant denies that this was so and, by application dated 5 April 2024, applies (i) to strike out the claim, and (ii) for summary judgment.

The Claimant's claim

3. Of particular relevance to the application is Paragraph 10 of the Claimant's particulars of claim which sets out the incidents (individually and cumulatively) upon which the Claimant relies in support of her case, which paragraph provides:

(a) On 1 January 2012, the Claimant disclosed that her mother's boyfriend, RO'M, had punched her in the arm and lifted her by the hair.

(b) On 20 and/or 25 October 2013, the Claimant was distressed at school. She disclosed that Mr RO'M had slapped her and encouraged her brother to also smack her. The Claimant described excessively punitive parenting by Mr RO'M.

(c) On 28 March 2014, the Claimant attended school with bruising. She disclosed that Mr RO'M had punched her, dragged her upstairs, pulled her hair and kicked her head. Medical evidence was consistent with the Claimant's account. The Claimant disclosed further assaults by Mr RO'M to the police, including that he had thrown shoes and a chair at her. The Claimant's older half-sister, M, confirmed that Mr RO'M was abusive towards the Claimant. The police resolved to take no further action.

(d) In May 2014, the Defendant determined that the Claimant was not at risk of physical abuse.

(e) On 23 March 2015, the Claimant disclosed that Mr RO'M punched her and that people did not believe her when she reported this.

(f) In June 2016, the Claimant was arrested for assaulting Mr RO'M. She was later exonerated on the basis that she had acted in self-defence.

(g) On 23 July 2016, the Claimant reported that her leg was scratched when Mr RO'M pushed her against a desk.

(h) On 10 January 2018, it was reported that Mr RO'M had grabbed the Claimant by the neck.

(i) On 4 March 2018, it was reported that Mr RO'M had slapped the Claimant's face.

(j) On 19 April 2018, the Claimant reported long standing physical and emotional abuse by Mr RO'M. The Claimant was accommodated by the Defendant pursuant to Section 20 of the Children Act 1989.

(k) On 30 July 2018, the court made an interim care order in respect of the Claimant.

The legal principles relevant to the application

4. Under CPR 3.4 the court may strike out particulars of claim if they disclose *"(a)... no reasonable grounds for bringing…the claim…"*

5. Practice Direction 3A (Striking Out a Statement of Case), at paragraph 1.2 gives examples of cases where the court may conclude that particulars of claim fall within CPR 3.4(2)(a) as:

"*those which set out no facts indicating what the claim is about…those which are incoherent and make no sense…[and] those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant*".

6. The court assumes that the facts stated in the particulars of claim are true and asks whether, on those facts, the claim is or is not bound to fail. A claim is not bound to fail if its resolution will depend on disputed issues of fact or if it raises novel or contentious issues of law. It is bound to fail if the pleaded facts disclose no legally recognisable claim against the Defendant (see generally White Book 3.4.2.).

7. Under CPR 24 the court may enter summary judgment for one party if the other has "*no real prospect of succeeding"* (CPR 24.3).

8. The correct approach to applications for summary judgment was summarised by Lewison J (as he then was) *in Easyair Limited (trading as Openair) v Opal Telecom Limited [2009] EWHClaimant339 (Ch)* at [15], as follows:

"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman [2001] 1 All ER 91*;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED& F Man Liquid Products v Patel [2003] EWCA Civ 472* at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED& F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550*;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63*;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if

the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725*".

9. In *AB-v-Worcestershire CC and another [2023] EWCA Civ 529* the Court of Appeal said that in order for an Art 3 "failure to remove" claim, such as in the present instant, to succeed the Claimant must show

10. "*...(1) a real and immediate risk (2) of the individual being subjected to ill-treatment of such severity as to fall within the scope of Article 3 of the Convention (3) that the public authority knew or ought to have known of that risk and (4) the public authority failed to take measures within their powers which, judged reasonably, might have been expected to avoid the risk*" [56].

The grounds for the application

11. The application proceeded before me on two grounds, as neatly summarised by Mr. Ford in his skeleton argument; namely: the threshold and breach issue.

Discussion

12. In order for the Defendant to succeed in its application it must show either that the Claimant has no reasonable grounds for bringing the claim (CPR 3.4) or has no real prospect of succeeding (CPR 24.3). There is, of course, a great degree of overlap; however, it seems to me that given the grounds upon which this application is advanced the "real prospect" test is slightly easier to meet for the applicant such that if it is not satisfied then there is no need for me to go on to consider the "no reasonable grounds" test.

13. If I am wrong about the above, then any reference in the rest of this judgment to "summary judgment" should be read, also, as a reference to "strike out". I would, of course, also adopt the reasoning given in relation to summary judgment as if it also referred to strike out.

14. In this instance the Defendant identifies two issues, in relation to which if I accept its arguments on either, I should conclude that the Claimant has no real prospect of succeeding on her claim.

The threshold issue

15. The first issue is whether the Defendant can show that the Claimant has no real prospect of succeeding on the threshold issue at trial. At trial the Claimant will have to show, on the balance of probabilities, that she had been subjected to ill-treatment of such severity so as to fall within the scope of Article 3.

16. Put another way, the question for trial on this issue will be whether the ill-treatment alleged to have been suffered by the Claimant reached a minimum level of severity so as to fall within the scope of Article 3. I remind myself that

that assessment, which will need to be carried out by the trial judge, is relative and depends upon all the circumstances of the case, principally the duration of the treatment or punishment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. Sexual or physical abuse of a child is capable of involving ill-treatment falling within the scope of Article 3 (see par 59 of *AB*). Further, the special vulnerability of children is relevant to the assessment as to whether the Article 3 threshold is met (see par 66 *SZR v Blackburn with Darwen Borough Council [2024] EWHC 598 (KB)*.

17. Mr Ford submits that the Claimant has no real prospect of establishing, at trial, that she suffered ill-treatment of such severity that Article 3 is engaged. He expands on that submission with reference to paragraph 10 of the Claimant's particulars of claim. He says that whilst this paragraph appears, at first blush, to identify 11 incidents only four of these are capable of being causally significant treatment for the purpose of Article 3:

i) Incident 10 (a) did not come to the Defendant's attention until after the Claimant was in care;

ii) Incident 10 (d) is part of 10 (c) and, in any event, not an example of ill-treatment;

iii) Incident 10 (f) is not an example of ill-treatment;

iv) Incidents 10 (h) and 10 (i) post-date the latest allegation of causative breach (which is "2017"), and regardless of this the Claimant was in fact removed from her mother's care shortly after incident (i). Furthermore, incident (h) is significantly overstated (alleging that RO'M grabbed the

Claimant by her neck, when in fact he grabbed her shirt collar when she went to hit him).

v) Incidents 10 (j) and 10 (k) are part of the factual narrative rather than separate incidents of ill-treatment.

18. That leaves incidents 10 (b), (c), (e) and (g). The Defendant's position in respect of these, is that:

i) None of these incidents involved sexual assault or serious physical assault.

ii) None of the incidents resulted in serious physical injury. One incident (10 (c)) appeared as if it might have done as it was thought that the Claimant had a lump on her head as a consequence, but on medical examination this was found not to be the result of any injury and Claimant was said to be fit and healthy.

iii) The incidents occurred at a rate of about one a year; they were not frequent.

iv) The incidents were not of a different order of severity to the incidents complained of in the case of *AB*; whereas the abuse alleged both in *Z-v-UK* and in *SZR* was on any view much more serious.

v) The context of these incidents was generally family argument and disagreement, parental difficulties with the teenage claimant and (at worst) overzealous chastisement (e.g. incident 10 (b)).

19. The first point to note is the limited utility to be derived from comparing the severity of the incidents in earlier cases and attempting to use individual cases (such as *AB*) as some sort of 'threshold yardstick' by which the seriousness of incidents might be measured at trial. The required threshold assessment is not only multi-factorial, but is fact specific (see *SZR* par 90). Additionally, cases on appeal (such as *AB*), at best, only tell us that the judge below did not err. They do not tell us whether or not the court above would, itself, have come to the same threshold assessment.

20. Next, taking only incidents (b),(c), (e) and (g) the ill-treatment complained of by the Claimant includes allegations that Mr. RO'M, an adult, had punched her, pulled her hair, kicked her in the head and thrown a chair at her when she was around nine or ten years old. Even if it is accepted at trial that the evidence suggests that these incidents are likely to have arisen in the context of familial difficulties and a rate of perhaps one a year, to categorise these particular incidents as simply overzealous chastisement is to considerably understate the case. The assault of a nine / ten year old girl by an adult male by punching, kicking in the head, pulling her hair and throwing a chair at her can fall, on any reasonable measure, to be categorised as serious physical abuse. Even accepting the evidence that these assaults did not result in serious injury it still remains the case that these were nasty assaults which are capable of properly being categorised as serious physical abuse. A judge, at trial, with the benefit of fully hearing all of the evidence and argument could well conclude that the Claimant succeeds on the threshold issue.

21. The Claimant, therefore, has every prospect of succeeding on the threshold issue; and, accordingly, the Defendant has failed to satisfy me that the Claimant has no real prospects of success on this issue.

The breach issue

22. At trial the Claimant will have to show that the Defendant failed to take measures within its power which, judged reasonably, might have been expected to avoid the risk (in this case of the incidents identified of occurring).

23. I remind myself that at trial:

   i) The positive obligation under Art 3 must not be interpreted in a way that imposes an "*impossible or disproportionate burden on the authorities, bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources...*";([62] of *AB*); and that

   ii) "*...it is recognised that the test for determining whether a public authority has violated Article 3, by failing to take reasonable measures within its powers to avoid a real and immediate risk of harm of which it knows or ought to known, is a stringent test that is not readily satisfied*" ([63] of *AB*);

   iii) The test to be applied to the conduct of social workers under Art 3 was not the common law negligence (Bolam) test and there was no need for liability expert evidence. The question was whether "*judged reasonably", either [defendant] had failed to take appropriate steps to*

avoid a real and immediate risk of Article 3 ill-treatment. That was a question for the court, not for expert evidence" ([82] of AB); and

iv) The court should remember that one of the aims of the Children Act 1989 was "*to ensure, so far as possible, that children can remain with their family. An application for a care order, with a view to removing the child from the care of the child's parents, is the last resort where the child is suffering, or is likely to suffer, significant harm...That does mean that children will remain if possible with their families. Society will have to tolerate very diverse parenting including the barely adequate and the inconsistent and children will have very different experiences of parenting and very unequal consequences as a result, as recognised in the case law summarised by Ward LJ in Re MA (Care Threshold) [2009] EWCA Civ 853 at 49 to 53*." ([78] of AB).

24. The Defendant argues that the Claimant has no real prospect of showing, at trial, that the Defendant failed to take measures within its power, which judged reasonably, might be expected to avoid the risk.

25. Mr Ford argues that the Defendant did, in fact, take such measures as could reasonably have been expected to avoid the risk. By reference to incident:

i) 10(b) Mrs. Kingsland's evidence is that the records show that the Duty Social Woker ("DSW") immediately commenced an investigation and that s/he concluded that the Claimant was reporting relationship difficulties and physical chastisement at home, the threshold for involvement had not been met and that school was to support the family at this time.

ii) 10(c) Mrs. Kingsland's evidence is that the documents show that:

a) the incident was investigated by the DSW on the day of referral,

b) that this investigation resulted in a Strategy Discussion ("SD") and a "s.47 investigation",

c) The SD concluded that there should be a medical examination and a decision was taken to accommodate the Claimant with her birth father pending the return of her mother (who was abroad at this time),

d) A medical examination was carried out by a Dr. Gorman who concluded that there were no injuries to the Claimant's head, but did find marks, bruising and scratching which would fit with the explanation of being grabbed there.

e) The Claimant and RO'M were interviewed by the police.

f) On her return the Claimant's mother confirmed that RO'M had left home and she agreed to prevent unsupervised contact between the Claimant and RO'M.

g) On 2 & 3 April a social worker visited and interviewed the Claimant's mother, RO'M, the Claimant and the Claimant's sister.

h) By 14 April 2014 the Claimant's mother had told the Defendant that she was struggling by herself and was asking if RO'M could return. The Defendant concluded that given the medical report,

if the police took no action and the Claimant's mother was willing to o-operate and undertake work with the family centre then reunification would be appropriate.

i) RO'M was thereafter allowed to return home and the first visit from the family centre support worker took place on 20 May 2014. Support continued to be provided until 1 December 2014 when the case was closed.

iii) 10(e) Mrs. Kingsland's evidence is that the records show that the Defendant investigated and concluded that "t*here are support services involved with the family and therefor an assessment by CSC would only refer to the services already involved with the family, therefore no further action is recommended"*.

iv) 10(g) Mrs. Kingsland's evidence is that the records show that the Claimant ran away from home on 19 November 2017 after an argument with her mother and RO'M, was accommodated for the night by the Defendant and that she disclosed to a "worker" a long scratch on her leg which she said came about as a result of RO'M pushing her against a PC desk, and then her case was transferred to the long term Child in Need team before finally being allocated to the Be Positive Pathway programme which involved supporting the family directly.

26. Mr. Ford submits that, in fact, in respect of incident 10(c) the Claimant carried out a model investigation. However, the difficulty with such a submission is that it is premised solely upon a review of the Defendant's records carried out by the Defendant's solicitor. Whilst I anticipate that the Claimant's recollection of

events (which took place over six years ago and whilst she was a child) is likely to be patchy, her evidence may well cast a very different light on the documents. Further, whilst unlikely and therefore an insufficient reason by itself, there also remains the possibility that other witnesses (who can speak to and clarify the documents) are also identified.

27. There is no claim made that a model investigation was carried out in relation to incidents (b), (e) and (g). What is said is that the Defendant took such measures as could reasonably have been expected to avoid the risk.

28. The difficulty with this submission is that when one starts to examine the investigations carried out and measures put in place by the Defendant (whether they are said to be model or just reasonable) in the sort of detail required, it begins to feel like a mini-trial. The point is amply illustrated, in my view, by looking at the detail that Mrs. Kingsland is obliged to go into in her witness statement in order to make good her points on this issue.

29. Further, taking incident (e), by way of illustration, a question for trial would be whether the decision to take no further action was a reasonable one to take in the circumstances. There is, clearly, not enough before me to decide that issue summarily.

30. Nor is it any argument to say that summary judgment should be provided on the basis that the Claimant has no prospect of successfully arguing that a care order would have been made or a court would have ordered the Claimant’s removal earlier than April 2018. Whilst I accept that it is the Claimant’s pleaded case that the Defendant should have applied for a care order on or shortly after April 2014 (or annually thereafter until 2017) the Claimant also pleads that the

Defendant failed to take "reasonable and available measures" as a result of which the Claimant suffered harm. As a result, the Claimant remains able to argue at trial that the Defendant had failed to take other reasonable measures, as an alternative. Establishing, therefore, that there was no real prospect of the Claimant being able to successfully argue that a care order resulting in removal would have been made does not provide the Defendant with the sort of "knock out" blow that, in my view, is required.

31. Finally, the Defendant seeks to draw a distinction between cases that are advanced only on a "cumulative basis" and those that are advanced on an individual and cumulative basis. The former might include cases of long-term persistent neglect which, it is argued, has a cumulative, deleterious effect on the Claimant over a number of years. The latter includes cases, such as the present one, where it is alleged that the identified incidents either by themselves or together represent ill-treatment that falls within the scope of Article 3. The point that is being made is that in cases advanced solely upon the "cumulative basis" the evidential basis is much more fluid which mean that there was likely to be a significant number of live issues of fact, rendering such cases inherently unsuitable for summary judgment.

32. For my part I do not find such categorisation helpful. I should prefer to work from first principles. The starting point for determining summary judgment applications in all cases (be they "failure to remove" cases identifying individual, cumulative or both type of incidents) remain the principles set out in *Easyair*. Therefore, if in a particular case resolving a particular issue requires a

mini-trial then that issue is likely, in my judgement, to be unsuitable for summary determination.

33. In summary, in this case the records are not, in themselves, sufficient to show that the Claimant has no prospect of showing that the Defendant failed to take reasonable measures available to it to prevent the harm complained off. The Claimant's evidence at trial will add further context. The breach issue can, therefore, only be determined at trail and is accordingly unsuitable for determination summarily.

Conclusion

34. For the reasons given I dismiss the application.

35. The parties are invited to agree any orders consequent upon this judgment and to file a draft in advance of this judgment being handed down. In the event that a draft order is agreed the parties and their representatives are excused from any further attendance. Alternatively, if agreement is not possible I shall hear submissions on any consequential orders following the formal handing down of judgment.

36. It remains only for me to, publicly, thank counsel for their invaluable assistance. In particular, I am indebted to them for the production of very helpful written skeleton arguments which have greatly assisted in the formulation of this judgment.