IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT
[2018] EWHC 1543 (Admin)

CO/5929/2017

Royal Courts of Justice
Tuesday, 12 June 2018

Before:

LORD JUSTICE GROSS
MR JUSTICE GREEN

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
ELIZABETH WEBSTER — Claimant

- and -

THE SECRETARY OF STATE FOR
EXITING THE EUROPEAN UNION — Respondent

MR H MERCER QC, MR G LEWIS & MS J McARTHUR (instructed by Geldards LLP) appeared on behalf of the Claimant.

MR T CROSS instructed by the Government Legal Department appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE GROSS:

1 This is a renewed application on the part of the claimant for permission to apply for judicial review. As characterised by the claimant, she challenges the defendant's ongoing conduct of the Brexit negotiations:

> "In the absence of a 'decision to withdraw' from the European Union that accords with the UK's constitutional requirements as required by Art.50(1) Treaty of the European Union."

2 Mr Mercer described this as a public interest challenge. We do not disparage the motivation for such challenges given the importance of the rule of law. However, the fate of the application in question does not turn on the motives of those making it.

3 Art.50 of the Treaty on European Union ("the Treaty") provides as follows:

> "1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
>
> 2) The Member State which decides to withdraw shall notify the European Council of its intention [...]."

4 The claimant's argument, in a nutshell, is that the United Kingdom has not taken a qualifying decision within Art.50(1). It has therefore not fulfilled a necessary condition precedent to notifying the decision under Art.50(2).

5 Accordingly, the claimant seeks a declaration:

> "[...] that the UK has not made a valid 'decision to withdraw' from the European Union in accordance with its constitutional requirements, as required by Art.50(1) of the Treaty on European Union, such that the defendant has no authority to conduct the withdrawal negotiations for which Art.50(2) of the TEU provides."

6 Supperstone J refused permission on the papers. He said this:

> "2) The claim is out of time. The claim form must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose, CPR 54.51.
>
> The challenge necessarily involves the contention that the Act of Notification of the UK's intention to withdraw from the EU was unlawful. Accordingly, her claim arose at the time the notification was given on 29 March 2017.
>
> The claim form was filed on 22 December 2017, nearly 9 months after the notification. No good reason has been an advanced for the extension of time.
>
> 3) Further, there has been undue delay which I consider would be detrimental to good administration, s.31(6(a) SCA 1981. The claimant seeks a declaration that the defendant's ongoing conduct of the negotiations is ultra vires. However, she sought no interim relief preventing the commencement of negotiations.

> 4) In any event, I consider the claim to be unarguable. In *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, the Supreme Court held that notification could lawfully be given by ministers if the Parliament providing prior authorisation for which it did. The notification being lawful, it follows that the challenge to the ongoing negotiations must fail."

7 This application is the latest in a series of similar applications advancing the same argument. In all cases the High Court has refused permission to apply and, in two, it certified that the claims are Totally Without Merit ("TWM"), pursuant to CPR 23.12(a).

8 Undeterred, the claimant has pursued the present renewed application.

9 The defendant's response is straightforward. First, on its merits, the claim is unarguable. Secondly, it is out of time under CPR 54(5)(1) and there is no good reason for extending time. Thirdly, permission should be refused under s.31(6)(a) of the Senior Courts Act 1981 ("the 1981 Act") on the basis that the claim has been brought with undue delay and that to grant the relief sought would give rise to the clearest possible detriment to good administration.

10 In my judgment, elegantly though the application has been presented, for which we are grateful to Mr Mercer QC, it is hopeless and, for that matter, Totally Without Merit. I agree with Supperstone J and all three of the defendant's answers to the claim. My very brief reasons follow.

The claim is unarguable:

11 The Majority Judgment in *Miller* said this at para.82:

> "We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation."

Later, the Majority Judgment continued as follows:

> "(121) [...] the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation.
>
> (122) What form such legislation should take is entirely a matter for Parliament [...] The essential point is that [...] the Act can only lawfully be carried out with the sanction of primary legislation enacted by the Queen in Parliament."

12 Legislation duly followed, in the form of the European Union (Notification of Withdrawal Act) 2017, ("the 2017 Act"), described in the Long Title as: "An Act to confer power on the Prime Minister to notify, under Art.50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU." S.1 is headed: "Power to notify withdrawal from the EU" and, s.1(1) reads as follows:

> "The Prime Minister may notify, under Art.50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU."

13 The change in the law with which *Miller* was concerned involved invoking Art.50 of the Treaty; in short, a decision to withdraw from the EU, accompanied by notification of doing

so. The legislation was intended to give effect to the decision in *Miller*. Its authorisation to the Prime Minister to notify under Art.50(2), plainly contemplated and encompassed the power to take a decision to withdraw and conferred that power expressly on the Prime Minister; there would indeed be no point in notifying under Art.50(2), absent a decision to withdraw under Art.50(1).

14 The matter is put beyond argument by the Prime Minister's letter of 29 March 2017, ("the Prime Minister's letter"), notifying the European Union of the United Kingdom's decision to withdraw under Art.50(2) of the Treaty. This letter in includes the following passage:

> "On 23 June last year, the people of the United Kingdom voted to the leave the European Union [...] that decision was no rejection of the values we share as fellow Europeans [...].
>
> Earlier this month, the United Kingdom Parliament confirmed the result of the Referendum by voting with clear and convincing majorities in both of its Houses for the European Union (Notification of Withdrawal Bill.) The Bill was passed by Parliament on 13 March and it received Royal Assent [...] and became an Act of Parliament on 16 March.
>
> Today, therefore, I am writing to give effect to the democratic decision of the people of the United Kingdom [...]."

15 Even putting the Referendum to one side, this is the language of <u>decision</u> not of <u>notification</u> alone, *in vacuo*, so to speak. The Prime Minister's letter itself contains a decision; backed by the authority of the 2017 Act, that decision complies with the requirements of *Miller*. No additional UK constitutional requirements remained to be satisfied. I reject the argument that additional formality was required under the UK constitution or that there was any requirement for the Art.50(1) decision to be in some separate document from the Art.50(2) notification.

16 In my judgment, the contrary is unarguable, so that the claim is doomed to fail on the merits.

17 For completeness, it is noteworthy that the claimant has nowhere identified the body which, on its case, should take the "decision" to withdraw, which it contends remains lacking.

18 For the avoidance of any doubt, we do not reach our decision on the basis of the defendant's submission that Art.50(1) confers no rights on individuals and we express no view on that submission.

<u>The claim is out of time:</u>

19 Mr Mercer put his argument under this head on three bases: (i) the negotiations were ongoing so that the claimant was not out of time; (ii) the defendant's case had remained unclear until November 2017, so that, again, the claimant was not out of time; (iii) given the public importance of the matter, there were good reasons for extending time.

20 This issue can be dealt with summarily. Notwithstanding the claimant's forensic focus on the continuing negotiations, it is a necessary part of the claimant's argument that the Prime Minister's letter was unlawful and ultra vires. It is to be underlined that the negotiations themselves are not justiciable. It follows that, as Supperstone J put it, the claim arose at the time the notification was given on 29 March, 2017. The Claim Form was filed on 22 December 2017. It was anything but prompt and well outside the 3 months' time limit contained in CPR 54(5)(1). There is no conceivable -- let alone good -- reason for extending

time. This is a paradigm instance of a claim needing to be made promptly and within the applicable time limit. We add only this that the facts and principles of both *R (on the application of) Burkett v London Borough of Hammersmith & Fulham* [2004] EWCA Civ 1342, LBC 2002/UKHL 23 2002 1 WLR 1593 and *Uniplex v NHS Business Services Authority* (ECJ) PTSR 1377 are far removed from the present case.

Detriment to good administration:

21 Finally, I agree with the defendant and Supperstone J that, using the language of s.31(6)(a) of the 1981 Act, there has been undue delay and that to grant the relief sought would give rise to the clearest possible detriment to good administration.

22 If the claimant was to pursue this claim (assuming, contrary to my view, that it otherwise enjoyed any merit), then it cried out for prompt pursuit, if need be, seeking interim relief. The notion that good administration would be assisted by the grant of permission here or that the negotiations would not be derailed is with great respect wholly unreal, not least given the timetable under which the negotiations are taking place.

23 It is difficult to conceive of a challenge more detrimental to the conduct of a major issue of national and international importance whatever political view is taken of the merits or the demerits of Brexit. The prospect of some later revisiting the UK's constitutional position by the CJEU is entirely speculative and does not remotely persuade me to take a different view.

Conclusion:

24 Put bluntly, the debate which the claimant seeks to promote belongs firmly in the political arena, not the courts. For all the reasons given the claim has no real prospect of success.

25 As already indicated, I regard it as hopeless and separately, but for the reasons already given, as Totally Without Merit. Though this is a judgment on a permission application, this judgment can be cited.

26 MR JUSTICE GREEN: I agree.

MR CROSS: My Lord, the Secretary of State is most grateful to the court with the speed with which it has delivered the judgment, notwithstanding our consciousness accords with the general rule under the *R (Mount Cook Land Ltd and another) v Westminster City Council* [2003] EWCA Civ 1346; [2004] JPL 470 principles.

LORD JUSTICE GROSS: (*The learned judge indicates that the court cannot hear counsel.*)

MR CROSS: I am sorry, my Lord, notwithstanding our consciousness accords with the general rule under *Mount Cook* principles that one doesn't ordinarily recover the costs when successful of preparing for and attending the oral hearing permission.

This is, in our submission, plainly one of those cases envisaged by *Mount Cook Land* in which it is appropriate for the court, we respectfully submit, to make such an order.

In relation to the question of costs, in principle, our submission is straightforward. Your Lordships have decided, in the language of the judgment, that the claim was "hopeless" and

indeed formed "Totally Without Merit". It is recognised that the hopelessness of the claim is expressly on the basis on which the court in an appropriate case may depart from the ordinary *Mount Cook* rule.

The further point to make and it is a short one, my Lord, is simply that this is not a case in which the claimant is unable because of funds of their own to meet any adverse costs awarded, the amount of costs that was in dispute, and what I'm asking for is some £4,000. But we understand from the claimant's Crowd Justice Funding Website that she has raised some £190,000 for the purposes of bringing this application.

LORD JUSTICE GROSS: Have you shown Mr Mercer your calculation of £4,000?

MR CROSS: My Lord, I have. I only just have, not having previously been aware of the outcome but I only just, I'll appreciate that Mr Mercer wants more time, of course, to have a look at that. It is very straightforward, my Lord.

LORD JUSTICE GROSS: No, no, no, no. We will deal, one thing we will not do is add to costs by taking time to deal with costs.

MR CROSS: No.

LORD JUSTICE GROSS: Mr Mercer.

MR MERCER: My Lord, it is not the, it is not the amount, which we might say on this case, it is the principle. *Mount Cook Land* it does not, in fact, that is the rule which is applied: the respondent knows that when they come along, if they come along on an oral renewal of the application for permission, that they don't get their costs.

That is the order of Supperstone J, is the final costs, p.69 of the core bundle, the costs paying the acknowledgment of service of the final order unless the claimant went as far as the

LORD JUSTICE GROSS: And is there a principle that coming along they should get their costs?

MR MERCER: Indeed, my Lord. That is *Mount Cook Land*.

LORD JUSTICE GROSS: (*The learned judge indicates that the court cannot hear counsel.*)

MR MERCER: *Mount Cook Land*. It's a case, I haven't got the case in court.

LORD JUSTICE GROSS: No.

MR MERCER: But I have never been successful in obtaining it for the Government.

LORD JUSTICE GROSS: You have never been successful getting it.

MR MERCER: I have never been successful in obtaining it for the Government and so there's no reason for today why the, well, it is well acknowledged. I mean it doesn't, it's not a question of: 'Oh well, it depends on the weight of the case,' it is simply the respondent comes along to these hearings at their own risk and it may be if that is to be, we do not have *Mount Cook Land* in court.

MR JUSTICE GREEN: Is it absolute?

MR MERCER: My Lord, from recollection, it is -- it is----

LORD JUSTICE GROSS: I mean it is usually applied.

MR MERCER: It is "absent unreasonableness. "Unreasonable conduct."

LORD JUSTICE GROSS: What if the claim is hopeless? I mean normally, *normally*, respondents don't turn up on renewed applications for obvious reasons.

MR MERCER: But even when they do, my Lord. I did one for the Government, for example, in *Compassion in World Farming[not supplied]* and there we were running, in fact, we were running a case on costs, just that the conduct had been unreasonable and run up costs.

LORD JUSTICE GROSS: But couldn't, what about the defendant's submissions for today. Those were very helpful.

MR MERCER: My Lord.

LORD JUSTICE GROSS: Should those not be recognised?

MR MERCER: My Lord, it is simply that the, as I say, it is the principle. It's not the costs of my learned friend's, I mean, as I say, the costs seem modest in the scheme of things. It is not that. It is the principle as to whether they should have them and, with respect, we have tried to run this in as clean a way possible. Not to take any points, well, we have taken the points we have taken.

LORD JUSTICE GROSS: H-mm.

MR MERCER: We are trying to cut away the extraneous.

MR JUSTICE GREEN: I mean; I do not have the authority. I have a recollection that unreasonableness is not the same as unarguable.

MR MERCER: Well, it is.

MR JUSTICE GREEN: I am not certain of that. All right.

MR MERCER: No, well, that is absolutely right. My learned friend----

LORD JUSTICE GROSS: Your junior is obviously knowledgeable in the case.

MR JUSTICE GREEN: And involves something about the conduct of the case rather than the merits of the argument.

MR MERCER: Yes, and I mean, and we really we do rely here on the fact.

LORD JUSTICE GROSS: Yes.

MR MERCER: That it isn't unreasonable to continue a claim in the absence of a clear position on the decision. Like every advocate, when my learned friend heard Green J articulating what subsequently went in the judgment, and, of course he grabbed it, as anyone would but that does not mean we can anticipate that he will grab it, or come up with an answer to----

LORD JUSTICE GROSS: So you mean if you had heard the judgment before the start of the case, you would have dropped it.

What about, just helping me with this: that is the cost of turning up but does *Mount Cook Land* deal with, for instance, written submissions?

MR MERCER: Yes, my Lord, *Mount Cook Land* is designed to give the respondent the costs of the acknowledgment of service and the statement of facts and grounds, sorry the statements saying, the summary grounds of resistance.

MR CROSS: My Lord, could I help? I do not mean to cut across Mr Mercer.

LORD JUSTICE GROSS: Nobody has brought us the authority. The only interesting question are the limits on the authority.

MR CROSS: My Lord, I am sorry the authority isn't before the court. It is, I assure the court, the entire leading, standard authority, the leading authority.

LORD JUSTICE GROSS: Yes. Yes, well, that is why we do not----

MR CROSS: The position is, I am sorry, as my Lord reaches across to the **White Book**, it is referred to a passage in the **White Book**, within the commentary to part 54. There are two parts to *Mount Cook*: one is that the ordinary position, which no one is challenging, is that we do get our costs of finally preparing the acknowledgment of service.

LORD JUSTICE GROSS: Yes.

MR CROSS: That's not what I'm applying for.

LORD JUSTICE GROSS: No.

MR CROSS: It is also true that in the general case reflecting the fact as your Lordship observes that the defendant doesn't not have to and sometimes doesn't turn up for the renewal hearing, they cannot ordinarily expect to get their costs on a costs following the event.

LORD JUSTICE GROSS: What is the reference to, in this case?

MR CROSS: Paragraph 76(1), Lord Clark.

LORD JUSTICE GROSS: What is the reference to this authority?

MR CROSS: It is 2003, my Lord, I can't

MR JUSTICE GREEN: Is it in the **White Book**, I've got the reference.

MR CROSS: It is in the **White Book**. It's in a commentary to one of The Rules in the **White Book**, a copy of which I don't have.

LORD JUSTICE GROSS: We have got lots of authorities that we don't need and not those that we do.

MR CROSS: I am very grateful to Mr Lewis, who can point out the passage. My Lord, Green J. It is 54.12.5.

LORD JUSTICE GROSS: What is the reference, because there may be a copy here.

MR MERCER: It is 2004. Two property and compensation reports. 405.

LORD JUSTICE GROSS: I doubt there will be a reference here.

MR MERCER: It is on page 1970 of the **White Book**, my Lord.

MR CROSS: Can your Lordships see, Green J, the last paragraph of p.1970.

LORD JUSTICE GROSS: Hang on, what page?

MR CROSS: Page 1970.

MR JUSTICE GREEN: Page 1970.

MR CROSS: It is the last paragraph. I entirely accept it is not the general position, but

LORD JUSTICE GROSS: It is the margins we are looking at.

MR CROSS: Indeed it is.

MR MERCER: It is the paragraph at the centre of the page, my Lord. Starting: "The Court of Appeal has also reviewed."

LORD JUSTICE GROSS: Yes, thank you. Could we just look at it?

MR MERCER: It is particularly the bottom paragraph of the page, my Lord.

LORD JUSTICE GROSS: (After a pause). Yes.

MR CROSS: It is A, my Lord, which are the factors, A to D factors specifically identified. I simply say this is a paradigm case of A.

LORD JUSTICE GROSS: Of A.

MR CROSS: Of course, I don't get them as of right, but that's the submission in the light of your Lordship's observations, specifically about hopelessness.

LORD JUSTICE GROSS: Mr Mercer.

MR MERCER: All I can say to that is the fact that it is the fact that in para.34 of his skeleton he does not pin his colours to the mast. So I would say that certainly up to the point of receipt of the skeleton, I mean, we would say that there's nothing up to there. The points of the costs of today, your Lordship may feel differently on that.

LORD JUSTICE GROSS: We will rise very briefly. Thank you very much.

(A Short Adjournment)

RULING ON COSTS

LORD JUSTICE GROSS:

1 Dealing with costs. In our judgment, the position is as follows:

(i) We did categorise the claim as hopeless. Accordingly, one of the factors in the authorities cited to us is satisfied.

(ii) The defendant's presence in court was helpful to enable us to dispose of the matter on a full consideration of the arguments both ways.

(iii) Mr Mercer is right to say that the arguments undoubtedly evolved over the course of the proceedings.

(iv) We think it is right that the defendant should get some award of costs, so recognising that pursuing hopeless claims may not be cost free. That is important in other cases.

2 However, we do not think the defendant should get its full costs or anything like that. The sum we fix, doing justice between the parties, is £1,500. Thank you very much.

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