CO/716/2018

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

[2018] EWHC 1825 (Admin)

Royal Courts of Justice

Wednesday, 20 June 2018

Before:

LORD JUSTICE SALES

B E T W E E N :

THE QUEEN

ON THE APPLICATION OF

RICHARDSON **Claimant**

- and -

(1) THE JUDICIAL EXECUTIVE BOARD

(2) THE LORD CHIEF JUSTICE OF ENGLAND AND WALES **Defendants**

MR A JONES QC (instructed by Keystone Law) appeared on behalf of the Claimant.

MR S GRODZINSKI QC (instructed by Blackstone) appeared on behalf of the Defendants.

J U D G M E N T

LORD JUSTICE SALES:

1 This is an application made orally for permission to apply for judicial review in relation to what are said to be two distinct decisions. The primary decision which is the target of the proposed proceedings is a decision reflected in a decision letter of 30 June 2016 from Burnett LJ, as he then was, in his then role as Chairman of the Judges' Council Library Committee. The decision related to a choice that it had been decided it was sensible to make to choose a single work of commentary on the criminal law which would be purchased out of the public purse to sit on the bench in criminal courts in England and Wales, so that there should be a

uniform arrangement in that regard. It was felt, after discussion in the Judicial Executive Board, that it would be sensible to standardise practice which had become rather disparate at the local level and make a choice between either having *Archbold Criminal Pleading, Evidence and Practice* or *Blackstone's Criminal Practice* on the bench in each court. No criticism is made of the decision to make a choice in that way. What is criticised is the way in which the process for making the choice was handled and the outcome of that process, which was to result in a choice that it would be *Blackstone's Criminal Practice* which would be procured for placement on the bench in the criminal courts in England and Wales.

2 The relevant decision letter, which reflects the primary decision under challenge, is that of 30 June 2016. The body of the letter states as follows:

"Every Crown Court in England and Wales is provided with a suite of books which sits on the bench with the judge. Within the suite is a copy of either *Archbold Criminal Pleading, Evidence and Practice* or *Blackstone's Criminal Practice*. The choice made across the country by the local courts themselves has resulted in some courts having *Archbold* and others *Blackstone*.

The Judicial Executive Board has recently decided that there should be a uniform approach across the criminal courts in England and Wales. After taking soundings from judges who sit in the Criminal Courts the decision is that for the coming year the choice would be *Blackstone*. The decision will be revisited in coming years. There can be no question of handing any publication a *de facto* monopoly in our courts.

My purpose in alerting you to this change is twofold. First, you will appreciate that the preponderance of view of the criminal judges at every level is that *Blackstone*, at least at the moment, is a more useful book. Secondly, we will let the profession know of the decision that has been made.

One of the reasons for seeking uniformity across the courts is to make life easier for practitioners who at present cannot be sure which book will be available readily to the judge, and thus for judges too.

In sounding out the views of criminal judges the concern was to elicit views about which of the books was preferred. It was not a money saving exercise. *Blackstone* was considered to be better written and provided better treatment of CPR and the Sentencing Guidelines.

As I am sure you know, judges have a personal allowance from which to purchases books. It is not uncommon for judges sitting in crime to have a personal copy of whichever of the texts does not sit on the bench in their courtrooms. Many judges will, no doubt, continue to ask for a personal *Archbold*. Furthermore, we all have access to it on-line.

I understand that the publication date for the next edition of Archbold is November 2016. Given that plans may be very far advanced, for that reason, if none other, it seemed right to give you early warning of the decision."

3 Unsurprisingly, Mr Richardson, the claimant, who at the time was the editor of *Archbold*, was upset by that decision. The decision was likely to have a commercial impact in relation to sales of *Archbold*. He, however, stayed his hand and did not take prompt action to challenge the decision reflected in that letter, even though significant aspects of the claim which he now seeks to bring were plainly known to him in June of 2016 or shortly thereafter. He gives an explanation for his delay in taking action in his witness statement; but plainly, if he wished to challenge and quash the decision to prefer the purchase of *Blackstone* for criminal courts for the forthcoming year, it was incumbent on him to take prompt action to challenge that decision before it was acted upon, as it clearly was going to be within a timetable of a few months.

4 It is said that part of the reason why he only brought his judicial review claim by instituting these proceedings on 15 February 2018 is that he acquired further material which would serve to bolster his claim in certain respects thereafter. It is said that he learned that a majority of judges in fact had indicated a preference for *Archbold* rather than *Blackstone*, contrary to the indication given in the letter of 30 June 2016. He plainly knew that by October 2017, because that claim is reflected in the letter before claim sent by him, dated 30 October 2017. It is a matter in dispute precisely when Mr Richardson acquired the information on which he seeks to rely in relation to this part of his claim, but it is clear that he had it by the end of October 2017.

5 It is also said that it was only in September 2017 that he learned that Sir Brian Leveson had been a member of the Judicial Executive Board ("JEB") and had participated in the decision to prefer the acquisition of *Blackstone* over *Archbold* which was taken at a JEB meeting on 23 June 2016. Sir Brian had participated in that meeting and decision even though he was an advisory editor in relation to *Blackstone.* Mr Richardson objects that there was unfairness in Sir Brian involving himself in this way. In relation to these matters, which are said to have improved the prospects of success for the claim and bolstered the claim which Mr Richardson wished to bring, again they were known to him long before he eventually brought these proceedings.

6 The basic rule in CPR Rule 54, as is well known, is that a claim for judicial review should be brought promptly and in any event, subject to exceptional circumstances, within three months.

7 Even having regard to the particular items of evidence which Mr Jones QC in the application today has emphasised to me as being significant, which I have referred to, the claim in relation to the decision reflected in the letter of 30 June 2016 was brought well after three months had passed after the acquisition of that further information. As I have already indicated, it was brought very late indeed, if goes back to the other parts of the grounds of challenge on which Mr Richardson now relies, in particular, the ultra vires and irrationality grounds set out in his grounds of claim.

8 So far as the challenge to the decision reflected in the decision letter of 30 June 2016 is concerned, I am not persuaded that there is a sufficient or indeed any good explanation for the delay that has occurred. It is said that Mr Richardson took some comfort from an indication from a letter from Fulford LJ that there was to be a review of the decision for the following year. That, however, is not something which can provide a good explanation for the delay in relation to a challenge to a quite distinct earlier decision, namely that reflected in the letter of 30 June 2016.

9 The particular matters referred to in Mr Richardson's witness statement as providing his reasons for wishing to delay in relation to bringing this claim are not such as, in my view, could possibly justify the delay that has occurred. As I have already indicated, it was obvious that if he wished to challenge the decision reflected in the letter of 30 June 2016, which was to be acted upon as the foundation for purchase of books for the courts for the forthcoming year, he needed to get on with it. I do not consider that the explanation put forward by him for the delay affords good grounds on the basis which it would be right to extend time for the bringing of this claim.

10 The second matter which it is said will be the subject of challenge in these proceedings is what is alleged to be a further intimation of a decision to be made for the coming year or periods, as set out in the Government Legal Department's letter of 14 December 2017 responding to the pre-action letter from Mr Richardson. It is said that in that letter it is indicated that a new process for reviewing the choice between *Blackstone* and *Archbold* is being put in hand. The particular sub-paragraph relied upon is this:

"Finally, we consider that any judicial review would in this instance be entirely academic. The decision taken has had effect for a significant period of time. Moreover, as we explain below, the judicial library and information service, which is the team of civil servants responsible for this area has begun preparing for the

planned review of the selection of Blackstone as the sole in-court textbook in readiness for the 2019 editions of both Archbold and Blackstone. This is in line with the letter of 30th June 2016 which said that the decision in respect to Blackstone would be revisited in coming years. Clearly, though the fact of a review cannot be taken as any indication as to its outcome."

11 Mr Jones submits that that is itself a decision which is open to review or is indicative of the procedure which is to be followed in the future in relation to the carrying out of such a review, and that it is to be inferred that it is going to be the same procedure as was followed in relation to the decision reflected in the letter of 30 June 2016.

12 In my view, that is not a tenable reading of this letter. The letter indicates that there will be a review of the position, as indeed did the letter of 30 June 2016. No objection is made by Mr Richardson to the proposal to carry out a review. But nothing determinate is said in the letter of 14 December 2017 either about what the outcome of that review will be or about the process by which it will be carried out. That all remains at large. Therefore, so far as the attempt to rely upon the letter of 14 December 2017 is concerned, I consider that any attempt to fashion a challenge is simply premature. No relevant decision had been taken even as to the processes which might be followed in relation to a future review. Accordingly, in my view, there is no relevant decision contained in the letter of 14 December 2017, as would be needed to bring judicial review proceedings in respect of it.

13 For these reasons I decline to extend time in relation to the challenge to the decision reflected in the letter of 30 June 2016 and decline to give permission for a challenge in relation to what is alleged to be a further decision in the letter of 14 December 2017, which in reality does not constitute a relevant decision at all.

14 However, since I have been pressed with arguments in relation to the substance of the case, and for completeness, I would also indicate that in my view the grounds of claim do not disclose a properly arguable case suitable to be taken forward in judicial review proceedings in relation to the substantive merits relied upon. Since I have refused permission for procedural reasons already, I propose to indicate only very briefly my views in relation to the substantive matters.

15 Four grounds of claim are relied upon. The first is an attack on the vires of the decision taken at the JEB meeting on 23 June 2016 to which the letter of 30 June 2016 relates. It is said that the decision was of the JEB itself. The answer given by the defendants is that the JEB exists as an informal body, not recognised in statute per se, to provide assistance and advice to the Lord Chief Justice, who is the relevant person exercising statutory functions so far as this matter is concerned. Although reference is made in the relevant documentation, and in particular the letter of 30 June 2016, to the decision of the JEB, the proper legal analysis is not excluded by what is said in that letter, namely that it was the Lord Chief Justice who took the final decision and who exercised relevant powers under s.7(2) of the Constitutional Reform Act 2005 to give effect to it. It is common ground that the eventual purchase of the books was always to be by the Lord Chancellor and was in fact carried through by the Lord Chancellor. What is in issue is the role and lawfulness of the decision by the Lord Chief Justice to advise the Lord Chancellor regarding which book to buy to place on the bench in courtrooms. That decision was lawfully taken by the Lord Chief Justice, as the defendants would say, with support and advice from the JEB.

16 Section 7(2) of the Constitutional Reform Act 2005, states that the Lord Chief Justice, as President of the Courts of England and Wales, has responsibility:

"(a) for representing the views of the judiciary of England and Wales to Parliament, to the Lord Chancellor and to Ministers of the Crown generally;

(b) for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales within the resources made available by the Lord Chancellor;

(c) for the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales and the allocation of work within courts."

17 The first question in relation to the Ground 1 ultra vires challenge is whether the relevant decision-maker in relation to the advice given to the Lord Chancellor as to the exercise of his power to acquire books was the JEB or the Lord Chief Justice. In view of the clear statements in the acknowledgement of service and the plain statutory framework, I consider that it is clear beyond argument that the relevant decision maker was the Lord Chief Justice.

18 The second question which arises is whether the Lord Chief Justice as a decision-maker had power to make the decision which is under challenge. In my view, the Lord Chief Justice plainly and beyond argument did have power to represent the views of the judiciary of England and Wales to the Lord Chancellor in the way that he did, so as to persuade the Lord Chancellor to purchase the books which in the event were purchased to be placed in courtrooms: see s.7(2)(a) and s.7(2)(b) of the 2005 Act.

19 The next ground relied upon is a ground based on the obligation of fairness. It is said that the conduct of the consultation which was carried out and is reflected in the decision letter of 30 June 2016 was unfair. In my view, however, the consultation was carried out in what was clearly an appropriate manner.

20 One sees the relevant consultation request for responses in an email dated 13 April 2016, calling for responses from judges, which made it clear what the nature of the decision in contemplation was and in relation to which the advice of the judiciary was being sought, namely whether judges in the Crown Court would be better served by having a copy of *Blackstone* rather than *Archbold* immediately available in court, to be purchased out of public funds for each courtroom.

21 I do not consider that there is any arguable unfairness in the way in which the request for responses was framed or in relation to the persons targeted for that consultation. The whole point of the consultation was to find out which of the two books judges considered courts would be most assisted by having available to them in court. So far as that question was concerned, it was unnecessary for the consultation to be directed at practitioners or persons other than those to whom it was directed. The consultation was specifically directed in that email to resident judges but it included the request:

"I would be grateful if you would consult your colleagues on these proposals and then let me have your response by Friday, 6 May so the results can be discussed at the next meeting of the Library Committee on 26th May."

22 It is also explained in the grounds of defence that High Court judges sitting in crime and Court of Appeal judges sitting in crime had their views canvassed as well.

23 I do not consider that there is any arguable case that there was any unfairness in relation to the conduct of the consultation exercise.

24 The next ground - Ground 3 - is an allegation of bias on the part of members of the JEB in making the relevant decision. However, as I have already indicated, it is clear in the context of this case that the actual decision-maker was the Lord Chief Justice. Further, so far as the complaints about indications of bias by members of the JEB are concerned, I consider that they are not properly arguable on the basis of the material that has been put forward. Plainly, the role being carried out by the JEB was not one of sitting as judges

in relation to court proceedings. The JEB was assisting the Lord Chief Justice to carry out what in this context is an administrative role in giving advice to the Lord Chancellor as to what appropriate arrangements should be made in relation to having materials available in court and, in doing that, representing the views of the judiciary to the Lord Chancellor.

25 In that context, I consider that the fact that individual judges on the JEB had been criticised by Mr Richardson as editor of *Criminal Law Week* does not afford grounds for asserting that any relevant risk of or appearance of bias arose in relation to the decision that had to be taken. Judges expect at various points in their careers to be subject to criticism from all quarters, including academic commentators. The mere fact they have been subject to criticism, including trenchant criticism, is not a basis for an inference - even arguably - that they have been improperly motivated in exercise of their functions and in giving advice to the Lord Chief Justice, as they did.

26 The same reasoning applies, in my view, in relation to the criticism of Sir Brian Leveson's role. So far as that is concerned, it is stated by the defendants that the critical decision-maker, namely the Lord Chief Justice, was aware of his position in relation to *Blackstone*. In any event, in my view it is not arguable that in the context of the decision which is under challenge in this case that there is any appearance of bias on the part of Sir Brian Leveson so far as the relevant decision in which he was involved was concerned. His position was unpaid, so he would derive no financial benefit from the decision in question. By reason of his judicial experience, he was well-placed to comment on the choice to be made. There is no proper inference that he would or might give advice which would be distorted by his position in respect of the general editorial board of *Blackstone*.

27 Further, in relation to this part of the case, the defendants rely upon section 31(3D) of the Senior Courts Act 1981. They say that even if there was an appearance of bias, it is clear that the same decision would have been taken. I consider that this is clearly correct as well. The JEB was offering advice which reflected the consultation responses which had come through from judges across the country. The Lord Chief Justice was entitled to assess the effect of the consultation responses as he did, as showing a preponderance of judicial views in favour of selection of *Blackstone* over *Archbold* (I deal with this in relation to Ground 4, in what follows). That being so, it was in practice inevitable that the selection of *Blackstone* would be made, to reflect the views of the judiciary which had been canvassed in the consultation exercise.

28 The fourth and final ground of claim is a complaint of irrationality in relation to the assessment of the responses to the consultation which had been carried out. It is said that it was irrational on review of those responses to select *Blackstone* over *Archbold*. However, I do not consider that it is properly arguable that the assessment of responses was irrational. I have reviewed the digest of the consultation responses from the resident judges. In addition, there were responses from the High Court and the Court of Appeal judges sitting in crime, as I have indicated. I do not consider that are arguable grounds for maintaining that an irrational assessment had been made of those responses such as would warrant the grant of permission in relation to this matter.

29 For these reasons which relate both to the procedural matters which I have referred to and to the substantive merits of the claim, permission to apply for judicial review is refused.

MR GRODZINSKI: My Lord may have seen that section D of our acknowledgement of service of 8 March 2018 sought an order for costs to be paid by the claimant and attached a schedule of those costs that was served in March on the claimant's solicitors.

LORD JUSTICE SALES: What do these costs relate to? I can see, in accordance with ordinary principles, you would normally be entitled to your costs of preparation of the acknowledgement of service. Are you asking for more than that?

MR GRODZINSKI: Two schedules of costs have been served. The first schedule, dated 8 March, is relating to the costs of the preparation of the acknowledgement of service in sum of £10,728 largely generated by the need to review carefully the significant amount of evidence that was served by the claimant in support of his claim. A further----

LORD JUSTICE SALES: I am just trying to identify the dates. Where does one get the dates for these two documents?

MR GRODZINSKI: It is 8 March 2018.

LORD JUSTICE SALES: Yes, but where do I see the date?

MR GRODZINSKI: The end of the schedule. It is the penultimate page of the schedule.

LORD JUSTICE SALES: That is 8 March one.

MR GRODZINSKI: There is another one that was served earlier this week of 18 March.

LORD JUSTICE SALES: 18 June.

MR GRODZINSKI: 18 June.

LORD JUSTICE SALES: I have copies of both of those.

MR GRODZINSKI: In accordance with ordinary *Mount Cook* principles we are entitled to the first set, which is in fact the largest set. The second set of costs, £5,146, are costs incurred since the AOS was filed. Ordinarily, of course, we would not be entitled to the costs of attending a permission hearing but in circumstances where the court has quite properly, in our submission, directed there to be a hearing rather than dealing with the matter on paper and directed a skeleton argument to be served by the defendants, it would be appropriate for those costs to be ordered as well. My Lord may detect the primary claim relates to the larger amount which we are entitled to on any view in accordance with *Mount Cook*.

LORD JUSTICE SALES: Is there a separate assessment or statement of the costs in relation to preparation of the skeleton argument?

MR GRODZINSKI: Yes, it is the one of 18 June.

LORD JUSTICE SALES: I see.

MR GRODZINSKI: That covers everything since the AOS was served.

LORD JUSTICE SALES: Does that not cover your attendance at the hearing?

MR GRODZINSKI: It does.

LORD JUSTICE SALES: In answer to my question, there is not a separate assessment in relation to the preparation of the skeleton?

MR GRODZINSKI: No.

MR JONES: My Lord, I would respectfully argue that the order for costs ought only to be on the ordinary basis, the *Mount Cook* basis of a response to the skeleton argument -- the response to the claim by way of acknowledgement of service of the summary grounds.

LORD JUSTICE SALES: That is in----

MR JONES: The first of the two.

LORD JUSTICE SALES: That would be costs summarily assessed in the sum of 10,728? Yes. I see.

Is there anything additional you want to say?

RULING ON COSTS

1 The defendants make an application for assessment of costs in their favour on a summary basis.

2 Two statements of costs are put forward, one relating to the preparation of what I have to say is a very full acknowledgment of service with summary grounds of defence in the sum of £10,728. The sum is so high, I am told, particularly because of the extensive evidence that was put forward by Mr Richardson in relation to his claim which required a considerable amount of work to analyse and the work that then had to go into preparing the summary grounds of defence.

3 A second statement dated 18 June 2018 is for the sum of £5,946 which relates to the costs of attendance at today's hearing and preparation of a skeleton argument for today.

4 In my view, the just and appropriate award of costs is an award of costs in the amount of the first statement of costs, namely £10,728. In my view, that is a reasonable and proportionate level of cost to award in favour of the defendants in this case. It is true that the court gave directions for there to be an oral hearing for today and for the defendants to serve a skeleton argument. Nonetheless, in my view given the high figure relied upon in relation to the summary grounds of defence, the extensive nature of that document and, by comparison, the rather limited nature of the skeleton argument that has been put in, essentially repeating the points in the grounds of defence, the overall justice of the case is that the costs should be awarded in what I regard as a substantial but also sufficient sum of £10,728.

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CERTIFICATE

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This transcript has been approved by the Judge.