



Neutral Citation Number: [2024] EWHC 3233 (KB)

Case No: QB-2021-003136

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 December 2024

Before :

Her Honour Judge Karen Walden-Smith, sitting as a Judge of the High Court

Between :

(1) THE JULIE RICHARDSON LIMITED	<u>Claimants</u>
(2) BANBURY HEIGHTS LIMITED	
- and -	
OXFORDSHIRE COUNTY COUNCIL	<u>Defendant</u>

SIMON BUTLER (instructed by **HCR LEGAL LLP**) for the **Claimants**
DORIAN DAY (instructed by **OXFORDSHIRE COUNTY COUNCIL LEGAL**
DEPARTMENT) for the **Defendant**

Hearing dates: 29 November 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 17 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ KAREN WALDEN-SMITH:Introduction

1. This is an application brought by the defendant, Oxfordshire County Council (“Oxfordshire CC”), to strike out the claim brought by the two claimant care homes known as the Julie Richardson Limited (“the Julie Richardson”) and Banbury Heights Limited (“Banbury Heights”) pursuant to the provisions of CPR 3.4(2)(a), alternatively for summary judgment pursuant to the provisions of CPR 24.2(a)(i) and (b). The claimants seek permission to amend their pleadings pursuant to the provisions of CPR 17. I am grateful to counsel for the claimants and the defendant, Mr Butler and Mr Day, for their helpful written and oral submissions.
2. The Julie Richardson is a nursing home registered to provide accommodation and personal and nursing care at its premises in Banbury, Oxfordshire. The CQC published a report in April 2020 rating the Julie Richardson as “outstanding”. Banbury Heights is another nursing home registered to provide accommodation and personal and nursing care at another premises in Banbury, Oxfordshire. The CQC published a report in December rating Banbury Heights as “good”.
3. Oxfordshire CC is a local authority responsible for adult social care services in accordance with the provisions of the Care Act 2014.
4. The application to strike out the claims brought for the payment of care home fees has been made on the basis that *“the claims are wholly misconceived in that they rest on the premise that OCC were obliged to meet all care costs from the time that JS [a care home resident at Banbury Heights] reached the financial threshold assessment”* and that *“the claim in respect of MH [a care home resident at The Julie Richardson] is also without foundation as the OCC were not obliged to make payment pending the financial assessment and her family were repeatedly requested to provide requisite financial information which they failed to do.”*
5. This claim commenced in the Oxford District Registry on 13 August 2021, with Oxfordshire CC filing a Defence on 20 September 2021. After a request for further information of the Defence and a Reply on 15 November 2021, the application to strike out was made on 24 November 2022. That application was met with an application to amend the Particulars of Claim on 6 December 2022 and a further application to strike out on 21 February 2023. A further request for further information was made by the claimants on 15 September 2023 and responded to on 13 November 2023.
6. The case was allocated to the multi-track with a costs and case management hearing listed to take place on 30 November 2022. The directions were drawn on 19 December 2022 and on 6 January 2023, HHJ Melissa Clarke directed that the application to strike out, and the cross-application to amend, be listed together for the first open date after 3 February 2023. The applications were in fact listed to be heard on 25 April 2023. It appears that listing did not take place and the applications were then listed to be heard on 27 July 2023 which was then adjourned until 3 November 2023 and then adjourned again until 17 November 2023 with a 1 day listing.

7. There was agreement between the parties to transfer from the District Registry to the King's Bench Division but the claim was not received by the KBD until 22 May 2024. The applications were then listed for hearing on 28 November 2024. Regrettably, therefore, it appears that no substantive progress has been made with respect to this case from the claim being issued in August 2021 for more than three years.
8. In the circumstances, although I delayed to give Counsel time to consider the making of further submissions in light of my raising two relevant authorities in the course of submissions, it was in my judgment important to give a prompt determination in order to enable the parties to either progress the claim, if the claimants succeeded on the application to amend, or have finality if the defendant succeeds.

The Factual Background

9. The two claims within these proceedings are brought together as the two homes have common management and the issues raised against Oxfordshire CC are the same with respect to the claim for costs arising from the care and residence provided respectively to Mrs Muriel Hayward and Mrs Joan Smith.
10. Julie Richardson provide specialist residential nursing care and dementia services, while Banbury Heights provides general residential nursing care services.
11. The claimants have, according to the principal executive director and majority shareholder of the two claimants, Charles Andrew Taylor, enjoyed a "*significant, constant and consistent commissioning and contractual relationship*" with Oxfordshire CC since 2003. In his statement dated 23 January 2023, this was referred to as being an "underlying contract" which is said to be based upon the defendant's statutory obligation to provide accommodation and care services for persons in need and for whom the defendant owes a statutory duty to provide such accommodation and services.

Mrs Hayward

12. Mrs Muriel Hayward was born on 31 March 1933. On 8 February 2015, Oxfordshire CC carried out a detailed "Overview Assessment" in respect of the needs of Mrs Hayward. The Overview Assessment concluded that:

"Mrs Hayward is not able to do anything for herself. She needs help with personal care, meal preparation, medication, attending to toilet needs, cleaning and shopping."

13. Oxfordshire CC were informed by Mrs Hayward's brother that her savings were below the threshold and that:

"She owns her property but she took out equity and brother will check with the solicitor if the house is still registered in her name. She will be treated as self-funding pending the outcome of the status of the registration of the property and financial assessment"

14. Mrs Hayward could not return home after being in hospital and she was initially placed in a NHS funded bed at Banbury Heights on 20 February 2015. After a period of assessment while at Banbury Heights it was agreed that as a consequence of her dementia she required the increased care that the Julia Richardson could provide her.
15. Payments for Mrs Hayward's placement at the Julia Richardson from 2 April 2015 until 31 October 2015 were made by Oxfordshire CC in October 2015. She was treated as a private patient from 1 November 2015 until 17 July 2017 when her brother, Mr Donovan, stopped paying her fees, Mrs Hayward's funds having been exhausted. The Julie Richardson continued to provide care and accommodation pending Oxfordshire CC undertaking and concluding the financial assessment. The alternative to the Julie Richardson continuing to provide care and accommodation would have been removing her from the care home.

Mrs Smith

16. Mrs Joan Smith was born on 20 January 1927. On 30 April 2018, was admitted to Banbury Heights. Her care was initially funded by NHS intermediate care until 19 July 2018. From 20 July 2018 Oxfordshire CC agreed to fund Mrs Smith's placement until 10 October 2018 under a 12-week property disregard. She was considered to be a private paying resident as she was the joint owner of a property. £50,000 was paid by Mrs Smith's family 5 May 2020 at which point it was said by Mrs Smith's family that she had passed through the financial threshold.
17. Oxfordshire CC undertook a financial assessment process and on 23 December 2020 confirmed that payment would be made from 5 May 2020 plus a further week's grace (namely back to 29 April 2020). As a consequence, Banbury Heights has not received payment from 11 August 2019. Oxfordshire CC have relied upon the fact that they did not receive notification until 5 May 2020 that Mrs Smith had reached the threshold for financial support. Banbury Heights continued to provide care and accommodation for Mrs Smith throughout. The alternative would have been to remove her from the care home.

The Proceedings

18. In summary, the issue between these parties is whether Oxfordshire CC has an obligation to pay for the care provided by the Julia Richardson and Banbury Heights which was not paid privately.

The First Particulars of Claim

19. In the first claim the claimants sought declarations against Oxfordshire CC that, having determined that both Mrs Hayward and Mrs Smith were eligible for care and support pursuant to the provisions of section 13 of the Care Act 2014 and The Care and Support (Eligibility Criteria) Regulations 2015 (SI2015/313):

- (i) Mrs Hayward was eligible for care and support under section 13 of the Care Act 2014;
- (ii) The provision of accommodation for Mrs Hayward was the necessary and appropriate conduit for practical and effective deliver of care and support for her needs;
- (iii) Oxfordshire CC was under a duty to assess Mrs Hayward's (and Mrs Smith's) financial resources and the ability of Mrs Hayward/Mrs Smith to pay towards the cost of meeting the needs for care and support;
- (iv) Oxfordshire CC was under a duty pursuant to section 18 of the Care Act 2014 to meet Mrs Hayward's/Mrs Smith's needs for care and support from 1 July 2017/11 August 2019 due to Mrs Hayward's resources not exceeding the financial limited;
- (v) Oxfordshire CC was under a duty to meet the costs of Mrs Hayward's/Mrs Smith's care and support from 1 July 2017/11 August 2019.

The Amended Particulars of Claim

- 20. In the amended Particulars of Claim, the claimants set out that Oxfordshire CC was under a statutory duty to meet the needs of Mrs Hayward and Mrs Smith, including accommodation in a care home, and that duty was fulfilled by Oxfordshire CC arranging for the Julia Richardson and Banbury Heights to provide adult social care services in the care homes (see paragraphs 1.7 and 1.8).
- 21. By paragraph 6.1 it is alleged that when Mrs Hayward and Mrs Smith were placed with into care at the Julie Richardson and Bramley Heights respectively, the needs could be met on behalf of Oxfordshire CC in accordance with the provisions of the Care Act 2014. On 26 February 2019 and 26 June 2018 respectively, Oxfordshire CC determined that Mrs Hayward and Mrs Smith met the eligibility criteria (paragraph 6.2) and the Julie Richardson and Bramley Heights provided the necessary services to Mrs Hayward and Mrs Smith (paragraph 6.5).
- 22. The essence of the amended Particulars of Claim is a claim in restitution, as set out in paragraph 7, namely:
 - “7.1The Claimant has had to cover the cost and expense of providing accommodation in a care home to Mrs Hayward and Mrs Smith. At the date Mrs Hayward and Mrs Smith met the eligibility criteria, the Defendant would have been under a statutory duty to meet their needs under section 18 to 20 of the 2014 Act.

7.2 The Claimant has met the needs of Mrs Hayward and Mrs Smith on behalf of the Defendant.

7.3 The Defendant has been unjustly enriched at the expense of the Claimants. The Defendant must make restitution of its unjust enrichment. The Defendant is primarily/100% responsible for meeting the needs of Mrs Hayward and Mrs Smith during the eligibility period.”

23. The claimants claim that Oxfordshire CC have been unjustly enriched for (i) the accommodation and care services provided to Mrs Muriel Hayward at the Julie Richardson for the period between 1 July 2017 and 15 May 2020 in the sum of £155,839 and (ii) the accommodation and care services provided to Mrs Joan Smith at Banbury Heights for the period between 11 August 2019 to 28 April 2020 in the sum of £39,300.

The Applications

24. Oxfordshire CC applied to strike out the claim brought by the claimants pursuant to the provisions of CPR 3.4 that the statement of case discloses no reasonable grounds for bringing the claim. Alternatively, Oxfordshire seek “reverse” summary judgment pursuant to the provisions of CPR 24.3 on the grounds that the claimants (a) have no real prospect of succeeding on the claim and (b) there is no other compelling reason why the case should be disposed of at trial.
25. The claimants seek permission to amend the Particulars of Claim to seek an equitable remedy against Oxfordshire CC, either by way of estoppel or restitution, as set out in the amended Particulars of Claim referred to above.
26. Pursuant to the provisions of CPR 17.1, the claimants require the permission of the court to amend. The court’s power to grant permission to amend is discretionary and the factors to be applied have been summarised by Lambert J. in *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB) (following *CIP Properties (AIPT) Limited v Galliford Try Infrastructure Limited* [2015] EHC 1345 (TCC) and *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm.)). The starting point is always the overriding objective as set out in CPR 1.1 and the need to deal with cases justly and at proportionate cost. Importantly the proposed amendment must be arguable, carry a degree of conviction, be coherent, properly particularised and supported by evidence that establishes a factual basis for the allegation (see *Kawasaki Kisen Kaisha Limited v James Kemball Limited* [2021] EWCA Civ 33).
27. While Oxfordshire CC first applied to strike out the original Particulars of Claim, in my judgment the proportionate way to deal with the various applications is to consider the amended Particulars of Claim and whether those have a prospect of success. If they do, such that the applications to strike out and for summary judgment could not succeed, then the case should proceed on those amended pleadings.
28. There will, of course, be issues with respect to the cost implications given the timing of the various applications. Those will need to be argued further, if not agreed between the parties, once my determination on the application to amend is known and whether this case should proceed to trial, is known.

29. The defendant denies the existence of any “underlying contract” between Oxfordshire CC and the claimant care homes. The statement of Richard Hodby, solicitor for Oxfordshire CC dated 9 April 2023 sets out that the idea of an underlying contract is “fictitious”: *“What is the point of the numerous specific funding agreements that exist between the Claimants and the Defendant is a general one is always in place? The lack of documentary evidence speaks for itself.”* Mr Hodby also states that there is no statutory obligation to pay fees to the claimant. He says as follows: *“The idea of a statutory obligation arises from mistakenly assuming that because the Defendant has obligations to individuals under the Care Act 2014 it therefore also has obligations to the homes that accommodate them. The Care Act creates no funding obligations.”*
30. Oxfordshire CC contend that permission should not be granted to allow the amendment to the Particulars of Claim as it introduces a new cause of action and *“a new raft of relief and the contentions are well beyond the remit of the original pleaded claim.”* The basis of the objection to the claim is said by Mr Dorian Day, Counsel to Oxfordshire CC, to be *“that there are no enforceable obligations and rights as between the parties that give rise to any cause of action and those declarations are otiose.”*

The Statutory Framework

31. The statutory framework of the care obligations of Oxfordshire CC, as the relevant local authority for both Mrs Hayward and Mrs Smith, is contained within the following provisions of the Care Act 2014:

Section 9 Assessment of an adult's needs for care and support

(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess—

(a) whether the adult does have needs for care and support, and

(bi) if the adult does, what those needs are.

(2) An assessment under subsection (1) is referred to in this Part as a “needs assessment”.

(3) The duty to carry out a needs assessment applies regardless of the authority's view of—

(a) the level of the adult's needs for care and support, or

(b) the level of the adult's financial resources.

(4) A needs assessment must include an assessment of—

(a) the impact of the adult's needs for care and support on the matters specified in section 1(2),

(b) the outcomes that the adult wishes to achieve in day-to-day life, and

(c) whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.

(5) A local authority, in carrying out a needs assessment, must involve—

(a) the adult,

(b) any carer that the adult has, and

(c) any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare.

(6) When carrying out a needs assessment, a local authority must also consider—

(a) whether, and if so to what extent, matters other than the provision of care and support could contribute to the achievement of the outcomes that the adult wishes to achieve in day-to-day life, and

(b) whether the adult would benefit from the provision of anything under section 2 or 4 or of anything which might be available in the community.

(7) This section is subject to section 11(1) to (4) (refusal by adult of assessment).

Section 13 The eligibility criteria

(1) Where a local authority is satisfied on the basis of a needs or carer's assessment that an adult has needs for care and support or that a carer has needs for support, it must determine whether any of the needs meet the eligibility criteria (see subsection (7)).

(2) Having made a determination under subsection (1), the local authority must give the adult concerned a written record of the determination and the reasons for it.

(3) Where at least some of an adult's needs for care and support meet the eligibility criteria, the local authority must—

(a) consider what could be done to meet those needs that do,

(b) ascertain whether the adult wants to have those needs met by the local authority in accordance with this Part, and

(c) establish whether the adult is ordinarily resident in the local authority's area.

(4) Where at least some of a carer's needs for support meet the eligibility criteria, the local authority must—

(a) consider what could be done to meet those needs that do, and

(b) establish whether the adult needing care is ordinarily resident in the local authority's area.

(5) Where none of the needs of the adult concerned meet the eligibility criteria, the local authority must give him or her written advice and information about—

(a) what can be done to meet or reduce the needs;

(b) what can be done to prevent or delay the development of needs for care and support, or the development of needs for support, in the future.

(6) Regulations may make provision about the making of the determination under subsection (1).

(7) Needs meet the eligibility criteria if—

(a) they are of a description specified in regulations, or

(b) they form part of a combination of needs of a description so specified.

(8) The regulations may, in particular, describe needs by reference to—

(a) the effect that the needs have on the adult concerned;

(b) the adult's circumstances.

Section 14 Power of local authority to charge

(1) A local authority—

(a) may make a charge for meeting needs under sections 18 to 20, and

(b) where it is meeting needs because Condition 2 in section 18 or Condition 2 or 4 in section 20 is met, may make a charge

(in addition to the charge it makes under paragraph (a)) for putting in place the arrangements for meeting those needs.

(2) The power to make a charge under subsection (1) for meeting needs under section 18 is subject to section 15.

(3) The power to make a charge under subsection (1) for meeting a carer's needs for support under section 20 by providing care and support to the adult needing care may not be exercised so as to charge the carer.

(4) A charge under subsection (1)(a) may cover only the cost that the local authority incurs in meeting the needs to which the charge applies.

(5) Regulations may make provision about the exercise of the power to make a charge under subsection (1).

(6) Regulations may prohibit a local authority from making a charge under subsection (1); and the regulations may (in reliance on section 125(7)) prohibit a local authority from doing so where, for example, the care and support or the support—

(a) is of a specified type;

(b) is provided in specified circumstances;

(c) is provided to an adult of a specified description;

(d) is provided for a specified period only.

(7) A local authority may not make a charge under subsection (1) if the income of the adult concerned would, after deduction of the amount of the charge, fall below such amount as is specified in regulations; and the regulations may in particular (in reliance on section 125(7)) specify—

(a) different amounts for different descriptions of care and support;

(b) different amounts for different descriptions of support.

(8) Regulations under subsection (7) may make provision as to cases or circumstances in which an adult is to be treated as having income that would, or as having income that would not, fall below the amount specified in the regulations if a charge were to be made.

Section 17 Assessment of financial resources

(1) Where a local authority, having made a determination under section 13(1), thinks that, if it were to meet an adult's needs for

care and support, it would charge the adult under section 14(1) for meeting at least some of the needs, it must assess—

(a) the level of the adult's financial resources, and

(b) the amount (if any) which the adult would be likely to be able to pay towards the cost of meeting the needs for care and support.

(2) Where a local authority thinks that, in meeting an adult's needs for care and support, it would make a charge under section 15(7), it must assess—

(a) the level of the adult's financial resources, and

(b) the amount (if any) which the adult would be likely to be able to pay towards the amount attributable to the adult's daily living costs.

(3) Where a local authority, having made a determination under section 13(1), thinks that, if it were to meet a carer's needs for support, it would charge the carer under section 14(1) for meeting at least some of the needs, it must assess—

(a) the level of the carer's financial resources, and

(b) the amount (if any) which the carer would be likely to be able to pay towards the cost of meeting the needs for support.

(4) Where a local authority, having made a determination under section 13(1), thinks that, if it were to meet a carer's needs for support, it would charge the adult needing care under section 14(1) for meeting at least some of the needs, it must assess—

(a) the level of the financial resources of the adult needing care, and

(b) the amount (if any) which the adult needing care would be likely to be able to pay towards the cost of meeting the carer's needs for support.

(5) An assessment under this section is referred to in this Part as a “financial assessment”.

(6) A local authority, having carried out a financial assessment, must give a written record of the assessment to the adult to whom it relates.

(7) Regulations must make provision about the carrying out of a financial assessment.

(8) The regulations must make provision as to cases or circumstances in which, if the financial resources of an adult who has needs for care and support (whether in terms of income, capital or a combination of both) exceed a specified level, a local authority is not permitted to, or may (but need not)—

(a) in a case where the adult's accrued costs do not exceed the cap on care costs, pay towards the cost of the provision of care and support for the adult;

(b) in a case where the adult's accrued costs exceed the cap on care costs, pay towards the amount attributable to the adult's daily living costs.

(9) The regulations must make provision as to cases or circumstances in which, if the financial resources of a carer who has needs for support or of the adult needing care (whether in terms of income, capital or a combination of both) exceed a specified level, a local authority is not permitted to, or may (but need not), pay towards the cost of the provision of support for the carer.

(10) The level specified for the purposes of subsections (8) and (9) is referred to in this Part as “the financial limit”; and the regulations may in particular (in reliance on section 125(7)) specify—

(a) different levels for different descriptions of care and support;

(b) different levels for different descriptions of support.

(11) The regulations must make provision for—

(a) calculating income;

(b) calculating capital.

(12) The regulations may make provision—

(a) for treating, or not treating, amounts of a specified type as income or as capital;

(b) as to cases or circumstances in which an adult is to be treated as having, or as not having, financial resources above the financial limit.

(13) The regulations may make provision as to cases or circumstances in which a local authority is to be treated as—

(a) having carried out a financial assessment in an adult's case, and

(b) being satisfied on that basis that the adult's financial resources exceed, or that they do not exceed, the financial limit.

Section 18 Duty to meet needs for care and support

(1) A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if—

(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,

(b) the adult's accrued costs do not exceed the cap on care costs, and

(c) there is no charge under section 14 for meeting the needs or, in so far as there is, condition 1, 2 or 3 is met.

(2) Condition 1 is met if the local authority is satisfied on the basis of the financial assessment it carried out that the adult's financial resources are at or below the financial limit.

(3) Condition 2 is met if—

(a) local authority is satisfied on the basis of the financial assessment it carried out that the adult's financial resources are above the financial limit, but

(b) the adult nonetheless asks the authority to meet the adult's needs.

(4) Condition 3 is met if—

(a) the adult lacks capacity to arrange for the provision of care and support, but

(b) there is no person authorised to do so under the Mental Capacity Act 2005 or otherwise in a position to do so on the adult's behalf.

(5) A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if—

(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence, and

(b) the adult's accrued costs exceed the cap on care costs.

(6) The reference in subsection (1) to there being no charge under section 14 for meeting an adult's needs for care and support is a reference to there being no such charge because—

(a) the authority is prohibited by regulations under section 14 from making such a charge, or

(b) the authority is entitled to make such a charge but decides not to do so.

(7) The duties under subsections (1) and (5) do not apply to such of the adult's needs as are being met by a carer.

The Issue

32. In both the cases of Mrs Hayward and Mrs Smith Oxfordshire CC therefore had a statutory duty to assess whether Mrs Hayward and Mrs Smith had needs for care and support and, if so, what those needs were (section 9).
33. Where, as in these cases, the local authority is satisfied that an adult has needs it must determine whether any of the needs meet the eligibility criteria and consider what could be done to meet the needs that meet the eligibility criteria, establish whether the Mrs Hayward and Mrs Smith wanted to have those needs met by the local authority and establish whether the adult is ordinarily resident in the local authority (section 13). Both fulfilled the eligibility criteria, had needs they wanted to be met and were ordinarily resident in the local authority.
34. Oxfordshire CC is required to meet the needs of both Mrs Hayward and Mrs Smith for care and support as they met the eligibility criteria, were ordinarily resident in the authority's area, the accrued costs do not exceed the cap on care costs and there is no charge pursuant to the provisions of section 14 (section 18). Section 14 creates the power to charge, but for the periods of time for which the Julie Richardson and Banbury Heights seek recompense, neither Mrs Hayward nor Mrs Smith had funds.
35. By virtue of sections 8, 13 and 18 of the Care Act 2014, Oxfordshire CC had a duty to provide for the needs of both Mrs Hayward and Mrs Smith.
36. The needs of both Mrs Hayward and Mrs Smith were directly provided by the Julie Richardson and Banbury Heights. Part payment was made for the care and accommodation by the respective families of Mrs Hayward and Mrs Smith, part was paid by the NHS (with respect to Mrs Smith), and part was paid by Oxfordshire CC. The shortfall in payment has been covered by the Julie Richardson and Banbury Heights – the alternative being to remove these two elderly and vulnerable women from their settled accommodation.
37. The Julie Richardson and Banbury Heights contend that Oxfordshire CC had the statutory obligation to provide for Mrs Hayward and Mrs Smith and that as that obligation has been provided by the care homes, they have a restitutionary remedy against Oxfordshire CC. The response of Oxfordshire CC is that the private provider bares the risk of the private funding running out and that the exclusivity principle as set out in *O'Reilly & Ors v Mackman & Ors* [1983] 2 AC 237 means that the proceedings

brought against Oxfordshire CC (whether in the original form of the Particulars of Claim or in the amended form) are abusive because any claim ought to have been brought in judicial review proceedings. Judicial review would have provided safeguards to Oxfordshire CC as a public authority, in particular the requirement for leave and a strict time limit for commencing proceedings. It has been argued by Mr Dorian Day, counsel for the Defendant, that the claimants in this case should not be permitted to bypass those safeguards by bringing a private law claim under Part 7.

38. Exceptions to the exclusivity principle are numerous. Where the principle issue is one of public law, but private law rights are involved and it would cause an injustice for a claimant to be required to use judicial review procedure, *O'Reilly v Mackman* exclusivity does not apply. This claim is based upon the allegation that Oxfordshire CC failed to deliver the care and accommodation to Mrs Hayward and Mrs Smith as it was obliged to pursuant to the MHA 1983 and allowed the Julie Richardson and Bramley Heights to shoulder that burden.
39. As I noted to counsel in the course of submissions, this issue was dealt with by the Court of Appeal in *Richards v Worcestershire CC, South Worcestershire Clinical Commissioning Groups* [2017] EWCA Civ 1998 where Jackson LJ, giving the judgment of the court, refused to allow an appeal against the decision of Newey J. (as he then was) refusing to strike out a private law claim in similar circumstances to this case. In *Richards*, the claimant, acting by his deputy and litigation friend, claimed repayment of the care fees which he had expended between 2004 and 2013. In his amended Particulars of Claim, the claimant maintained that his placement and various care services he had received were all after-care services that the defendant was obliged to pay pursuant to the provisions of section 117 of the Mental Health Act 1983. Amongst other defences, the defendant denied that the claimant had any legal entitlement to recover monies which had been paid out by the deputy either on the basis of restitution or unjust enrichment.
40. Newey J. identified two issues for consideration, namely:
- i) Is it in principle possible for the claimant to bring a restitutionary claim?
 - ii) If so, can the claimant's present claim be pursued otherwise than by way of judicial review?

He answered the first question yes. In his judgment, he referred to Goff & Jones, "The Law of Unjust Enrichment" (eighth ed.) paragraph 9-02, which suggests:

"If the defendant was enriched at the claimant's expense as a result of an operative mistake, then a restitutionary remedy should be available to recover the value of this enrichment, regardless of whether the benefit received by the defendant is the face value of money, the capital value or the use value of some other type of asset, the receipt of services, or the discharge of an obligation which the defendant owed to another party."

41. In the circumstances, Newey J found that it was at least seriously arguable that the defendants had been enriched at Mr Richards' expense. Similarly, in the circumstances

of this case, where the Julie Richardson and Bramley Heights have fulfilled the statutory duties of Oxfordshire CC at their own expense, it must be at least seriously arguable that Oxfordshire CC has been enriched at their expense.

42. In the more recent case of *Surrey County Council v NHS Lincolnshire Clinical Commissioning Group* [2020] EWCA Civ. 3550, Surrey County Council brought a private law claim in restitution against the Defendant, NHS Lincolnshire Clinical Commissioning, to recover sums paid by the Council for the costs of accommodation and care of JD, a young man with autism spectrum disorder. On behalf of the Council, it was said that a claim in restitution was established on the facts. Lincolnshire Primary Care Trust accepted that it acted unlawfully in refusing to accept commissioning responsibility for JD and thereby declining to assess JD's eligibility for continuing NHS care. As a result, the Council was left to fund the care of JD and the Council contended that left the NHS Trust unjustly enriched. It was said by the defendant that the claim was an entirely novel and unmeritorious private law claim, that it was fundamentally misconceived, being a private law challenge to a public law decision by the NHS Trust. Further, it was argued that, in any event, there could not be a viable claim in restitution because the primary care trust did not benefit from its public law error and the defence of change of position applied. Any money 'saved' was spent on others.
43. Thornton J found that "change of position" was potentially open to the defendant but that it had failed to discharge the evidential burden. More fundamentally, for the purpose of this claim, Thornton J found that Surrey Council had discharged a liability to JD, which but for the defendant's unlawful decision, would have been owed by the defendant. In doing so the defendant was enriched to the extent of the cost of the care fees paid by the Council to JD's care home.
44. The same applies to the circumstances of this case. Oxfordshire CC have been enriched to the extent to which the Julie Richardson and Banbury Heights have provided care and accommodation for Mrs Hayward and Mrs Smith, to whom Oxfordshire CC owed statutory duties.
45. This determination is based upon fundamental equitable principles which robustly protect the rights of those who fill in the gap that was created by Oxfordshire CC not fulfilling their statutory duty. The factor making the enrichment of Oxfordshire CC unjust is rooted in public law. The right to restitution and the obligation to make restitution are part of the private law of obligations. Just as there is no requirement that the time limit for judicial review applies to the tort of misfeasance in public office, so also it should not apply to claims seeking restitution against public bodies.

Conclusion

46. For the reasons set out in detail in this judgment, I am satisfied that it is strongly arguable that Oxfordshire CC have been unjustly enriched by reason of the Julie Richardson and Banbury Heights fulfilling the statutory duties of Oxfordshire CC. The Julie Richardson and Banbury Heights consequently have strong arguments for contending that they should be entitled to the declarations sought and recompense for the monies expended fulfilling Oxfordshire CC's statutory duties. In these circumstances, the claimants are given permission to amend to plead the claim in unjust enrichment. The claim in estoppel does not have the same strength, but it is an argument that has sufficient prospects of success that I will allow the entirety of the drafted

amendments. As a consequence the applications to strike out and for summary judgment cannot succeed and I dismiss those applications brought on behalf of Oxfordshire CC.