Recent developments in the law of unjust enrichment and their relevance to disagreements about funding of special educational provision

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In ***Surrey CC v NHS Lincolnshire Clinical Commissioning Group*** **[2020] EWHC 3550**, the High Court considered a novel claim in restitution which may be of relevance to those advising and representing local authorities, and in some situations potentially also individuals, in relation to the cost of educating individuals with special educational needs where there has been an unlawful public law decision.

The claim

In ***Surrey CC v Lincolnshire CCG***, it was common ground that the CCG had unlawfully refused to accept commissioning responsibility for a young adult with autism (**"JD"**). The costs of funding JD's care and accommodation had, as a result, fallen on Surrey County Council (**"the Council"**) until the CCG eventually accepted responsibility in 2015. The Council claimed that, because of this, the CCG had been unjustly enriched at its expense by avoiding the costs of JD's care. Such a claim by one public body against another, in relation to core services provided to a third party, had not been heard before.

The law of unjust enrichment

A claim in restitution for unjust enrichment has four key elements, as set out in ***Banque Financière de la Citee v Parc (Battersea) Ltd*** **[1999] 1 AC 221,** at 227:

a) The Defendant has been enriched
b) At the Claimant's expense
c) The enrichment was unjust
d) No defence arises

If those four elements are made out, the claimant has a right of recovery in restitution, which is a private law claim.

English law does not have a unified theory of restitution, rather, it develops incrementally. There are a number of categories which are recognised as giving rise to an unjust enrichment, and the courts will only extend those categories where there is justification for doing so.

The CCG's defence

The CCG submitted that the Council could not bring a private law challenge to public law decision by an NHS Trust. Rather, the Council should have proceeded by judicial review. To this end, the CCG invoked the exclusivity principle laid down in ***O'Reilly v Mackman*** **[1983] 2 A.C. 237**. This provides that it is generally contrary to public policy, and an abuse of process, for a claimant complaining of a public authority's infringement of their

public law rights to seek redress by a private law claim.

The CCG also submitted, in the alternative, that even if an unjust enrichment was established, it had a change of position defence on the basis that any money "saved" was not retained but spent on other patients.

The decision of the High Court

In response to the CCG's submission that the matter should have been dealt with by judicial review, the Court noted that the error in public law decision making had been admitted by the CCG and it was, on the facts, highly likely that if the CCG had assessed JD they would have found that he had a primary health care need, making them liable to pay for his care. Accordingly, the Court was not required to delve into specialist decision making when determining the claim. Additionally, there were no wider issues of public interest at play that would have been better served by a judicial review. Accordingly, the Council had acted appropriately by bringing a claim in restitution.

Further, the Court found the elements of unjust enrichment to be made out: the CCG was indeed enriched by the fact that the Council took on liability for JD's care, leaving it free to spend the funds that would have been spent on JD on other patients. The Court considered that the CCG had failed to discharge the evidential burden required to establish the change of position defence, and determined that the categories of unjust enrichment should be extended so as to allow the Council to succeed.

Potential Consequences for Education Law

Restitution for costs incurred by public bodies

Children and young people with highly complex special educational needs generally also have co-existing social care and health needs of equal complexity. These areas of need tend to interrelate with each other. For those with an Education, Health and Care Plan (**"EHC Plan"**), this document will set out the individual's needs in these areas. Disputes can arise as to whether provision required to meet these needs is properly classified as educational, health or social care provision. Section 21(5) of the Children and Families Act 2014 provides that:

"Health care provision or social care provision which educates or trains a child or young person is to be treated as special educational provision (instead of health care provision or social care provision)."

Determining whether provision falls into one category or another is not always easy, and requires an evaluative approach (see ***London Borough of Bromley v SENT*** **[1999] ELR 260** and, more recently, ***East Sussex County Council v TW*** **[2016] UKUT 528 (AAC)**). Similarly, it is also well established that the dividing line between health care and community care services cannot always be precisely drawn, and will depend on the facts and circumstances (see ***R v North and East Devon Health Authority, Ex p Coughlan*** **[2001] QB 213**).

A good example of the difficulties faced when determining whether something is health or educational provision is the case of ***East Sussex County Council v JC*** **[2018] UKUT 81 (AAC)**, where the Upper Tribunal considered the question of whether a powered wheelchair provided to a young man with cerebral palsy was special educational provision – and did not rule out the possibility that it could be. In similar vein, special educational placements offering a waking day curriculum (which in extreme cases might include residential provision over 52 weeks per year) in reality provide services to children and young persons which meet needs across the spectrum of education, care, and health. Ultimately, if a local authority accepts (or the First-tier Tribunal determines) that these services are needed and that they educate or train, then in law they will be treated as educational provision.

This has an important consequence for the relevant local authority, in that the duty to secure special educational provision under section 42 of the Children and Families Act 2014 is absolute and non-delegable. There is no means threshold which applies to it. Under section 63 a local authority must also pay any fees in respect of education and training provided to a child or young person, including any fees associated with board and lodging. Furthermore, educational provision cannot be easily reduced if it is written into the EHC Plan. Educational placements with a residential element tend to be very costly, and the lifespan of an EHC Plan extends to the age of 25 meaning that an adult for certain purposes (for example, under the Care Act 2014) could still be entitled to special educational provision under an EHC Plan for a significant period. It is worth recalling that under the Education Act 1996, the entitlement to a Statement of Special Educational Needs did not extend this far.

By reason of the above, disputes as to how provision should be funded can and do arise between education, care and health partner bodies - despite the Children and Families Act 2014 encouraging an integrated approach to the delivery of these services (see sections 25-26). There are many contexts in which this can arise. For example, where a local authority forms a view that a form of provision is properly characterised as health provision because it does not educate or train. This could relate to equipment (note the wheelchair example mentioned earlier, although children and young people with SEN can have extensive equipment needs beyond this), but also to therapeutic interventions such as occupational therapy or physiotherapy (local authorities often argue, in the context of First-tier Tribunal proceedings, that particular therapeutic interventions are health related instead of educational).

As the SEN Code of Practice recognises at paragraph 3.9, services covered by joint commissioning arrangements - and in relation to which disagreements as to funding responsibility have could arise - are potentially very broad. They may include:

"… specialist support and therapies, such as clinical treatments and delivery of medications, speech and language therapy, assistive technology, personal care (or access to it), Child and Adolescent Mental Health Services (CAMHS) support, occupational therapy, habilitation training, physiotherapy, a range of nursing support, specialist equipment, wheelchairs and continence supplies and also emergency provision. They could include highly specialist services needed by only a small number of children, for instance children with severe learning disabilities or who require services which are commissioned centrally by NHS England (for example some augmentative and alternative communication systems, or health provision for children and young people in the secure estate or secure colleges)."

Where such provision is inherently linked to the choice of educational placement, as is often the case where the placement is chosen because of an integrated approach taken towards provision delivery, then a local authority might justifiably raise a question as to whether it should be solely responsible for the funding of the placement, if in reality that placement delivers things which are not (at least exclusively) educational.

The difficulty here, of course, is that because something can be characterised as a social care or health need does not mean that it is not also, or instead, an educational need. There can be legitimate arguments both ways as to which side of the line something should fall applying section 21(5). In circumstances where a Tribunal has determined that all the provision required to meet need is educational, there would realistically be no scope for a local authority to go behind this and argue that another public body should contribute to the cost. But there may be situations where historically an appeal has not been brought, or where such a ruling ever made, or where the child or young person's

needs have developed and the decision has become out of date. There may also be situations where (as was the situation in ***Surrey CC v Lincolnshire CCG***) a local authority has essentially assumed responsibility to meet needs as educational provision but another public body, such as a CCG, has not fulfilled its own assessment obligations and the local authority later wishes to challenge the status quo. Here, following ***Surrey CC v Lincolnshire CCG,*** restitution could provide a route of redress in relation to historic expenditure.

However, such cases would not be straightforward, and the facts would need to be considered carefully on an individual basis. It is clear that such disputes would need to be ventilated outside of the scope of any proceedings before the First-tier Tribunal about the content of an EHC Plan (beyond the application of section 21(5), that is). This is for two main reasons. First, in ***East Sussex County Council v KS*** **[2017] UKUT 273 (AAC)** it was recognised that a local authority cannot be ordered to deliver and pay for health provision, in the form of fees relating to clinical provision at a special school, because it has no statutory duty to do so. Therefore, if something is properly described as health provision, then the Tribunal cannot order a local authority to provide it, nor can it order a CCG to do so. It should, of course, be noted that currently the Tribunal would be able to make recommendations as to health care provision under the Special Educational Needs and Disability (First-tier Tribunal Recommendations Power) Regulations 2017 (this was not available in ***KS***). Whilst this is an important tool which has generally been welcomed, it is only of use to appellants and it has its limitations. Second, it is ultimately not the function (at least directly) of the Tribunal to resolve conflicts between public bodies. As was held in ***NHS West Berkshire CCG v First-tier Tribunal*** **[2019] UKUT 44 (AAC)**, a CCG has no right to participate as a party in proceedings before the Tribunal even where its jurisdiction to make health recommendations is engaged.

Restitution for costs incurred by private individuals

While ***Surrey CC v Lincolnshire CCG*** has potentially set a clearer path for public bodies to succeed in claims in restitution against one another, it is worth noting that restitution may also be of use to individuals in claims against public bodies in the context of payment for educational services provided to children and young person with SEN. For example, where a local authority has not paid the fees for an educational placement which has been specified in an EHC Plan, and it has instead been left to the parents of a child or young person to fund it. Here there would arguably be a clear case for the return of those monies to the parents by the local authority, which had not been fulfilling its statutory duty to deliver the EHC Plan. This is likely to be a relatively unusual situation, but the authors of this article have encountered such cases. Although not an exact analogy, some parallels can be drawn with ***Richards v Worcestershire City Council & South Worcestershire CCG*** **[2017] EWCA Civ 1998**. Here, the Court of Appeal accepted that a restitution claim should not be struck out where a claimant alleged that services he had paid for (using damages obtained from a personal injury award) should have been provided by the local authority pursuant to section 117 of the Mental Health Act 1981.

Another situation where restitution might assist is where a local authority has breached a statutory duty by failing to undertake an EHC needs assessment pursuant to section 36. If costs have been incurred privately for a period in order to meet needs pending the outcome of a belated assessment by a local authority, which concludes that a child or young person has SEN which should be met via an EHC Plan, then there may be a case for seeking restitution of those sums. This would be a very fact dependent question, and as a starting point a comparison would need to be made between the privately funded provision and the provision which is eventually specified in the EHC Plan.

There can also be cases before the First-tier Tribunal where appellants set out a robust evidential case for a particular educational placement at the outset, and the respondent local authority chooses to resist the appeal only to concede it at a very late stage in the proceedings. Particularly for cases concerning high complexity needs, where specialist placements have limited availability and are popular, in some cases appellants cannot guarantee that their placement of choice will still be available by the time of an appeal hearing. Sometimes it is necessary for them to accept a placement offer prior to an appeal hearing, and incur the cost privately in the interim. In other situations, appellants choose to do so because they want to access the advantages of the placement as soon as possible. In either case, appellants make a personal financial sacrifice and can feel mixed emotions after they win an appeal (whether or not though a concession) – pleased with the outcome, but frustrated that it was not obtained sooner thus avoiding private expenditure. Another factor here is that late-notice postponements and general delays in the Tribunal system can prolong the appeal timeline (despite this, it has to be said that the First-tier Tribunal is a relatively efficient jurisdiction).

Until a local authority accepts by consent that it must pay the associated fees of a placement by amending Section I of the EHC Plan, or a Tribunal orders this, strictly speaking the legal duty for it to do so has not arisen. This leaves appellants with limited options for redress in relation to past expenditure – despite it sometimes being clear that the local authority should have accepted its duty much sooner. It is also worth recalling that it is relatively rare for the Tribunal to award costs due to unreasonable conduct, and when awarded costs are generally modest (and, in any event, would not cover placement fees). The application of restitution in this context will be highly fact dependent, and is unlikely to extend sufficiently far in the vast majority of these cases. A decision by a local authority to resist an appeal at the outset of proceedings, but concede it at a later point in response to a material change of circumstances, will usually be reasonable based on the evidence in existence at the material time. However, this might not always be the case, and in the right set of circumstances restitution could provide an answer.

Conclusion

The situations in which a private law claim for restitution will arise in the context of funding of special educational provision will be highly context specific and are likely to be rare. However, there may be situations where viable claims arise, and so those practising in education law should be aware of the recent case law developments. ***Surrey CC v Lincolnshire CCG*** shows that the courts will in principle be willing to entertain such claims, even where the dispute is between public bodies.

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