

## **Jones v Powys Local Health Board and another [2008] All ER (D) 234 (Nov)**

Queen's Bench Division

EnglandandWales

Plender J

20 November 2008

**Practice – Striking out – Abuse of process – Negligence – Claimant administrator commencing proceedings against defendant local health boards for failing to pay deceased's care and accommodation costs in nursing home during period of residence – Defendants contending abuse of process on basis that challenge to their decisions or actions or to decision of All Wales Special Review Panel should be by way of judicial review or by means of complaint to Public Service Ombudsman for Wales – Whether abuse of process.**

### **Abstract**

*Practice – Striking out. Queen's Bench Division: A claim for restitution or negligence based on private law was struck out as an abuse of process where the institution of the proceedings by writ rather than by application for judicial review had deprived the defendant local health board of protection that they would have enjoyed in an application for judicial review, so as to be inconsistent with the just conduct of the proceedings.*

### **Digest**

The claimant was the administrator of the estate of his father, the deceased. The claimant maintained that throughout the period from the deceased's admission to a nursing home on 2 February 2000, to his death on 8 January 2006, the deceased was entitled to free home care and accommodation. He alleged that the first defendant (the board) should have conducted a multidisciplinary assessment of the deceased's entitlement on his admission to the nursing home or subsequently. He further alleged that if that had been done the deceased would have been found to be entitled to free care and accommodation and the defendants would have accordingly paid for those costs. He commenced proceedings against the defendants, seeking an appropriate refund for the sums he alleged he had paid in respect of the deceased's care and accommodation costs. The defendants applied to strike out the claim.

They denied that the deceased was entitled to receive free home care and accommodation in the period at any time prior to 13 November 2005, relying upon a decision made by the All Wales Special Review Panel (the panel), recommending that the claimant should only receive reimbursement of the fees paid for the deceased's home care and accommodation from 13 November 2005 until his death. They submitted that the instant proceedings was an abuse of process because any challenge to their decisions and actions, or to the decision of the panel, should have been made by way of judicial review, alternatively by means of a complaint to the Public Service Ombudsman for

Wales. An issue arose as to whether the claimant's case had amounted to a challenge to a public law action or decision, rather than an attempt to assert some private right which could not be determined without an examination of the validity of a public law decision.

The court ruled:

A challenge to a decision of the local health board regarding the costs of residential care and accommodation should be commenced by way of judicial review.

The institution of the instant proceedings by writ rather than by application for judicial review had deprived the board of protection that they would have enjoyed in an application for judicial review, so as to be inconsistent with the just conduct of the proceedings. A civil action in the High Court was not the optimum way of resolving disputes where the claimant had previously referred the matter for reconsideration by the board, which had seized the panel, to whose decision the claimant had taken exception. The panel was a specialist body, experienced in the determination of the needs of a patient for continuing health care. That had meant that it was well placed to distinguish between those services which should be supplied by the Secretary of State for Health and those that were 'merely ancillary to the provision of accommodation and of a nature which was expected to be supplied by a local authority whose duty it was to supply social services'. Whereas the panel had contained members with clinical experience, the High Court was not so composed. The panel had been able to dispose of cases more rapidly and much more cheaply than the High Court. The imposition of very substantial costs on a local health board was liable to reduce the sums available to it for clinical purposes; and the threat of such costs was liable to cause it to compromise cases that it had not otherwise considered meritorious (see [37] - [39] of the judgment).

Accordingly, the claim would be struck out.

Alison Foster QC and Fenella Morris (instructed by Morgan Cole Solicitors & MLM Cartwright) for the claimant.

Richard Gordon QC and Robert Weir (instructed by Hugh James Solicitors) for the defendants.  
Tunde Gbadamosi Barrister.

## **Judgment**

QUEEN'S BENCH DIVISION

MR JUSTICE PLENDER

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

THE HONOURABLE MR JUSTICE PLENDER :

The Issue

1 By action instituted by writ, this Claimant sues, in his own capacity and as administrator of the estate of his father Mr Evan Jones ("the deceased"), for restitution of the sums paid by his father to the Cwrt Enfys nursing home in the final six years of his life or for damages for the same amount. The claim is expressed as an action for restitution or negligence based on private law.

2 The Claimant avers that throughout the period from his admission to the nursing home on 2nd February 2000 to his death on 8th January 2006 the deceased was entitled to free home care and accommodation. The Claimant avers that the Defendants (or the Iechyd Morgannwg Health Authority, to whose liabilities the first Defendant has succeeded) , should have conducted a multi-disciplinary assessment of the deceased's entitlement on his

admission to the nursing home or subsequently. He claims that if this had been done the deceased would have been found to be entitled to free care and accommodation and the Defendants would have paid for it; but the Claimant or the deceased paid for that care and the Claimant is entitled to an appropriate refund.

3 The Defendants deny that the deceased was entitled to receive free home care and accommodation in the period at any time prior to 13th November 2005; and rely on a decision made by the All Wales Special Review Panel ("AWSRP") recommending that the Claimant should receive reimbursement of the fees paid for the deceased's home care and accommodation only from 13th November 2005 until his death. Further the Defendants deny "that the Claimant is entitled to mount a collateral challenge to the decisions and actions of the [...] Defendants and/or to the decision of the All Wales Special Review Panel by means of these proceedings." The LHBs submit that "Any such challenge ought to have been made by way of judicial review, alternatively by means of a complaint to the Public Services Ombudsman for Wales, and the present proceedings are an abuse of process" and it invites the court to stay these proceedings under CPR 1.4(2)(e) "so that the Claimant may pursue his claim for reimbursement of the sums paid in respect of Evan Jones' residential care home charges under the specialist regime laid down by the Welsh Assembly, i.e. by way of complaint to the Public Services Ombudsman for Wales".

4 By Order dated 2nd April 2008 Eady J directed that the Defendants' application to strike out the claim for abuse of process should be listed for a separate hearing; and that otherwise the claim should be stayed. So I have to determine whether the present proceedings should be struck out as an abuse of process. I am also invited to consider whether they should be stayed pending the outcome of a complaint to the Ombudsman for Wales.

5 For the reasons set out below I have concluded that these proceedings should be struck out as an abuse of process.

#### The Pleadings

6 By a generally endorsed writ issued, I am told, before 26th January 2007, the Claimant claimed against the Defendants damages in restitution, negligent misstatement or negligence. On 26th January 2007 the Claimant was informed that AWSRP were unable to find that the deceased met the eligibility criteria for free accommodation and health care save for the period from 13th November the deceased's death. The parties had agreed that the Claimant might delay supplying his Particulars of Claim so that the deceased's case could proceed through the internal review procedure of the LHB, including (so it appears) review by the AWSRP. The Claimant supplied his Particulars of Claim a little more than three months after the decision of the AWSRP.

7 By his Amended Particulars of Claim the Claimant sets out the outline facts and continued by pleading that:

- (i) The Defendants should have assessed the deceased for his entitlement to continuing NHS healthcare periodically and, in particular, following those occasions when he was admitted to hospital; but no such multi-disciplinary assessment was made during the relevant period.
- (ii) Had the Defendants assessed the deceased's entitlement during the relevant period, the first Defendant would have applied the Iechyd Morgannwg Health Policies and Eligibility Criteria ("the 2001 criteria"); and the Second Defendant would have applied the Neath Port Talbot Local Health Board Policies and Eligibility Criteria for NHS Continuing Health Care ("the 2003 criteria"). Following the deceased's death the Second Defendant's policy document was updated in April 2006, the new document ("the 2006 guidance") being the Mid and West Wales Regional Joint Implementation Plan for Continuing NHS Health Care.
- (iii) When the deceased's case was assessed by the AWSRP the latter used, in addition to the 2001 and 2003 criteria, the Dyfed Powys Health Authority Eligibility criteria. "It is the claimant's case that the Dyfed Eligibility criteria are of no application to this case [...] and the Defendants should have complied with the 2006 guidance throughout the relevant period."

- (iv) Had the Defendants established, as they should have done, that the deceased was entitled to continuing NHS healthcare, the Defendants would have funded the deceased's care home fees throughout the relevant period. In that event the deceased would not have been required to enter into a contract with the nursing home and subsequently with the council to pay for/towards the cost of the nursing home fees and the Claimant would not have had to pay top up fees. The Claimant says that he and the deceased are entitled to restitution of the fees paid since they were paid under a mistake induced by the Defendants' failure to conduct any multi-disciplinary assessment, or paid under duress to ensure that the deceased should remain in the care home, and the Defendants have thereby been enriched at the Claimant's or the deceased's expense.
- (v) The Claimant says that he and the deceased are entitled to recover damages for negligence because they relied, and were entitled to rely, on the Defendants to conduct multidisciplinary assessments to assess the deceased's entitlement to continuing health care; and the Defendants owed to the Claimant or to the deceased a duty of care and acted in breach of that duty so as to cause loss to the Claimant and the deceased.

8 For a proper understanding of these pleadings it is necessary to give an account of the relevant statutory provisions and policy documents.

9 Section 1 of the National Health Service Act 1977 imposes on the Secretary of State for Health a duty to continue the promotion in England and Wales of a comprehensive health service and to provide or secure the effective provision of services in accordance with that Act.

10 In *R v North and East Devon Health Authority ex parte Coughlan*, [2001] 1 QB 213 the Court of Appeal held that in applying section 1 of the 1997 Act the Secretary State for Health was not required to provide those services that could be supplied by a local authority pursuant to section 21 of the National Assistance Act 1948 to a person in need of care and attention; and that nursing services could normally be provided under section 21 of the 1948 Act when they are merely ancillary to the provision of accommodation which might be expected to be supplied by a local authority whose duty it is to supply social services. It is a question of fact and degree to distinguish between those services which should be supplied by the Secretary of State for Health and those that are "merely ancillary to the provision of accommodation and of a nature which might be expected to be supplied by a local authority whose duty it is to supply social services".

11 In *Grogan v Bexley NHS Trust*, [2006] EWHC 44 (Admin) § 30(v) Charles J stated, on the basis of *Coughlan*, that the National Health Service ("NHS") is liable to fund a patient's health care in its entirety where the patient needs to be accommodated for the provision of nursing care on a sufficiently extensive scale; and that if the NHS fully funds continuing care in a nursing home, the patient does not have to make any contribution to the cost of that care. If the NHS does not do so, the patient or his family must fund any part of the cost of the care that is not funded by the local authority responsible for the supply of social services, following a test of the patient's means.

12 In her Report on NHS Funding for Long Term Care, HC 399 of February 2003 the Parliamentary Health Service Commissioner for England, Ann Abraham, identified a "problem" which was that in some of the cases that she had examined patients were inappropriately refused funding for continuing NHS care. She stated that "Health authorities and trusts will need further support and very clear guidance from the Department ... to avoid similar problems in the future." She recommended that the eligibility criteria should be reviewed, particularly in the light of the *Coughlan* judgment. Health authorities in England and Wales were therefore required to put in place systems to identify and review cases where reimbursement might be due to families or individuals arising from deficiencies in the original assessment process.

13 In Wales, a network of Local Health Boards was established by the Local Health Boards) (Establishment) (Wales) Order 2003. Each Local Health Board ("LHB") covers the same geographical area as each of the local authorities in Wales. In February 2004 the Powys LHB issued advice to all other LHBs regarding the management of requests for retrospective review of continuing care status. The report stated in part that people requesting

reimbursement are responsible for providing basic information to enable an investigation to take place and for consent to access all health and social care records which might be relevant. There would be established an All Wales Special Review Panel, chaired by an independent person appointed by the Chairman of the Powys LHB following open recruitment. The other members of the AWSRP would be a nominated non-executive member of the LHB Board and a council member nominated by a local authority. The AWSRP would be authorised to make recommendations to the LHB about eligibility for fully funded continuing NHS care; the date when the case first becomes eligible; and whether reimbursement should be made and from what date.

14 The AWSRP undertakes cases at the request of LHBs which in turn act on the initiative of aggrieved individuals who supply the basic information required for determination of the case. It was in May 2006 that the Claimant's solicitors asked the LHB to undertake a retrospective review of the deceased's health and nursing care needs. It was on 5th July 2006 that the Claimant completed the appropriate Request for Re-examination of Assessment and Funding Decisions. It was on 24th January 2007 that the matter was referred to the AWSRP.

15 Statistical information disclosed by Judith Hill of the Neath Port Talbot LHB shows that of the 49 cases referred by that authority to the AWSRP, 33 cases were approved by that local authority as being eligible for continuing health care. In 24 of those cases the AWSRP agreed with the local authority's recommendations in full. In 6 cases the AWSRP concluded that the patient was eligible for continuing health care from a date earlier than that identified by the local authority. In 2 cases the AWSRP concluded that the patient was eligible from a date later than that identified by the local authority. In one case the AWSRP concluded that the patient was not eligible, whereas the LHB had concluded that he was eligible.

### ***The Principle in O'Reilly v Mackman***

16 I had the benefit of submissions by two Queen's Counsel expert in administrative law –Mr Richard Gordon QC who appeared with Robert Weir for Mr Jones and Miss Alison Foster QC, who appeared with Fenella Morris for the Powys LHB - on the principles to be derived from the line of cases beginning with *O'Reilly v Mackman*. I am grateful to them both for their erudition but doubt that any difference between them on the point is such as to affect the outcome of this case.

17 The main principle to be deduced from *O'Reilly v Mackman*, [1983] 2 AC 237, is that as a general rule it is an abuse of process for a person seeking to establish that a decision or action of a person or body infringes rights which are entitled to protection under public law, to proceed by way of an ordinary claim rather than by judicial review (see in particular the speech of Lord Diplock at 285E).

18 Where, on the other hand, a claimant has a private law right, he may, without any abuse of process, enforce that right by ordinary action even though the proceedings involve a challenge to a public law act or decision. As Lord Bridge stated in *Roy v Kensington and Chelsea Family Practitioner Committee*, [1992] 1 AC 624, 628H-629A:

“where a litigant asserts his entitlement to a subsisting right in private law, whether by way of a claim or defence, the circumstance that the existence and extent of the private right may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons.”

19 Mr Gordon relies on the explanation of that decision given by Lord Woolf MR in *Trustees of Dennis Rye Pension Fund v Sheffield City Council*, [1997] 4 All ER 647, 753 b-c:

“Roy, I would regard as being a case where the plaintiffs' relationship with a public body, whether statutory or contractual, would confer on him conditional rights to payment so that the bringing of ordinary actions to enforce those rights was not in itself an abuse of process.”

20 He also relies on *Clark v University of Lincolnshire and Humberside*, [2000] 1 WLR 1988 in which Sedley LJ explained that in *O'Reilly v Mackman*, the issues were purely public ones; and on a passage in the speech of Lord Slynn in *Woolwich Building Society v IRC*, [1995] 1 AC 70 <sup>2</sup>, 200F, in which he said

“the Revenue has contended that the proper procedure was for Woolwich to seek to challenge its decision not to pay interest by way of judicial review, although it would of course contend that no order should be made on such a review in the present case. I do not accept this. If a claim lies for money had and received, judicial review adds nothing.”

21 In *Boddington v British Transport Police*, [\[1999\] AC 143](#) , 172G, Lord Steyn explained the developments since *O'Reilly v Mackman* as follows:

“Since *O'Reilly v Mackman* decisions of the House of Lords have made clear that the primary focus of the rule of procedural exclusivity is situations in which an individual's aim was to challenge a public law act or decision. It does not apply in a civil case when an individual seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision”.

22 In the light of these cases I must determine whether, on proper analysis, the present Claimant's case amounts to a challenge to a public law action or decision, rather than an attempt to assert some private right which cannot be determined without an examination of the validity of a public law decision.

#### The LHB's Submissions

23 On behalf of the Powys LHB, Miss Foster submits that the present proceedings, properly examined, amount to a challenge to a public law action or decision. In so far as the negligence claim is concerned, Miss Foster submits that it is established by *O'Rourke v LB Camden*, [1998] AC 188 that no action lies against the Defendants in the circumstances of the case. In *O'Rourke* Lord Hoffman stated at 752j

“I regard it as clear that in general when performing its role in relation to the making of grants, the authority is performing public functions which do not give rise to private rights”.

Although that statement was made in the context of a private law action claiming housing grants, the same principle applies (according to Miss Foster) in the present case where continuing health care payments are in issue. Section 3 of the National Health Service Act 1977 has been held not to give rise to a private law duty of care to an individual on the part of the health body: *Coughlan* and *Grogan*. So far as the restitutionary claim is concerned, Miss Foster submits that this is another way of asserting a private law money claim against the Defendants and for the same reason that such a claim will not run in negligence, it will not run in restitution. Even if a cause of action may lie in damages, Miss Foster submits that the court should as a matter of discretion decline jurisdiction.

24 Thus the submission of Powys LHB is that it is not strictly necessary to determine the substantive issues as to jurisdiction since it is in any event appropriate for the matter to be stayed pending submission to the Ombudsman (as, Miss Foster says, has been done with other actions brought by judicial review, successfully so). Miss Foster concludes:

“Such rights as the Claimants do enjoy sound in public law. It was open to the Claimants to apply to the Administrative Court for an order compelling the relevant authorities to assess Mr Jones senior at the relevant time. Whether through deliberate choice, oversight or erroneous advice (it is not known) they never did so. When the AWSRP in 2007 decided there was a retrospective entitlement to continuing nursing care (paid for out of public funds) for part only of the time claimed, it was open to the Claimants to seek to apply for leave to challenge that conclusion in a judicial review. Similarly they did not do so.”

#### The Claimant's Submissions

25 On behalf of the Claimant, Mr Gordon first maintains that I must presume for the purposes of this hearing that he has an arguable claim in restitution or in negligence, since the compass of the present hearing is defined by the Order of Eady J, which confines the preliminary issue to the Defendant's application to strike out the claim for abuse of process. I accept that this is so, and that it would be inequitable for me to determine the submissions made by Miss Foster on the basis of *O'Rourke*, *Coughlan* and *Grogan* in circumstances in which counsel for the Claimant, however experienced, have not had a full opportunity to prepare their replies.

26 Responding to the submissions made by Miss Foster on abuse of process, Mr Gordon submits, on the basis of *Clark v University of Lincolnshire and Humberside*, [2000] 1 WLR 1988, that what is likely to be important is not whether the right procedure has been adopted but whether the protection afforded by judicial review rules had been flouted in circumstances which are inconsistent with the just conduct of the proceedings in accordance with CPR Part I (§ 39). He says that the Claimant has gained no advantage by pursuing a private law claim. The Claim Form was issued before the AWSRP had reached its decision so “the private law proceedings were issued before the time for judicial review even arose”. Bringing a private law claim will not lead to unnecessary delay or expense. The course followed in this case has been unusually slow because (a) the parties agreed to delay providing Statements of Case pending the outcome of the AWSRP and (b) this case has been managed with other cases.

27 He further submits that there was a proper basis for bringing a private law action because this is not a challenge to a decision of the AWSRP but an attempt by the Claimant to vindicate his rights arising from the failure of the defendants to assess the deceased was entitled to continuing health care. His case depends on issues of fact which are not agreed and for which judicial review is as ill-suited as the civil courts are appropriate. No discretionary remedy is sought. “The dominant, if not exclusive, issue in such a claim is, therefore, a private right”. It is not appropriate to deny access to the court in favour of the Ombudsman since his powers are discretionary and are limited by statute and at the best will lead to a re-hearing of the claim by the appropriate LHB.

#### The Dominant Issue in the Claim

28 In the light of these submissions, I think it right to examine the Claimant's pleaded case, to ascertain whether the Claimant is, in substance, asserting an entitlement to a subsisting right in private law, which “may incidentally involve the examination of a public law issue” or whether the “primary focus” or “dominant issue” is to challenge a public law act or decision.

29 Just as it is clear that the Claimant, in the present case, brings his action not against the AWSRP but against two LHBs, so it is clear that he cannot succeed without establishing that the AWSRP erred in assessing the deceased as entitled to continuing NHS care only from 13th November 2005 until his death. The complaints made of the AWSRP in the Particulars of Claim are central, explicit and suitable for determination by judicial review. For instance at Particulars of Claim § 14 the Claimant submits that the AWSRP applied irrelevant criteria (the 2006 criteria); at Particulars of Claim § 27(d) he identifies the 2006 guidance as the relevant standard; and at Particulars of Claim § 27 (f) the Claimant repeats that the AWSRP sought to apply the Dyfed Eligibility criteria which were irrelevant and acted unlawfully “in relying on that assessment”.

30 Moreover, the Claimant pleads (Particulars of Claim § 24) that if a proper assessment had been performed “the only responsible conclusion reached would have been that the deceased had been entitled to continuing NHS healthcare throughout the relevant period (alternatively for a part of the period to be determined by the court).” From this we may deduce that upon the Claimant's case, the decision of the AWSRP was either illegal (being based on irrelevant considerations) or irrational (because it was inconsistent with the only responsible conclusion that could have been reached).

31 I was not persuaded by Mr Gordon's submission, forcefully made, that the right of action on which the Claimant relies is separate from any alleged error of the AWSRP because it arose from the moment when the LHB failed to assess the deceased's eligibility for NHS funding. Not only does the Claimant plead a continuing breach of the duty to assess the deceased's care periodically (Particulars of Claim § 11) but the remedy that he claims is precisely the same as the remedy that would have been awarded by the AWSRP if it had reached the decision that the Claimant says it ought to have reached, less the sum allowed by the AWSRP in its decision of 2007 (Particulars of Claim § 7(b)).

32 The present case is unlike *British Steel v Commissioners of Customs & Excise*, [1997] 2 All ER 366 in which the revenue authorities made an unlawful demand for tax and the taxpayer, as it was bound to do, paid that sum and then made a demand for its return. There the taxpayer was entitled to a restitutionary remedy; but the right to

restitution of the entire sum arose immediately on the payment of the sum unlawfully demanded; whereas in the present case the sum demanded by way of restitution is a sum that increased day by day for so long as the LHB failed to assess the deceased's eligibility for NHS funding and became due if, but only if, a determination should be made that the deceased's condition was such that he was entitled to continuing NHS care. That is precisely the issue determined by the AWSRP.

### The Procedural Consequences

33 I now consider whether the choice of the present proceedings, in place of judicial review rules, has deprived the LHBs of protection that they would have enjoyed in an application for judicial review, so as to be inconsistent with the just conduct of the proceedings.

34 By proceeding as they have, the Claimant deprives the LHBs of two elements of protection guaranteed to them by CPR 54 (judicial review). One is the stringent time-limit prescribed by CPR 54.5. That is however without significance in the present case since the Claimant's Particulars of Claim were served only slightly later than the period of three months set by that rule. Miss Foster, QC states on behalf of the LHBs that they take no point as to delay, since it has not caused inconvenience. I regard her undertaking on that issue as one of some importance. The second element of protection afforded to a respondent to an application for judicial review is the requirement for permission prescribed by CPR 54.4. That is likely to be of practical significance in the present case, not least because the identification of the correct eligibility criteria to determine the deceased's entitlement to continuing NHS health care may be central in the resolution of the claim.

35 Judicial review is well suited to determination of the issues that the Claimant raises in his Particulars of Claim. It has always been the case that judicial review is suitable for determination of claims such as those made by the Claimant about errors of the AWSRP. On an application for judicial review a Claimant can, where appropriate, correct an error made by the AWSRP and cause it to reconsider the claim on the correct basis. Since 1st May 2004 the High Court has had power to allow the remedies of restitution and the award of a liquidated sum on a claim for judicial review: Civil Procedure (Amendment) No 5) Rules 2003.

36 I have been informed by counsel for both parties that the present case is intended to test a procedural issue that may be relevant to many other cases. Mr Gordon QC informed me that his instructing solicitors have care of very many claims for continuing health care, fourteen of which have been instituted in the High Court.

37 I am far from persuaded that a civil action in the High Court is the optimum way of resolving such disputes at least in a case (such as the present one) where the Claimant has previously referred the matter for reconsideration by the LHB, which has seised the AWSRP, to whose decision the Claimant takes exception. The AWSRP is a specialist body, experienced in the determination of the needs of a patient for continuing health care. This makes it well placed to distinguish between those services which should be supplied by the Secretary of State for Health and those that are "merely ancillary to the provision of accommodation and of a nature which might be expected to be supplied by a local authority whose duty it is to supply social services".

38 By contrast the High Court exercises a general jurisdiction and when confronted with a case such as the present it must choose between the opinions of experts. Whereas the AWSRP contains members with clinical experience, the High Court is not so composed. The AWSRP is able to dispose of cases more rapidly and much more cheaply than the High Court. (Although counsel differed in their estimate of the costs of proceedings in the High Court, the estimates on both sides were measured in tens of thousands of pounds). The imposition of very substantial costs on a local health board is liable to reduce the sums available to it for clinical purposes; and the threat of such costs is liable to cause it to compromise cases that it does not otherwise consider meritorious.

39 I am therefore satisfied that the institution of the present proceedings by writ rather than by application for judicial review deprives the LHBs of protection that they would otherwise have enjoyed and is inconsistent with the just conduct of the proceedings.

## Right of Access to Court

40 In an argument devoted principally to the LHBs' alternative submission that these proceedings should be stayed pending submission of the case to the Ombudsman, Mr Gordon submitted that a litigant is not to be deprived of access to a court in favour of an alternative procedure which is both optional and without compulsory effect. It was in this context that he referred me to *Halsey v Milton Keynes General NHS Trust*, [2004] 1 WLR 2002 <sup>1</sup> § 9 (a case concerning alternative dispute resolution). I might have found greater force in this submission than I do if the present Claimant had not himself elected to ask the LHB to undertake a retrospective review of his father's health and care needs from his admission to the Cwrt Enfys Nursing Home until his death and secured the referral of the case to the AWSRP by completing a Request for Re-examination of Assessment and Funding Decisions. There were obvious reasons of expense and convenience for taking this course. The Claimant is now explicit in stating that he disagrees with the findings of the AWSRP (Statement, §§ 41-43).

41 In his judgment in *Halsey*, Dyson LJ (at 3007E) summarised the case law of the European Court of Human Rights to the effect that the right of access to a court may be waived by way of an agreement to arbitrate (subject, of course, to particularly careful review to ensure that the claimant is not subject to constraint). A fortiori it cannot amount to a contravention of an individual's right of access to a court to require him to proceed by way of judicial review, rather than by writ, to correct an error that he says has been made by a panel to which he elected to refer his case; and if appropriate to continue to pursue his claim before his chosen panel once any error has been corrected.

42 Different considerations might arise in a case in which the Claimant has not first elected to have his case considered by a panel such as the AWSRP; or in which it is alleged that he ought to proceed instead by complaint to the Ombudsman. On the facts of this case, however, and on the findings set out in this judgment, those considerations do not arise. Since they may arise in others of the numerous cases currently entrusted to the solicitors for the present Claimant, upon which I have received no submissions, I deliberately refrain from making any comment in this judgment.