Neutral Citation Number: [2018] EWCA Civ 1712

Case No: B5/2017/1218

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
Mr Recorder Williamson QC
Case No: B00KT962

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2018

Before :

LORD JUSTICE SIMON
LADY JUSTICE ASPLIN
and
SIR COLIN RIMER

- -

Between :

PARAGON ASRA HOUSING LIMITED (formerly known as Paragon Community Housing Limited)	**Appellant**
- and -	
JAMES NEVILLE	**Respondent**

- -
- -

Ryan S. Kohli (instructed by **Batchelors**) for the **Appellant**
Edward J. Fitzpatrick and **Justine Compton** (instructed by **GT Stewart Solicitors and Advocates**) for the **Respondent**

Hearing date: 10 July 2018

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Approved Judgment

Sir Colin Rimer :

Introduction

1. The appellant, Paragon Asra Housing Limited ('Paragon'), formerly known as Paragon Community Housing Limited, is a community benefit society registered under the Co-operative and Community Benefit Societies Act 2014. It is a provider of social housing and is the successor in title to Richmond upon Thames Churches Housing Trust ('the Trust') to the ownership of 38a Victoria Road, Surbiton, Surrey. The defendant is James Neville, to whom in 2008 the Trust granted what became an assured tenancy of Flat 5.

2. In 2015 the Trust instituted possession proceedings against Mr Neville on the ground that, in breach of his obligations as tenant, he had committed acts of nuisance and harassment. Mr Neville admitted material breaches but said they arose in consequence of his disability in the nature of personality and behavioural disorders and that the proceedings discriminated against him contrary to the Equality Act 2010.

3. There was no trial and the claim was disposed of by an order made by District Judge Smart on 11 April 2016 at a hearing attended by the parties' legal representatives. Paragon was by then the landlord. The order recorded Mr Neville's admissions, Paragon's acceptance that his disability was an Equality Act protected characteristic and that the court found it reasonable to make an order for possession by 9 May 2016 but to suspend it on the terms that Mr Neville committed no further material breach of the terms of his tenancy.

4. Following continuing complaints about Mr Neville's conduct, Paragon issued a warrant for possession. Upon Mr Neville's application for its suspension, the question arose whether the court should proceed on the basis that (i) as Judge Smart was satisfied that the suspended possession order did not discriminate against Mr Neville because of his disability, and (ii) there was no suggestion of any material change of circumstances in the meantime, it was unnecessary for the court to consider whether the proposed eviction would discriminate against Mr Neville on disability grounds.

5. District Judge King held, on 7 November 2016, that it was unnecessary and refused to suspend the warrant. On 7 April 2017, Mr Recorder Williamson QC, on Mr Neville's appeal, held that she was wrong, allowed the appeal and suspended the warrant until a further hearing when the issue of potential discrimination by the proposed eviction could be determined. On 4 January 2018, Henderson LJ permitted Paragon to pursue a second appeal on the basis that the difference in the courts below raised an important question of principle and/or practice.

Relevant legislation

(a) The Housing Act 1988

6. The Housing Act 1988, as amended, provides materially:

> '**7. Orders for possession**

(1) The court shall not make an order for possession of a dwelling-house let on an assured tenancy except on one or more of the grounds set out in Schedule 2 to this Act; …

(4) If the court is satisfied that any of the grounds in Part II of Schedule 2 to this Act is established, then, subject to subsections (5A) and (6) below, the court may make an order for possession if it considers it reasonable to do so.

8. Notice of proceedings for possession

(1) The court shall not entertain proceedings for possession of a dwelling-house let on an assured tenancy unless –

> (a) the landlord … has served on the tenant a notice in accordance with this section and the proceedings are begun within the time limits stated in the notice in accordance with subsections (3) to (4B) below; …

(2) The court shall not make an order for possession on any of the grounds in Schedule 2 to this Act unless that ground and particulars of it are specified in the notice under this section; but the grounds specified in such a notice may be altered or added to with the leave of the court.

9. Extended discretion of court in possession claims.

...

(2) On the making of an order for possession of a dwelling-house let on an assured tenancy or at any time before the execution of such an order, the court, subject to subsection (6) below, may –

> (a) stay or suspend execution of the order, or
>
> (b) postpone the date of possession,

for such period or periods as the court thinks just. …

9A. Proceedings for possession on non-absolute grounds: anti-social behaviour

(1) This section applies if the court is considering under section 7(4) whether it is reasonable to make an order for possession on ground 14 set out in Part 2 of Schedule 2 (conduct of tenant or other person).

(2) The court must consider, in particular –

> (a) the effect that the nuisance or annoyance has had on persons other than the person against whom the order is sought;
>
> (b) any continuing effect the nuisance or annoyance is likely to have on such persons;

(c) the effect that the nuisance or annoyance would be likely to have on such persons if the conduct is repeated.'

(b) Equality Act 2010

7. The Equality Act 2010 provides materially:

'**4. The protected characteristics**

The following characteristics are protected characteristics –

…

disability;

…

6. Disability

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability. …

15. Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim. …

35. Management

(1) A person (A) who manages premises must not discriminate against a person (B) who occupies the premises –

…

(b) by evicting B (or taking any steps for the purpose of securing B's eviction); …

The facts

8. On 30 June 2008, the Trust granted Mr Neville an assured shorthold starter tenancy of Flat 5. Upon its first anniversary, it became an assured tenancy within the meaning of the 1988 Act. Clause 3 imposed a series of obligations upon Mr Neville, including barring him from using the flat for illegal or immoral purposes, causing nuisance to others in the neighbourhood or to any tenant of the Trust, committing any form of racial harassment and playing sound reproduction equipment so loudly as to cause a nuisance to others in the neighbourhood or to be heard outside his flat.

9. Following the service of a notice dated 13 July 2015 pursuant to section 8 of the 1988 Act, the Trust, on 13 August 2015, issued possession proceedings against Mr Neville in the Kingston upon Thames County Court. Reliance was placed on Grounds 12 and 14 in Schedule 2 to the Act. Ground 12 provides that the court may order possession if any obligation of the tenancy (other than one related to the payment of rent) has been broken; and Ground 14 provides that the court may order possession if the tenant has been guilty of anti-social conduct of the like nature as that which the clause 3 obligations proscribed.

10. Paragraph 5 particularised over 45 paragraphs the acts of nuisance and harassment Mr Neville was said to have committed. The catalogue of complaints alleged anti-social conduct of a serious nature that would have been intolerable and alarming to neighbours.

11. By his Defence, Mr Neville admitted the breaches to the extent set out in a Scott Schedule but asserted that they arose in consequence of his disability. He was said to have suffered at all material times:

> '… from emotionally unstable personality disorder, agoraphobia and mental and behavioural disorders due to use of opioids/dependence syndrome which amounts to an impairment and which has had (and continues to have) a substantial and long term adverse effect on his ability to carry out normal day to day activities. The Defendant is therefore disabled as defined by s.6 of the [Equality Act] 2010
>
> Accordingly, throughout the period during which the incidents are alleged to have taken place, the Defendant had (and continues to have) a protected characteristic within the meaning of s. 4 of the EA 2010.'

12. The Defence then alleged breaches by the Trust of the Equality Act. Mr Neville asserted in paragraph 8(iii):

> 'By section 15 EA 2010 a person indirectly discriminates against a disabled person if he treats that person unfavourably because of something arising in consequence of that person's disability and cannot show that the treatment is a proportionate means of achieving a legitimate aim. The Defendant accordingly contends the following:
>
> The Claimant's decision to evict him and/or the service of the notice seeking possession and/or the use of possession proceedings amounts to unfavourable treatment;
>
> The trigger for the decision to evict/issuing the notice/issuing proceedings is the allegations of breach of tenancy and anti-social behaviour by the Defendant.

> It is clear from the allegations that the behaviour complained of is linked to and arises in consequence of the Defendant's mental health problems, which according to Dr Fuller causes the Defendant to have an unstable mood, feelings of paranoia when around people (preferring to stay indoors away from "external pressure"), feelings of panic and shaking and anxiety (see letter dated 29 April 2013). It is evident that his interaction and reaction to his neighbours and the perceived threat from them does impact on his ability to cope and triggers particular behaviour.'

13. Paragraph 8(iii) continued by asserting that the Trust had known of Mr Neville's mental health issue from at least 2011/12. Paragraph 8(vi)ff invited the Trust to make reasonable adjustments for him, including by varying the terms of his tenancy agreement 'so that where a disabled person commits anti-social behaviour, the relevant terms … will not apply or the conduct will not amount to a breach of tenancy'; alternatively, by offering him a transfer to alternative suitable housing. Mr Neville also asked the Trust to support him in his treatment by the mental health team.

14. Paragraph 8(x) alleged that the Trust was 'acting unlawfully by discriminating against the Defendant in taking steps to evict him and/or subjecting him to any other detriment contrary to section 35(1) EA 2010.' Paragraph 12 admitted that the Trust had proved Grounds 12 and 14 of Schedule 2 to the 1988 Act but said that Mr Neville relied 'on the protection of section 7(4) …, and contends that it would not be reasonable to order possession.' He set out particulars in support, including his mental health problems and vulnerability.

15. Mr Neville's reliance on the Equality Act was therefore squarely before the court. His position was that, whilst the Trust had a case under Grounds 12 and 14, it was discriminating against him by seeking to evict him because of something arising in consequence of his disability and it would not be reasonable to order him to give up possession.

16. The Trust's Reply admitted it was aware of Mr Neville's vulnerabilities, but not that he had a disability. It denied disability discrimination. It referred to the serious nature of his conduct, which included racist abuse and harassment and threats to kill and the court's need under section 9A of the Housing Act to have regard to the effect of his conduct on others. If he *was* able to show that his anti-social conduct had been caused by a disability, the Trust asserted that its proceedings were a proportionate means of achieving a legitimate aim and so involved no discrimination: see section 15(1)(b) of the Equality Act.

Mr Neville's disability

17. On 21 October 2015, Dr V.R. Stamps, a consultant forensic psychiatrist, produced a psychiatric report on Mr Neville. Mr Neville, now aged 39, has a history of drug abuse dating from when he was 13, when he started smoking cannabis. He started using alcohol at the same age. At 16, he progressed to LSD, amphetamines, ecstasy and cocaine. At the time of the report, he was still using cannabis and cocaine. Dr Stamps diagnosed him as suffering from a mental impairment in the nature of an Equality Act disability, namely an emotionally unstable personality disorder exacerbated by substance abuse. The way forward to a control of his behaviour was for him to engage with the Drug and Alcohol Services with a view to attaining total

abstinence from illicit drugs, following which he would benefit from psychological work directed at assisting him to address the features characterising his personality disorder.

The possession order made by District Judge Smart

18. Paragon's claim was allocated to the multi-track, directions were given for the filing of evidence, a pre-trial review was listed for April 2016 and the trial for 11 May 2016. In the event, there was no trial and the claim was disposed of by an order of District Judge Smart made following a hearing on 11 April 2016. For that hearing, there was a short Schedule of Admissions by Mr Neville by which he admitted (i) playing music and making noise so loudly as to cause a nuisance or annoyance to others in the neighbourhood, (ii) behaving on 15 March 2014 in a way that interfered with the peace and comfort of the residents of Flat 7, and (iii) that on 28 May 2015 the police executed a search warrant of his flat, when they found a cannabis plant and a parcel addressed to a neighbouring resident, and that Mr Neville then pleaded guilty to possession of a cannabis plant and the theft of a neighbour's parcel.

19. The hearing was attended by counsel for Paragon and a solicitor for Mr Neville. The order made recorded that the judge had considered its proposed terms, the statements of case and the admissions. It recorded that he found Grounds 12 and 14 satisfied, Mr Neville 'admitting that he has breached the terms of his tenancy agreement to the extent set out in the Schedule of Admissions.' It recorded Paragon's acceptance that Mr Neville 'has a protected characteristic for the purposes of the Equality Act 2010.' The order recited the court's finding that 'it is in all the circumstances reasonable to make a possession order but reasonable and appropriate to suspend such order on the terms set out … at paragraph 2.'

20. The substantive part of the order required possession of Flat 5 to be given by 9 May 2016 but suspended such order so long as Mr Neville 'commits no material breach and abides by the terms and conditions of the tenancy agreement … concerning anti-social behaviour and in particular the following clauses', namely 3.4 (use of the flat), 3.5 (nuisance), 3.6 (racial and other harassment), and 3.7 (noise). The order was to be discharged on 13 June 2017 (14 months thence) unless before then a request for a possession warrant had been made.

21. It was and is agreed that Judge Smart was satisfied that the proceedings, and the suspended possession order, did not amount to disability discrimination by Paragon against Mr Neville. That is because, whilst they involved unfavourable treatment of him because of his conduct arising in consequence of his disability, Paragon had shown the treatment to be a proportionate means of achieving a legitimate aim: section 15(1)(b).

The decision of District Judge King

22. Following the April 2016 order, further breaches were almost immediately alleged against Mr Neville and on 27 May 2016 Paragon obtained the issue of a warrant for the execution of the possession order on 21 June 2016. It was open to Mr Neville to apply to stay or suspend the warrant (section 9(2) of the 1988 Act). He did so and on 15 August 2016 Judge Smart gave directions for a Scott Schedule of the alleged breaches upon which Paragon was relying and the filing of evidence.

23. Mr Neville's application was listed to be heard by District Judge King on 7 and 8 November 2016. At the beginning of the hearing, on 7 November, she was faced with the question at the heart of this appeal, which I referred to at [4] above, and gave her ruling on it then. The point arose because, just three days before the hearing, Mr Kohli, for Paragon, saw the skeleton argument of Ms Compton for Mr Neville. It showed that, whilst she was not seeking, on a ground of alleged discrimination, to upset the making of the suspended possession order of April 2016, she was seeking on such a basis to challenge Paragon's decision to enforce it in reliance on the alleged breaches. Mr Kohli's point, advanced to Judge King at the start of the hearing, was that unless there had been a material change of circumstances since the making of the suspended possession order, there was no issue for the court to re-consider under section 15 of the Equality Act. Ms Compton, in her submissions, did not suggest that she was relying on, or proposing to assert, any such change.

24. Judge King delivered her ruling on this issue immediately. It is contained within the transcript of the proceedings before her, and was not separately transcribed for approval by her, but is none the worse for that. She said:

> 'At the end of the day the Equality Act duty is absolutely a continuing duty. All of these issues were undoubtedly considered because they were all pleaded in the defence, they were all responded to in the reply and District Judge Smart clearly went through the matters with the parties and had everybody in to look through the order before it was made.
>
> The reality is I am obliged to consider whether or not there have been breaches. If I find them I then have a discretion as to what I decide to do. Part of those circumstances will obviously be the effect on the defendant of any decision that I may or may not make. The reality is that whilst you say to me, Miss Compton, a decision to evict would be unfavourable, it is going to be unfavourable to anybody. I cannot see how that is discriminatory in relation to this particular gentleman, because at the end of the day it is going to be unfavourable to absolutely anybody.
>
> I am struggling, Miss Compton, with the idea that I must do effectively a re-looking at the same points that have been looked at, unless there is any change in relation to the circumstances. I am struggling to see how the court can come to any different decision, unless you can show me a significant change in circumstances. Mr Kohli is correct that to do so would otherwise be effectively reopening the inquiry that was made prior to the possession order being granted and effectively would therefore be trying to set aside/vary/the appeal word [sic] to the possession order by the back door. If you do not like the basis on which it was made back in April 2014 [sic: should be '2016'], then you should have (a) tried or thought to possibly appeal it or (b) sought to set it aside, both of which would have been difficult given that it was of course dealt with by consent, was it not?
>
> As part of the overall circumstances, I will certainly be considering the position of this defendant if I come to that, i.e., if I first find that there have been breaches. The reality is in relation to a new individual inquiry in relation to the specifics of the sections of the Equality Act, unless you can satisfy me that there has been a significant change in his personal position, vis-à-vis his disability, then it would,

> as Mr Kohli says, amount to potentially an abuse of process. That is not somewhere this court is going to.'

25. After dealing with a further preliminary matter, the judge proceeded with the substantive hearing of the application to suspend the warrant, following which she delivered her reserved judgment on 17 November 2016. In it she referred to the several witness statements provided by both sides and said she had had oral evidence from all but two of the witnesses. Between paragraphs 5 and 55, she considered the evidence relating to each of the six alleged breaches by Mr Neville and found each proved. Between paragraphs 56 and 72, she reviewed the arguments, including arguments relating to the public sector equality duty under section 149 of Equality Act, upon which no point arises, and concluded that she should exercise the discretion conferred by section 9 of the 1988 Act by dismissing Mr Neville's application to suspend the warrant.

26. Judge King's judgment was careful and thoughtful and I am satisfied that, had Ms Compton advanced any case to her that the evidence showed a material change of circumstances since the making of the suspended possession order such as to require a judicial consideration of whether Paragon's issue of the warrant was discriminatory, Judge King would have referred to and dealt with it. Her ruling of 7 November had not barred the making of such a case but the inference is that no such case was sought to be made. This is borne out by paragraph 21 of Mr Kohli's skeleton argument in answer to the appeal against the judge's decision to Mr Recorder Williamson QC.

27. I should quote from the last part of Judge King's judgment, where she explains her refusal to suspend the warrant. It includes paragraphs upon which Mr Kohli placed reliance in relation to one of Paragon's grounds of appeal to this court and so it is important to note exactly what Judge King said:

> '64. … Miss Williams, who lives next door, was quite clearly utterly traumatised by the whole situation. … whilst Ms Compton sought to have the court put this down due to her nervousness at giving evidence, given that she had never been in court before, it was quite clearly something way beyond that. Ms Quelch gave evidence of a substantial deterioration in her depression. Both these ladies have quite clearly been subjected to nuisance and harassment in their homes which is intolerable. On the other hand, I have a defendant who has mental health issues. He has been diagnosed with unstable personality disorder and it is clear and accepted that his mental health impacts on his behaviour. …
>
> 68. The court's finding in relation to its decision and whether this warrant should be suspended is that this is a *Lambeth v. Howard* case. The reality is that these residents, Miss Williams and Ms Quelch, have been so affected by the defendant's behaviour that, no matter what happens, there is no way to repair the situation. Ms Quelch was, frankly, incredibly fair to the defendant, but she has had a significant worsening of her depression and needs medication. Miss Williams is a 60-year-old woman who is, frankly, terrified in her own home. If I am wrong and this is not a *Lambeth v. Howard* case then the balancing act that the court must carry out, the *Massey* case makes clear, requires the court to find cogent evidence, persuasive evidence, looking forward, that the defendant's behaviour will not re-occur, that the defendant has mended his ways, and that the burden is on the defendant to provide this.

> 69. Dr Stamps' report is very clear. In order for the defendant to make progress, he must (1) stop abusing drugs and (2) then engage with treatment for his personality disorder. Yes, there is evidence from Ms Dyer, who appears to be assisting the defendant with issues with opiate substitutes, but the last drug test, in relation to opiates or opiate substitutes only, was in, possibly, April, possibly May. Other than that, all I have is self-reports. There is clear evidence that the defendant took ketamine in April and, on the balance of probabilities, the court does not find the defendant's evidence that he is drug-free persuasive. The court did not find him a credible witness. He has been given every opportunity to mend his ways, but he prefers to blame things on others, including his lawyers during cross-examination, in relation to evidence that, in his view, had not been put forward.
>
> 70. In terms of any evidence of his engagement with therapy, Dr Stamps' report says that the defendant would need to deal with a STEPPS programme, with which there has clearly been no engagement. The defendant's evidence on this was that he has tried to get referrals, but the referral needs to be from a GP and he cannot get a GP appointment.
>
> 71. Even if I were to have accepted the defendant's evidence that he has been drug-free since April, on the balance of probabilities, the court cannot accept that the defendant could not get a GP appointment between April and now. Whilst I take judicial notice that sometimes it can be a little bit difficult to get past GP receptionists, the reality is that six months and an inability to get any form of GP appointment is simply incredible.
>
> 72. The conclusion of the court, on the balance of probabilities, is that the evidence such as there is, even if it were accepted, would not be sufficient to amount to cogent evidence sufficient for the court to say that the defendant has mended his ways and that there will be no recurrence in the future. Accordingly, it is the court's decision that this application by the defendant is dismissed. The warrant may be referred back to the bailiff for a new appointment and a new notice to be given to the defendant.'

28. The reference to *Lambeth v. Howard* is to *Lambeth London Borough Council v. Howard* (2001) 33 HLR 636, a decision of this court. It was an appeal against an outright possession order made following persistent and obsessive harassment by the defendant tenant. The challenge was as to the judge's refusal to suspend the order. The conduct of the tenant was of a serious nature and had had serious effects on his neighbours. The present case has obvious parallels with it. I cite from what Sedley LJ said at the end of his judgment (with which Hale and Thorpe LJJ agreed):

> '38. The picture … illustrates the hard fact that the harassment of neighbours, especially although not only those with children, may reach a point where what has been done cannot be undone. So here it may be that the appellant in 1997 to 1998 had demonstrated a capacity to behave himself more or less properly when the stakes were high enough for him. It may even be that he would probably continue to do so if allowed to return to his flat. But although, as the judgment points out, the harassment in past years had been intermittent and not continuous, what the appellant cannot do, and it is entirely his own fault that he cannot, is dispel the fear and the tension which his return, on the judge's findings, will bring

> to Miss Gabriel. She holds down a job and is often out at work, and her daughter, now 13 years old, needs all the concentration that she can get on her schooling and all the protection that she can get from fear and stress.
>
> 39. If from these facts one turns to the Convention questions, just as if one asks whether an outright possession order is reasonable rather than a suspended one, there is only one answer. It is the one that the judge reached: an outright possession order against the appellant was necessary to protect Miss Gabriel and her daughter from the continuing consequences of the appellant's obsessive harassment of them in the past. It would be necessary even if he were to return next door and commit no acts of harassment in the future. The shadow of the past is too heavy upon the present. Such an order is within the law. It meets a pressing social need. It is proportionate to that need in the straightforward sense that nothing less will do and that it is an acceptable means of achieving a legitimate aim. The judge so held below, and I agree with him.'

29. Whilst Judge King did not identify this passage as the one she regarded as demonstrating the parallels with this case, she must have had it in mind. As in *Lambeth*, her view was that nothing less than permitting the enforcement of the possession order against Mr Neville was enough and that (by inference) she considered that such enforcement was, in Sedley LJ's words, 'an acceptable means of achieving a legitimate aim.'

The appeal before Mr Recorder Williamson QC

30. Judge King refused Mr Neville permission to appeal but His Honour Judge Madge gave it and suspended the warrant pending the hearing of the appeal. The appeal was heard by Mr Recorder Williamson QC, in the County Court at Central London, on 7 April 2017. Mr Fitzpatrick represented Mr Neville, Mr Kohli Paragon. In his judgment, the Recorder rehearsed the history and summarised the rival stances as to the disability discrimination issue adopted by the parties before Judge King on 7 November 2016. After referring to sections 15 and 35 of the Equality Act, the Recorder continued:

> '6. … Those provisions were considered recently by the Supreme Court in the case of *Akerman-Livingston v. Aster Communities Limited* [2015] UKSC 15, [2015] AC 1399. The leading speech was given by Lady Hale, and paragraphs 15 to 19 inclusive of that speech are to be treated as incorporated in this judgment. It seems to me clear from those paragraphs, where Lady Hale repeatedly uses the word "eviction" and/or "evict", that s.35 is focused upon the question of whether there is discrimination at the point of eviction. As far as I understand it, eviction is not a term defined either in the Act or in the speech of Lady Hale, but it is, it seems to me, apparent that she is directing herself to the situation where the end of the road has been reached and the disabled tenant is being made to leave his property. When that position arises, it is apparent from paragraph 38 of the judgment that the court has itself to undertake a proportionality exercise and that that requires a number of matters to be taken into account. Indeed, in the same case, in the speech of Lord Wilson, he explains the structured step by step approach which has to be taken in order to consider whether eviction should or should not proceed in these particular circumstances. Going back to the opinion of Lady Hale, she makes clear at paragraph 25 that the Equality Act duties are

> additional rights and essentially rights which benefit, so far as material, disabled people.
>
> 7. Against that background, it seems to me clear that, when the court made a suspended possession order in April 2016 it had to take into account the provisions of the Equality Act and it recited that it had done so, and there is no complaint about that particular order, and those seem to me to be matters which fall within the phrase, "Taking steps for the purpose of securing B's eviction" in s.35(1)(b). However, it seems to me that when a landlord comes to enforce a suspended possession order and seeks actually to evict a tenant, then s.35(1)(b) applies fully and without restriction and the tenant has the benefit of it and the court has to proceed in accordance with the approach which has been laid down by the Supreme Court in the case of *Akerman-Livingston v. Aster Communities Limited.* There is not a short-cut, as it seems to me, which is compatible with the opinions in that case. Furthermore, it seems to me, as was argued or sought to be argued on behalf of the tenant in this case, that when a landlord takes a step to evict, quite separate from the question of whether the order should be enforced, that step itself is subject to s.35(1)b) duties and potential defences. It seems to me, for understandable reasons, that the District Judge in this case was unwilling to entertain those arguments and fettered herself by concluding that, unless there had been a significant change since the April order, it was not open to the tenant to raise the s. 35 defences. For the reasons I have indicated, I think that is wrong.'

31. The Recorder therefore allowed Mr Neville's appeal, quashed Judge King's ruling of 7 November 2016 excluding consideration of sections 15 and 35 of the Equality Act and suspended the possession warrant until the further hearing of Mr Neville's application to suspend it.

The appeal to this court

32. Grounds 1 and 2 of Paragon's appeal combine to make essentially the same point. Judge Smart, when making the suspended possession order, had determined that the possession proceedings and his order did not discriminate against Mr Neville because of his disability. That is because they were 'a proportionate means of achieving a legitimate aim' for the purposes of section 15(1)(b) of the Equality Act. The sense of the order was, therefore, that save where there was subsequently a material change of relevant circumstances affecting Mr Neville, its enforcement following further breaches would also not discriminate against him. No such material change was sought to be shown by Mr Neville and so there was no need for the court to engage in an assessment of whether the execution of the warrant would be discriminatory. The decision of the Supreme Court in *Aster Communities Ltd v. Akerman-Livingstone* [2015] UKSC 15, [2015] AC 1399 was not authority to the contrary effect.

33. Ground 3 of Paragon's appeal was that if, contrary to its primary case, it *was* necessary for Judge King to consider whether the issue of the warrant discriminated against Mr Neville because of his disability, the judge had, for all practical purposes, answered that question in the negative in paragraphs 69 to 72 of her judgment, quoted at [27] above.

34. Taking grounds 1 and 2 first, Mr Kohli advanced careful submissions to us but the point is ultimately the short one described. His submission was that when the court,

on making a suspended possession order, finds that the proceedings and the order are not discriminatory against a disabled defendant, the court can be taken to be holding that the enforcement of the order in accordance with its terms will also not be discriminatory. Mr Kohli recognised that a landlord's Equality Act duty not to discriminate against a tenant is a continuing one and that there will be cases in which, by the time of a claim to enforce a suspended possession order, there will have been a material change of circumstances such as to require the landlord to satisfy the court afresh that, notwithstanding such change, enforcement will still be a proportionate means of achieving a legitimate aim and so not discriminatory. That, however, was not the position here and Mr Neville's assertion that it was nevertheless incumbent on Paragon to show likewise before being permitted to execute the warrant was an abuse of the court's process.

35. Mr Kohli supported the last assertion by reference to what this court said in relation to the analogous situation that arose in *Regina (JL) v. Secretary of State for Defence* [2013] EWCA Civ 449, [2013] PTSR 1014. The defendant had allowed the claimant and her family to occupy armed forces accommodation on compassionate grounds but then brought possession proceedings. The claimant had no statutory right of occupation but asserted that the claim would interfere with her article 8 Convention rights. The judge made a possession order, stayed for six weeks, without considering that argument: that was because, according to then binding House of Lords authority, it provided no defence to a claim for possession of residential property even when the owner was a public authority (see *Kay v. Lambeth London Borough Council* [2006] 2 AC 465 and *Doherty v, Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2009] AC 367).

36. Three years later, by when it was clear that article 8 *could* be deployed in defence of a possession claim (following the Supreme Court's decision in *Manchester City Council v. Pinnock (Secretary of State for Communities and Local Government intervening*) [2011] 2 AC 104), the defendant sought to enforce the possession order. The claimant applied for judicial review of that decision on the ground that it amounted to a disproportionate interference with her article 8 rights. The judge dismissed the claim, holding that whilst the claimant *was* entitled to a proportionality review at the enforcement stage, the eviction was a proportionate and justified interference with her article 8 rights.

37. The Court of Appeal dismissed the claimant's appeal, with the leading judgment being given by Briggs LJ (as he then was), with whom Sullivan and Arden LJJ agreed. Mr Kohli referred us to the following passage in it:

> '38. … The starting point is that article 8 confers a right that respect be had for a person's home, such that interference with it by a public authority must be both lawful, and a proportionate means of achieving a legitimate end. The court's task is to subject the process of dispossession by the public authority to a proportionality review. That is a process which may typically involve a number of stages, beginning in the present case with a notice to quit, followed by the issue of possession proceedings, the obtaining of judgment after a hearing, and the enforcement of an order for possession by the obtaining and execution of a writ of possession.

> 39. In the overwhelming majority of cases the occupant's article 8 rights will be appropriately and sufficiently respected by the provision at the occupant's request of a proportionality review during the possession proceedings themselves, and usually at the hearing of them. That is because, under English procedure, it is those proceedings, and in particular the hearing of them, which are designed finally to determine (subject only to any appeal) the lawfulness or otherwise of the owner's claim for possession.
>
> 40. The court hearing the possession proceedings is not obliged to conduct a proportionality review of its own motion. It must do so if, but only if, that review is requested by the occupant, by the raising of an article 8 defence: see the *Pinnock* case, at para 61. Thus, in the absence of special circumstances, the owner will only be in a position to seek a writ of possession after the occupant's article 8 rights have been exhausted, either because they have not been prayed in aid during the possession proceedings, or because they have been raised as a defence but rejected. Generally, an attempt to relitigate the article 8 issue at the enforcement stage, or to litigate it for the first time when it could and should have been raised as a defence in the possession proceedings, would have been an abuse of process by the occupant.
>
> 41. But there will be exceptional cases, and the present is a very unusual but powerful example, where the raising of article 8 rights at the enforcement state will not be an abuse. The obvious example is where there is a fundamental change in the occupant's personal circumstances after the making of the possession order but before its enforcement. The example canvassed during the hearing of this appeal was that of the diagnosis of an incurable illness for the first time after the making of the possession order, making it disproportionate for the public authority to evict the occupant before he or she could be allowed to die peacefully at home.
>
> 42. The present case is a (probably unique) example where it would not be an abuse of process to pray in aid article 8 rights at the enforcement stage. The claimant vigorously pursued her article 8 rights during the possession proceedings but, as the law then stood, and Collins J was bound to conclude, they afforded her no defence. Yet it is now recognised, before the end of the process designed to lead to her eviction, that the claimant has a right to a proportionality review of the enforced loss of her home on the application of the defendant public authority. There is, quite simply, no occasion other than the present proceedings, in which that review can be conducted in this case.'

38. Mr Kohli submitted that *JL* provides compelling guidance for this case too. Judge Smart was satisfied that Paragon's suspended possession order involved no discrimination. Absent any material change of circumstances between that order and the claim by Mr Neville to suspend its execution, it was an abuse of the process for him to seek to re-open the lawfulness of Paragon's claim to recover possession. The Recorder was wrong to regard the Supreme Court's decision in *Aster Communities* as authority to different effect.

39. In relation to ground 3 of the appeal, Mr Kohli said that if he was wrong on the first two grounds, and Mr Neville *was* entitled to have the lawfulness of the proposed eviction determined by court, Judge King substantively carried out that exercise in

what she said in paragraphs 69 to 72 of her ruling of 7 November 2016. He accepted she was not there addressing her mind to any issue arising under section 15 of the Equality Act, but he said that did not matter. She there made findings that precisely answered the question that an issue under that section would have raised, and they showed incontrovertibly that the enforcement of the possession order involved no discrimination against Mr Neville: such enforcement was an acceptable, or proportionate, means of achieving a legitimate aim.

40. Mr Fitzpatrick's submissions in response were to the effect that the Recorder was correct in his decision. He said the way that section 35(1)(b) of the Equality Act was framed – 'by evicting B (or taking steps for the purpose of securing B's eviction)' – showed that Parliament's intention was that the protection it provided to a disabled defendant in possession proceedings applied throughout the possession proceedings up to and including a claim actually to evict him and that there was no limitation on the right of such a defendant to raise at any stage that a particular step in the proceedings amounted to discrimination under section 15 of the Equality Act. Thus it was open to Mr Neville to do so in response to Paragon's proposed enforcement of the suspended order. Mr Fitzpatrick submitted that this was supported by *Aster Communities* and that the Recorder was correct so to hold. Moreover, given the acceptance that Mr Neville has a relevant disability, Paragon's claim to enforce the order raised, said Mr Fitzpatrick, a *prima facie* case of disability discrimination that had the effect of shifting on to Paragon the burden of proving that the enforcement of the order was not discriminatory, and Mr Fitzpatrick referred us to the burden of proof provisions in section 136 of the Equality Act. It followed that, in presenting its case, Paragon needed to show that the enforcement of the order would not discriminate against Mr Neville and that Judge King had been wrong not to give consideration to such question in her judgment of 17 November 2016.

41. As to ground 3 of the appeal, Mr Fitzpatrick submitted that Judge King's conclusions in paragraphs 69 to 72 of her judgment were addressed exclusively to the discretionary exercise required by section 9(2) of the Housing Act and cannot be read as ruling upon whether the enforcement of the order would be discriminatory. She had ruled out any argument on that issue and the paragraphs relied upon did not deal with the disability argument in the structured way required by *Aster Communities*.

Discussion and conclusion

42. Since *Aster Communities* was central to the Recorder's decision and Mr Fitzpatrick's submissions, I must summarise what it decided. The defendant had been homeless, his local housing authority had accepted it had a duty under the Housing Act 1996 to secure that accommodation was available to him and Aster provided him with temporary accommodation pursuant to an arrangement it had with the housing authority. The housing authority's duty to house the defendant then came to an end, it needed the accommodation so provided and Aster issued proceedings for possession. By his defence, he asserted disability discrimination, infringement of his article 8 rights and a breach of the public sector equality duty under section 149 of the Equality Act.

43. The circuit judge held that the court should approach the disability discrimination defence in the same way as it would an article 8 defence, holding 'the crucial point being effectively the presumption in favour of proportionality when a public authority

is exercising its housing functions'. He held that the actions of the local authority were entirely reasonable and Aster's actions could not be characterised as unreasonable or disproportionate, nor were they actuated by any malevolent response to the defendant's disability. On what was in substance a hearing for summary judgment, he held that the defendant had no arguable defence and made an outright possession order. The defendant's appeal to the High Court was dismissed, as was his second appeal to this court. Lady Hale DPSC summarised this court's reasoning as follows:

> '14. … It held that the approach to proportionality was the same under the Equality Act 2010 as it was under article 8 (para 27) and the weight to be given to the interests of a social landlord was no different: para 29. For a tenant to succeed in a disability discrimination case "he will have to show some considerable hardship which he cannot fairly be asked to bear"; para 37. There was no difference between a social landlord acting on the instructions of a local housing authority and the local housing authority itself: para 46'

44. The issue before the Supreme Court was whether the three lower courts had been right that, in relation to a proposed eviction from social housing met by a defence based both on article 8 and alleged disability discrimination, the approach to proportionality was the same. The Supreme Court disagreed that it was. At [15] to [19], to which the Recorder made specific reference, Lady Hale gave a succinct summary of the scheme of the Equality Act, referring in particular to the provisions of sections 15 and 35. She does indeed there refer to the Equality Act rights of a disabled tenant faced with a claim to evict him. In the case before the court, the circuit judge had made an outright order for possession and the dispute was as to whether his order was discriminatory. Lady Hale was not focussing on the different scenario in this case, in which an admittedly non-discriminatory suspended possession order was made and a warrant was then issued to execute it.

45. At [23], Lady Hale embarked upon an explanation of the differences between the substantive rights protected by article 8 and section 35 of the Equality Act respectively. At [27], she explained that a disabled person's substantive right to equal treatment is not an absolute obligation, because section 15 shows that a landlord is entitled to evict a disabled tenant if he can show that it is a proportionate means of achieving a legitimate aim. At [28], she explained the fourfold nature of such proportionality inquiry: (i) is the objective sufficiently important to justify limiting a fundamental right, (ii) is the measure rationally connected to the objective, (iii) are the means chosen no more than is necessary to accomplish the objective, and (iv) is the impact of the rights infringement disproportionate to the likely benefit of the impugned measure?

46. After explaining that the Supreme Court had rejected this structured approach to proportionality in cases where article 8 was the only defence raised in answer to a possession claim by a social landlord, Lady Hale explained why different considerations apply to claims affecting an occupier's equality rights. I shall set out an extended part of her judgment, including part of [38], upon which the Recorder placed reliance. Before doing so, however, I should first explain her references to the 'twin aims'. They are summarised in *Manchester City Council v. Pinnock (Secretary of State for Communities and Local Government and another intervening) (Nos 1 and 2)* [2010] UKSC 45, [2011] UKSC 6, [2011] 2 AC 104, per Lord Neuberger of

Abbotsbury MR, giving the judgment of the court, at [52]. This was a possession case in which an article 8 defence was raised. Lord Neuberger said that:

> '… the proportionality of making an order at the suit of the local authority will be supported not merely by the fact that it would serve to vindicate the authority's ownership rights. It will also, at least normally, be supported by the fact that it would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including, for example, the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisted housing. Furthermore, in many cases (such as this appeal) other cogent reasons, such as the need to remove a source of nuisance to neighbours, may support the proportionality of dispossessing the occupiers.'

47. Reverting to *Aster Communities,* Lady Hale said this:

> '31. No landlord is allowed to evict a disabled tenant because of something arising in consequence of the disability, unless he can show eviction to be a proportionate means of achieving a legitimate aim. He is thus obliged to be more considerate towards a disabled tenant than he is towards a non-disabled one. The structured approach to proportionality asks whether there is any lesser measure which might achieve the landlord's aims. It also requires a balance to be struck between the seriousness of the impact on the tenant and the importance of the landlord's aims. People with disabilities are "entitled to have due allowance made for the consequences of their disability": *Lewisham London Borough Council v. Malcolm* [2008] AC 1399, para 61. It certainly cannot be taken for granted that the first of the twin aims will almost invariably trump that right. Even where social housing is involved, the general considerations involved in the second of the twin aims may on occasions have to give way to the equality rights of the occupier and in particular to the equality rights of a particular disabled person. The impact of being required to move from this particular place on this particular disabled person may be such that it is not outweighed by the benefits to the local authority or social landlord of being able to regain possession…
>
> 32. … When a disability discrimination defence is raised, the question is not simply whether the social landlord is entitled to recover the property in order to fulfil its or the local authority's public housing functions, but also whether the landlord or the local authority has done all that can reasonably be expected of it to accommodate the consequences of the disabled person's disability and whether, at the end of the day, the "twin aims" are sufficient to outweigh the effect on the disabled person. These are questions which a court is well equipped to address. …
>
> 34. I am prepared to accept that, in possession cases brought by social landlords against tenants who otherwise have no right to remain in the property, it can generally be taken for granted that the landlord is acting in pursuance of the twin aims; and further that those twin aims are entitled to weigh heavily in a proportionality exercise. However, as already explained, that is by itself not enough to counter a discrimination defence. Once facts are established that could give rise to a discrimination claim, the burden shifts to the landlord to prove

> otherwise. This will depend on the particular type of discrimination alleged. … If it is a claim of disability discrimination under section 15, then the landlord would have to show that there was no less drastic means of solving the problem and that the effect on the occupier was outweighed by the advantages. The express burden of proof provisions in the Equality Act 2010 cannot simply be ignored because there are some elements in the proportionality exercise which can be taken for granted. …
>
> 36. There may also be cases where a discrimination case is so lacking in substance that summary disposal is merited. The test is whether the claim "is genuinely disputed on grounds that appear to be substantial". I agree with Lord Neuberger of Abbotsbury PSC (para 59) that the case could be summarily disposed of if the landlord could show … (iii) that bringing and enforcing the claim were plainly a proportionate means of achieving a legitimate aim. …
>
> 38. … It is, however, clear that in possession actions generally, and in discrimination cases in particular, the role of the court is not akin to judicial review. It has to undertake the proportionality exercise itself. The second problem is that [the circuit judge] regarded the proportionality exercise under section 15 as the same as the proportionality exercise under article 8. For the reasons given earlier, it cannot be exactly the same. While some things can be taken for granted, and some cases may be so clear that summary disposal is warranted, the issues are not all the same.'

48. Finally, I refer to this passage from the judgment of Lord Wilson JSC:

> '64. … Where [a defence is raised under section 35(1)(b) to a possession action], the court should adopt a four-stage structured approach to the claimant's attempt to show, pursuant to section 15(1)(b) of the 2010 Act, that the steps which it is taking for the purpose of securing the defendant's eviction are a proportionate means of achieving a legitimate aim.'

49. The outcome in *Aster Communities* was that, although the circuit judge had adopted an incorrect approach to the proportionality exercise, his possession order was affirmed since, in light of the matters explained by Lord Wilson at [74], on a full trial the court would be bound to conclude that the eviction was a proportionate means of achieving a legitimate claim.

50. I return to the present appeal. The Recorder, in paragraph 7 of his judgment, was of the opinion that *Aster Communities* showed that it was the eviction itself that was the central act in the drama of possession proceedings against a disabled tenant, and that even though the court may earlier have held that the making of a suspended order for possession was not discriminatory, it nevertheless had, of its own motion, to reconsider the same question at the point when such an order came to be enforced.

51. In my judgment, there is nothing in the judgments in *Aster Communities* supporting such an approach and I respectfully regard the Recorder's different view as wrong. The logic of his view is that in a case in which, following a section 15(1)(b) proportionality analysis, a court makes a lawful outright 28-day possession order with which the tenant fails to comply, so that the landlord has then to issue a warrant for possession, the tenant is at that point entitled to require the court to embark afresh

upon the same proportionality exercise that it had made when ordering possession. That is also the logic of Mr Fitzpatrick's submission. The suggestion is, in my judgment, mistaken and I would reject it. When making the possession order, the court has undertaken the relevant proportionality inquiry. It has satisfied itself that possession must be given and that, if it is not, the order can lawfully be enforced. The order is binding between the parties. The tenant can have no right, absent any relevant change of circumstances, to require the court to re-consider the same question upon the landlord's claim to enforce the order. The recognition of such a right would be a recipe for repeated applications of a vexatious nature. There is no such right.

52. As I have acknowledged, and as Mr Kohli accepts, there will be cases where between the making of the possession order (whether suspended or outright) and its enforcement there has been a material change of circumstances such that a legitimate question will arise as to whether it is still proportionate to enforce the possession order. In such a case, the court will have to re-consider the section 15(1)(b) proportionality inquiry. That, however, is not this case. The Recorder was wrong to hold that Paragon's claim to enforce the order must be the subject of such an inquiry.

53. That makes it unnecessary to consider Paragon's ground 3, which only arises if it is wrong on grounds 1 and 2, but I shall anyway do so. Whilst I am ready to take judicial notice of M. Jourdain's celebrated ability to speak prose without realising he was doing so, it initially appeared to me more difficult to regard Judge King as having, with similar unawareness, engaged on a valid proportionality inquiry under section 15(1)(b). That said, I have decided, however, that Mr Kohli's submission is correct. What counts is the substance, not the form; and the substance of what the judge was saying in the quoted paragraphs was that, in the extreme circumstances of this unhappy case, she was satisfied that the claim to enforce the possession order met all four elements in the fourfold proportionality inquiry explained at [28] in Lady Hale's judgment, referred to at [45] above.

54. More particularly, Judge King found that, and explained why, these were proceedings against a tenant whose anti-social conduct had had, and was having, an intolerable impact upon his neighbours. A landlord's claim to recover possession from such a tenant will plainly satisfy the first two steps in the inquiry. As to the third and fourth steps, the judge found that whilst Mr Neville had been given the opportunity to mend his ways, there was no basis for finding that he had done so or that, if the warrant was not executed, there would be no recurrence of his conduct in the future. In holding the case to be 'a *Lambeth v. Howard'* case, Judge King was finding that Mr Neville's conduct had been so intolerable that there was no way in which the situation could be repaired and so no alternative to permitting the execution of the warrant. In *Lambeth*, Sedley LJ had held that an outright order for possession was 'an acceptable means of achieving a legitimate aim' and, in regarding the present case as of the same character, Judge King regarded the execution of the warrant as a similarly proportionate response to Mr Neville's conduct.

55. In my judgment, therefore, whilst of course Judge King did not carry out the structured inquiry referred to in *Aster Communities*, her judgment nevertheless shows that she regarded the enforcement of the possession order as a proportionate means of achieving a legitimate aim. That is not surprising. The discretionary exercise of judgment with which she was faced necessarily required her to consider the reasonableness or otherwise of permitting the enforcement of the order; and a

conclusion in favour of enforcement was almost inevitably going to require her to answer, as in substance she did, the same questions as those posed by the section 15(1)(b) proportionality issue.

Disposition

56. I would allow the appeal, set aside paragraphs 1 and 2 of the Recorder's order, restore the ruling of Judge King of 7 November 2016 and dismiss Mr Neville's application to suspend the warrant.

Lady Justice Asplin :

57. I agree.

Lord Justice Simon :

58. I also agree.