Housing Law Practitioners' Association

Minutes of the Meeting held on 21 January 2015
University of Westminster

Using the Equality Act

Speakers: **Tony Ross, Arden Chambers**
Jamie Burton, Doughty Street Chambers

Chair: **Will Ford, Osbornes Solicitors**

Chair: Good evening everybody and welcome to the first HLPA meeting of the year on the Equality Act. Could I first ask if there are any corrections to the Minutes from the last meeting in November? If not, I have a couple of other announcements to make. Firstly, there are elections to the Executive Committee for 2015 and the deadline for nominations is 2 February. Secondly, Justin Bates is responding to a consultation on an increase in issue fees for civil cases and has asked members to email him before the end of January if they have any comments on that consultation for him to factor in.

So that just leaves me to introduce the two speakers for today. Firstly we have Tony Ross who has recently moved to Arden Chambers from 1 Pump Court. He is a very experienced advocate with expertise across the broad spectrum of housing law and he also sits part-time as an employment law judge, so he will be in a good position to be able to tell us all about the ins and outs of the Employment Act as a lot of the case law seems to stem from employment law. Our second speaker is Jamie Burton from Doughty Street Chambers who has particular expertise in public law covering a broad range of areas including human rights, social and clinical care, housing and social security. He is regularly instructed in judicial reviews and public bodies and has been described in Chambers as having an eagle eye for detail and a reassuring manner. He will be dealing with the second talk on the Equality Act so I will leave it to Tony to speak first.

Tony Ross: Good evening everyone. You have a handout of my talk, so it is not my intention to read through every line but to give you a few points focusing on the protected characteristic of disability, because many of our clients have a disability. The analysis that I will give of the Equality Act will focus on Sections 15 and 35 and 20 and 21, so discrimination arising from disability and breach of the duty of reasonable adjustments. I will draw on my experience from the employment tribunal and will spend time looking at practical matters in defending claims and practical matters in bringing claims and counter-claims, because perhaps that is something that we could all look at again.

The first point to note is that the Equality Act was a statute to harmonise various anti-discrimination statutes. I think it is important that when you look at a case with a client who has the protected characteristic of disability you take your housing hat off and you put a discrimination hat on. We need to make ourselves into discrimination lawyers and that is perhaps the most practical thing we can do. Will is right that many of the early cases in respect of disability discrimination come from the employment tribunal, but if we look through the law reports now many cases we will see come from, for example, services, road transport or air travel so we need to take the principles from those areas and apply them in our own. It is easier said than done but I am relieved to see that the Court of Appeal in *Akerman-Livingtone v Aster Communities Ltd* also found it very difficult, so you can be forgiven if you do not do it straight away.

I should say I have listed all the key provisions but what I want to look at first is Section 15, the first type of prohibited conduct, discrimination arising from disability. There is no easy way to break it down other than to say that A treats B unfavourably because of something arising in consequence of B's disability. There are two potential defences: firstly, justification, was the treatment a proportionate means of achieving a legitimate aim; secondly, that the landlord did not know and could not reasonably be expected to know of the tenant's disability. In paragraph 11 I deal with causation and the necessary test. The test is a wider one because it is that the occupier must show unfavourable treatment arising in consequence of the disability. Now that generally will give a broader test so, for example, from the

examples I have given one particular case I dealt with concerned a tenant who had OCD coupled with an anxiety disorder. The complaint was noise nuisance but it transpired that because of the disability she was walking round during the night and doing things during the night that other people would be doing during daylight hours and that formed the basis of the Section 15 defence. The other key thing to remember is that disability need only be an effective cause; not the main cause, not the substantive cause. That arises from a key principle that no discrimination whatsoever is justified. If there are mixed causes it is quite possible that medical evidence would be needed and many of you will tell me about the difficulty of getting good medical evidence. Someone has already mentioned that to me tonight. But that is what might be required if your client has an excluded condition as well such as addiction to alcohol.

In terms of the first or the most obvious statutory defence; that of the landlord not knowing; two things. The landlord is treated as having corporate knowledge, if you like, so the actual officer need not have it in his mind at the time if the organisation knows of the disability. The second point is that Section 149, which I know Jamie will talk about, but I will just mention at this point briefly, produces a heightened duty of enquiry. The scope of the duty is being looked at currently by the Supreme Court in a case called *Kanu v London Borough of Southwark.*

I think what the defence of knowledge shows us is that as advisor when you see a client for the first time, if they have just got notice and you suspect they have a disability or you think it is likely, it is important that you inform the landlord straight away and make a request for any adjustments to avoid any disadvantage which the client appears to be suffering.

Proportionality I am going to deal with only very briefly. I will be looking at it in the context of *Akerman-Livingston* anyway but just to make two points about the proportionality defence, the first is this, if there is a reasonable adjustment that has a prospect of removing the disadvantage suffered by the client, so in other words there is a breach of that duty, in my view it would be impossible for the unfavourable treatment to be justified. That would appear to be in keeping with principles in cases such as *Archbold v Fife*, a famous employment case. At the very least it would be very, very difficult, it seems to me, for a landlord to justify unfavourable treatment in those circumstances. But there is a second point that if there is a breach of the PSED it may be more difficult for the landlord to justify the treatment. So the proportionality defence requires you to, again, think more broadly and think of all the potential arguments in the area we are looking at of the Equality Act.

At paragraph 21 I basically explain that Section 35 which deals with management of premises needs to be read with Section 15. Section 35 prohibits discrimination in the management of premises and that would be discrimination arising either because of a Section 15 claim or because of a breach of the duty to make reasonable adjustments. It is also important to notice that Section 35 does not only deal with eviction and the stages leading up to eviction. It deals with subjecting the tenant or occupier to any other detriment. Now the term detriment in a case called *Shamoon v RUC* was given a wide definition. There does not have to be an economic or physical detriment. It is anything that the reasonable employee in that case but reasonable occupier in our case could consider to be a detriment. There does not have to be an economic or physical consequence. In the area that we deal with and perhaps particularly in anti-social behaviour injunction proceedings might give rise to the idea of detriment. In a case I am dealing with at the moment there is a term which is being sought whereby the tenant is not to contact any officer of the housing association and it seems to me that that term would be a detriment.

Moving on to practical application of Section 15 and *Akerman-Livingston*, Section 15 can be relied upon where there is an assured or a secure tenancy. It can form part of the reasonableness defence and if not, a free-standing defence. But the more interesting area is probably where there is a non-secure tenancy and it is relied upon. It is particularly important in that area because it will provide, if it is made out, a complete defence. In respect of notices which take on a particular importance in the non-secure tenancy area, the argument may be raised that as a notice to quit has been served and expired therefore the tenancy has come to an end, therefore a possession order has to be granted. If the defence is that the notice itself is an act of discrimination then it is fairly clear from two speeches in the House of Lords in *Malcolm* that the possession claim relying on the notice will be dismissed on the basis, very broadly, that you cannot take advantage of your own unlawful act and expect the Court to rubber stamp it. I like to look at it a second way. It may be two sides of the same coin but I like to look at it this way. Discrimination is a statutory tort. If the landlord in that scenario had taken possession by an unlawful eviction that would be a trespass. It seems to me it really is little different for it to be an act of discrimination in respect of the notice or the tort of trespass. Really they are both torts and the Court, in the case of tort, will look to provide a restitutionary remedy whether by an injunction and/or damages.

In respect of *Akerman-Livingstone v Aster Communities Ltd,* paragraph 29 onwards, obviously that is a case that is being heard by the Supreme Court and judgement is awaited. There is a very great deal that might be said about the argument in *Akerman-Livingstone*; I am not going to say them. Now for those of you who do not know the facts Mr Akerman-Livingstone has a severe mental impairment. He was found to be owed the full housing duty. That required him to choose a property under the choice based letting system operated by the authority. Because of his impairment he was unable to do that and the housing association brought possession proceedings. They were defended on the basis of Section 15 and the argument run in the County Court by the landlord with success was that the same test for proportionality as applied in Article 8 cases should be applied where a landlord raises the defence of proportionality or justification in the context of Section 15. Now there are many points that might be made. The first is that that imposes on the tenant a very high threshold; it would be necessary for the tenant to show, often at an early stage of the proceedings, that the defence under Section 15 was seriously arguable. The Court of Appeal also held that in most cases the interests of the social landlord would outweigh those of the tenant relying on Section 15 and the social landlord in this case was providing temporary accommodation for those homeless persons who had been referred to them by the local authority.

As I said, there are various problems with the approach taken by the Court of Appeal. One is that it would appear to reverse the burden of proof when indeed the Equality Act, Section 136 reverses the burden of proof the other way, as it were. Secondly, it would appear to cloak social landlords and possibly public landlords in some sort of special protection which is not justified. But rather than have an academic debate about what *Akerman-Livingstone* means I tried to think of points that you might make if you were facing the district judge tomorrow on a duty list. The first thing it almost certainly means is that your work is front-loaded. If you have an opportunity to see the client first you would need to do a fully particularised defence, get whatever evidence you could. Now I realise that that maybe entirely unrealistic but that, unfortunately, is what *Akerman-Livingstone* seems to require you to do. The second point I thought of is perhaps only a trick, an illusion, but perhaps it may work if that is what you need. It is very, very common in the employment tribunal, in fact in every discrimination case, there will always be a list of issues which is regarded as a tool for the full hearing of the matter. It may be in the time available you can do a very quick list of issues and dress it up as a triable issue, it is only a suggestion. The third point might be to look for an argument that there is a breach of the duty to make reasonable adjustments, because if you can point to one there will be no justification defence and in many scenarios there may be such a duty or at least an argument.

Fourthly, and this is an important point, there is a general principle in the employment tribunal which I would consider the holy grail when it comes to discrimination cases and that is that they are fact sensitive. I do not know when I learnt that, I know it is a long time ago, probably the first case I ever did. It is important to emphasise that to a district judge who may not see discrimination cases every day. It is very important to refer him, if you can, to the passage which I have quoted from *Anyanwu v South Bank Students' Union* which is at paragraph 32(d). It is Lord Steyn giving a typically bright and illuminating judgement. “For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest of cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.” Now it is true that that argument failed in the Court of Appeal but in my view that says nothing about the strength of that argument and it may be that a district judge would accept it. There is a further point which might be called the sequence point. When the issue of proportionality is dealt with in Article 8 cases it only arises after the eviction is found to be in accordance with the law. Proportionality under Section 15 determines whether the eviction is lawful at all and that is a point of fundamental difference. That is one of the arguments raised before the Supreme Court so we will have to see how they respond to that.

Moving on to paragraph 33, raising the Equality Act at the execution stage, there is a case called *Lawal v Circle 33 Housing Trust* which basically holds that Article 8 cannot be raised at the execution stage. My view is that the Equality Act can be raised at the execution stage and that is fairly clear from the terms of Section 35, which say by evicting B or taking steps for purposes of securing the eviction, that invites the Court, in my view, to look at unlawful acts perhaps at each stage or perhaps at a particular stage of the execution process. In my view that would not be an abuse of process, which was the argument that succeeded in *Lawal* because of all the reasons that I have set out within the handout. Firstly and fundamentally, there may be some reason arising from the disability that meant that it was not raised earlier and it seems to me it cannot be the case that a statute which is designed to protect those with disabilities in some way cannot be used when it is most critically needed at that crisis point.

The interesting point comes when it is the execution stage in respect of a non-secure tenancy. If we assume that the notice to quit was lawful the possession proceedings cannot be defended on that basis, but your concern is that the decision to apply for the warrant was tainted by discrimination. What I propose is the right course is that a fresh claim is brought for an injunction to restrain the execution of the warrant, or perhaps to restrain the landlord taking steps necessary for the warrant to be executed, or perhaps to restrain the landlord from applying for the warrant. This may be covered by the next speaker but Section 149 also applies to the decision to seek execution.

Paragraph 39 it is the duty to make reasonable adjustments. The duty is within Section 20 and Schedule 4 in respect of premises. The key points I think I can leave you with are these: that it is potentially a powerful tool because no unfavourable treatment is required, there is no proportionality defence, it is likely to be impossible for the landlord to make out a proportionality defence in the Section 15 claim if you win in the breach of reasonable adjustments claim and, fundamentally, it may require more favourable treatment to be accorded to your client. The duty concerns the levelling or equalling up of the playing field but it can lead to more favourable treatment. The key points that I want to extract from what I have set out in the notes are, firstly, the duty does not arise until a request has been made. The request is not necessarily for a specific adjustment; it is for the disadvantage to be removed. In terms of discharge of duty, what is a reasonable adjustment? There is a checklist from the Code of Practice on services which I have set out. You will note from the first of the bullet points on the checklist where particular steps would be effective in overcoming the substantial disadvantage. Now if the step would not be effective or could not be effective at all then it cannot possibly be a reasonable adjustment. If, however, the step has a prospect, not a substantial, not an overwhelming but if it has a prospect of removing the disadvantage it could be a reasonable adjustment and that is important because otherwise it would be important for your clients to be able to prove the effect, perhaps the ameliorating effect, of an adjustment. The other point to remember in respect of duty is that it is an objective test, not a Wednesbury test, not a band of reasonable responses test.

Now for your practice notes the most important part on reasonable adjustments is what I set out at paragraph 68. A case called *Environment Agency v Rowan* in the EAT established that a structured approach needs to be taken to deal with cases where there is a duty to make reasonable adjustments. I have adjusted that test to try and make it fit in with the premises part of the Equality Act. Although I have put the request first in the handout I think that should probably go last. All the steps are there, identify the PCP, identify comparators, ie non-disabled tenants and then, third, the nature and extent of the substantial disadvantage suffered by the tenant or occupier in relation to the enjoyment of the premises or use of some benefit. The other point to be clear about is that the substantial disadvantage has to arise out of the PCP. Fourthly, you need evidence that the adjustment would or may have been effective and, fifthly, the request.

Can I also make one thing clear? I looked at the notes from two years ago and the speaker was very clear that it would be a very powerful tool and it could be used more in housing. I do not disagree with that, that it can be a very powerful tool. My experience in the employment tribunal is that reasonable adjustment cases are difficult to run. There are a number of hurdles in there which are sometimes difficult to get over. It requires an extremely clear mind, sometimes an ice-pack, to clarify things. It cannot be done at 5 o'clock in the evening. The cases that I have dealt with when I have been sitting involving reasonable adjustments have been amongst the most difficult. I think it is a combination of all the factors that I have identified for you and I think the starting point for all of us, and I include myself in this, let us look at that checklist when we are considering the case and analyse each point or when we are doing our witness statement let us analyse each point, have we covered them? If we have not, we have to probably accept we are not going to succeed.

Moving on to paragraph 74, bringing claims and counterclaims, I do not want to spend very long on this, only to say that discrimination complaints are statutory torts. Possibly practitioners have been slightly afraid of them because they are not familiar but you need to think of them and plead them in the same way as you would an unlawful eviction. After all an eviction that is achieved through discrimination is an unlawful eviction and perhaps we should think of them in the same way. But it is important to particularise each complaint, each act of discrimination, a date and a time. We need to particularise injury to feelings and if there will be a claim for aggravated damages we need to particularise that as well.

In terms of remedies for a claim or a counterclaim, the primary remedies are those remedies which are available in judicial review or tort actions. The Court will consider whether to make an injunction or a declaration before it considers compensation. In an employment tribunal case there will always be a

declaration of discrimination and then compensation will be looked at. It is not uncommon for there to be a declaration but there will be nil compensation because one party has mitigated their loss perhaps or only compensation in terms of injury to feelings.

In terms of injury to feelings, again I have done my best to update the case of *Vento v Chief Constable of West Yorkshire Police*. That case set out different bands of injury to feelings for different types of conduct. A later case, *Da'Bell v NSPCC* said that those bands should be uprated with inflation and in my view they need to be uprated again because of the case of *Simmons v Castle* which says that general damages should go up by 10% from 1 April 2013. So the figures that I have given you I have updated using RPI to December 2014 so they should provide at least a handy tool for you. I do not think there is any magic to where a particular complaint, if it is proven, will fall within those bands other than in a very general way. It is easy to point to the band and much more difficult to point to where they fall within the band. That will very much be up to the Court and the fact-sensitive nature of the case. I know there will be people thinking, well sounds like a lot of trouble for a few hundred quid. I am not sure it is any more and just looking to see whether I could find any examples there was a recent case, *Campbell v Thomas Cook 2014 EWCA16/68*, a failure to make a reasonable adjustment for a disabled passenger who spent one day at the airport. She suffered from arthritis and there was no wheelchair provided and no comfortable seating. The judge at first instance awarded £7,500 which seems to me a fairly generous award. It was not appealed, the appeal was on a different basis. Now, again, can we read across that disabled passenger into a housing case? Well, I am not sure we can but it shows you that Courts are prepared to make proper substantial awards to reflect the injury to feeling.

The last point I want to finish on is assessors, paragraph 105 onwards. The procedure for the appointment of an assessor is at CPR 35.15 but the procedure itself is in the Practice Direction paragraph 10. The procedure requires that not less than 21 days before making any such appointment the Court will notify each party in writing the name of the proposed assessor or the matter in respect of which the assistance of the assessor will be sought and of the qualifications of the assessor to give that assistance. Now, in the employment tribunal in every discrimination case there will be two lay members who have had equality and diversity training. One will come from the TUC side of industry and one from the CBI side of industry. Industry and the unions are very content with the system. I could not give any official view myself as an employment judge but anecdotally it has been said to me by a majority of employment judges that they are “of doubtful benefit”; they slow the case down and they may not appreciate the key issues or link the key issues with the key evidence. I notice that one of the questions asked on the last occasion was what did the speaker think of the appointment of assessors? I suppose I would consider it similar to how I felt on learning that we were having twins. I was very pleased but I did not know what to expect and I sit, as an employment judge, and I still feel something of that feeling going into a discrimination case with members. The recent case that I have referred to, *Cary v Commissioner of Police for the Metropolis* sets out that the Court must appoint or must usually appoint at least one assessor in all discrimination cases. At an early stage it must address the question whether there is any reason not to have one or more assessors in respect of what matter the assistance of the assessor should be sought, what sort of assessor that should be and his or her identity. Now traditionally I am told from colleagues who are employment judges and, indeed the case bears out, that assessors have been provided from the lay membership of the employment tribunal. Now one thing comes to mind, that it if is only going to be one assessor do you want the CBI assessor or do you want the TUC assessor? I mean you might say, well, isn't that really stereotyping, you can't say that? Well, it may be but some of you may think that your case might be better dealt with by a TUC representative or a CBI representative or, perhaps to get around that, it may be better to have two assessors. Anyway, I will not go through the rest of the case but it is just about the last word on the procedure for assessors and what you need to do in the circumstances. It would be helpful to have at a CMC where you are raising an Equality Act defence.

That concludes my portion of the talk.

Jamie Burton: I am going to talk about one issue really which is the relevance of the Public Sector Equality Duty in the context of housing and in particular in relation to two issues. One, defending possession proceedings and two, in the context of public law decision-making when it concerns housing and accommodation. Before I do that, I am just going to remind everybody of the text of Section 149. I am doing that for a reason; it is because it is important with all law of course to always remind yourself of the primary legislation but particularly important in my view in relation to Section 149 in the Public Sector Equality Duty. Over time there is a sense developed I think, particularly by public authority decision-makers, that all they really need do is make reference to the duty, say something about it or even say something about having regard to equality considerations. As far as the case law is concerned

there is no question that that is not good enough. That said, of course, what is somewhat unusual about the Public Sector Equality Duty, and it is important to remember this too as advisors, is it is not results-focused. It does not predicate the particular consequence in any proceedings or indeed in the context of any particular public law decision. It is very firmly a process obligation; it requires a decision-maker to go through certain hoops or, if you like, have regard to certain specific considerations and not just have regard but have due regard to those considerations, ie the extent of regard that is considered appropriate in the circumstances. So, of course, the principal object of the provision is to ensure that decision-makers in the exercise of their functions have due regard to the need, so it has accepted that there is a need, to address each of these three goals. The first is to eliminate discrimination in all its forms, the second is to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not and the third is to foster good relations between persons who share relevant protected characteristics and persons who do not. It is clear, I think, that the second of those is the one we will most commonly be concerned with in our work, principally because quite commonly if you are looking at discrimination in its purest form you might be looking at alternative ways of helping your client and particularly the sorts of ways that Tony set out. Because, of course, what we are concerned with here is a public law obligation available in public law proceedings. What we are not concerned with here, for example, is a statutory tort. You cannot bring a claim for damages for breach of the PSED. However, as I will come on to show and it really is the point of my talk, that perhaps the biggest issue that has come out of recent jurisprudence concerning the Human Rights Act, the Equality Act and private law proceedings is precisely where the private law starts and the private law stops and the public law starts and the public law stops. Because, as I hope to show, this is still an area which has caused confusion and indeed even at the highest level in our judiciary we are getting inconsistent decisions about precisely what the implications of, for example, a breach of a public law obligation means in private law proceedings.

Turning back to the text, as I say, it is likely to be the middle one you are most commonly concerned with. Sub-Section 2 simply repeats what we know from the Human Rights Act in terms of what a definition of a public authority for the purposes of the applicability of this duty is, so for all our purposes that includes, of course, RSLs and suchlike who pass the test under the Human Rights Act. Three is very important; having due regard to the need to advance equality of opportunity between persons, so that is the second goal that I highlighted a moment ago, involves having due regard in particular to the need to remove or minimise disadvantages suffered by persons who share a relevant protected characteristic. Now just pausing there for a moment, remove or minimise disadvantages, it is principally from that provision that we see a great deal of case law focused on this simple principle that whenever a public authority is on the cusp or contemplating making a decision or doing something which they have determined may have an adverse consequence on somebody who shares the protected characteristic, they are duty bound to then ask themselves the next question, is there a way in which I could do what I am trying to do in such a way as to remove or minimise the disadvantage that might otherwise come to bear on a person with a protected characteristic? Now it does not require, importantly, that person necessarily to do those things, ie to take the least interventionist approach but it does require, which is still important, the decision-maker to consciously think about how they might achieve their objective in a way which causes less detriment to a person who shares a protected characteristic and take steps to meet the needs of persons who share a relevant protected characteristic. Next, (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it, ie treat people who are different differently. It is a very important part of discrimination law, of course. It is not just the same as treating everybody the same; it is not just about pure equality in that way, it is about recognising that what you do in 99 cases might not be what you should do in 100 cases if you are confronted with somebody who presents with different characteristics or different needs. And (c) is something which thus far I do not think has generated any particular litigation but that is not a reason to discard it. Again, I would ask you to remind yourself of precisely what the requirements of the public sector duty are when you are thinking about advising a client in these circumstances and use your imagination to think about whether or not you can see any evidence of the public authority to have specific regard to (c). Particularly relevant, of course, to people who share the protected characteristic of a disability, Sub-Section 4 says the steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities. Convoluted language, I am sure you all agree, well certainly that is the view of almost all the judiciary but the idea is pro-active steps have to be taken by the decision-maker to work out whether or not there are particular needs of people with disabilities that need to be factored in.

I will skip Sub-Section 5 for current purposes, but just as I said about Sub-Section 3(c) keep it in mind when you are advising a client. Finally, 6, positive discrimination as a consideration under the Public

Sector Equality Duty is explicitly provided for. Then, of course, we see the relevant protected characteristics. A common mistake is people think of sex as meaning gender and that is, of course, wrong; one must always refer to sex when considering differences of treatment between men and women. So just very quickly I will remind you of some of the established principles that have come out of the case law. These days if you are wanting to look this up quite quickly the decision in *Bracking v Secretary of State for Work and Pensions* is now pretty much accepted as being the definitive statement of all those principles and otherwise they summarise the principles that have come out of all the Court of Appeal authorities in recent times. I have just highlighted a couple of the key ones here but *Bracking* is good reading, it is a positive result and also a case where the judge did a very good job of going through those authorities. Just to remind you, the PSED forms an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation, ie despite what Theresa May might think of it, it is not just a hindrance or a burden; it is an important part of the State's attempt to rectify historic discrimination in society. The PSED must be exercised in substance with rigour and with an open mind.

Again, it is not a tick boxing exercise; it means something and has to be done properly. General regard to issues of equality is not the same as having specific regard by way of conscious approach to the statutory criteria. Again, that is really the point that I made in opening, very important; a decision-maker cannot show compliance by saying yeah, yeah, I did think about the Equality stuff. I know your client is vulnerable. It is not enough, we have looked at the particular stated goals and how they are amplified by the Sub-Sections for a reason and you should expect your decision-makers to do something similar. And (d), perhaps most critical in practical terms for your respective practices, the duty of “due regard” requires public authorities to be properly informed before taking a decision. If the relevant material is not available there will be a duty to acquire it. So it is not up to you always as advisors to put all the necessary information before a decision-maker, not least because you may not have it available to hand. How do you know, for example, whether or not a particular practise or policy that a decision-maker executes is one that has a disparate impact on a particular group who share a protected characteristic. You probably do not have the statistics to hand to answer that question but it may be necessary as part of their duty when contemplating doing something or not doing something to ask themselves, well wait a minute, if we do this will it really affect in an adverse way single mothers, for example, or people who have a particular disability or children or people over 65 or any such category or person who share a protected characteristic? This is by way of highlighting what is happening with public law in relation to the UK's international legal obligations which is now part of the component of the PSED, part of best practice if you like, for there to be an awareness of the requirement of the UN Convention on people with disabilities. Indeed, that actually applies to all of the international conventions and we have seen very similar jurisprudence in relation to the UN Convention on the rights of the child in the context of Article 8.

I wanted to raise the issue of decisions to evict only really briefly, partly because in reality it will be difficult to sustain a defence exclusively on a PSED in private law proceedings relating to possession but partly to try and look at that bigger issue that I mentioned at the beginning, which is what does it actually mean to show a public law failing on the part of the public authority landlord in the context of private law possession proceedings? Now Tony has already made a couple of very astute points about that; I just want to highlight one of them. By and large, this will only really matter in circumstances where you are looking at claims for possession which are based on mandatory grounds. It is absolutely right to say that a public authority, let us say a local housing authority might make a decision to bring possession proceedings against a secure tenant or a housing association against an assured tenant which portrays all of the same failings in terms of their public law obligations that we are discussing today and which have been the subject of some of Tony's talk, but we as lawyers do not really tend to focus on those because our minds naturally focus on the end result, the reasonableness test. Everything we want to say about what is vulnerable about our client, about what considerations ought to have been given to our client, etc are likely to be tied up in our argument that it is not reasonable to grant possession. If there is one thing that the Public Sector Equality Duty has added to that matrix is that where you do have a tenant who has a protected characteristic, particularly disability for practical purposes, part of the reasonableness assessment may now include at the very least asking the public authority to illustrate that they have thought about the consequences of eviction and, second, what might be available to the tenant and the tenant's dependants and family members, etc if a possession order is made. It might just be you can get a little further with your submissions on reasonableness before a judge if the public authority cannot show or say anything of any merit or value in the context of that issue. But by and large what we are concerned with here, as I said earlier, is claims for possession against people who do not have the right to invoke the reasonableness jurisdiction at the court. In other words, the court has to grant a possession order unless you can show either a public law defence or a defence based on Article

8 insofar as there is any difference between those two.

Now *Barber v Croydon* was a judicial review taken by Mr Barber in circumstances where Croydon sought possession of his home after he assaulted a caretaker. It was established that to some extent at least Mr Barber's behaviour was a consequence of a disability that he suffered from. What was established in that case as part of the predecessor to Section 149 and which is Section 49 of the Disability Discrimination Act is that the duty required at least two things. What would the effect of the eviction be on him personally, ie what would the adverse consequence be and, second, give explicit consideration to alternatives to eviction. That comes from the provision that is now actually explicit in Section 149, as I said a moment ago. Have they thought about how to remove or minimise the disadvantages, the disadvantage being the possession proceedings that follow on from his disability? Now Mr Barber was undoubtedly supported in his judicial review by the fact that Croydon actually had a policy which said when you are dealing with a vulnerable tenant you need to give explicit consideration to a number of factors including whether or not alternative accommodation might be available or, particularly, whether less serious measures might be available to the landlord and they specifically make reference to an anti-social behaviour contract in that case as an alternative to eviction. What is interesting, though, is the result which is at judicial review. The judge, having found that Croydon had not complied with this policy, had not thought about the consequences for Mr Barber, had not thought about whether or not there was something else they could do instead of evicting him, found for him on the application for judicial review and quashed the decision to bring the possession proceedings. Saying, of course, at the same time that that would not have prevented Croydon from bringing a second set of proceedings if they felt they could show compliance with their public law obligations in so doing. That is a relatively straightforward application of what we understood the law to be, really basically pre the Human Rights Act and pre that line of authorities that we are all now very familiar with which effectively established the right of every tenant in those circumstances in the County Court in the private law proceedings to say, hold on a minute, this will result in a breach of my Article 8 rights. Because it was in the context of that same jurisprudence in a slightly confused way, in my submission, that the House of Lords and the Supreme Court said, well of course, you can raise a public law defence in possession proceedings anyway, the old *Wandsworth v Winder* principle that it is a shield not a sword and you can raise that in proceedings. So to those judges, at least, it felt like a relatively natural jump to go from saying you can raise a public law defence to saying, well, you can also raise your Article 8 defence, not least because Section 7 in the Human Rights Act basically said you can raise it in any proceedings.

That is where things start to get, in my view, a little bit more complicated. I suspect you will all be familiar with the case of *Barnsley MBC v Norton*, it is not that recent. This was a case where Barnsley sought possession of accommodation that was provided to Mr Norton as part of his employment as a caretaker in a school and his employment had come to an end, in fact due to gross misconduct committed by Mr Norton. Naturally Barnsley said, well we want to replace you, Mr Norton, with our new caretaker in the premises because it is tied accommodation to the school. Now what Mr Norton said was, well, you are fully conscious of the fact that my daughter is very seriously disabled; that produces a very acute housing need on our part and you cannot show any compliance with the Equality Duty, the Public Sector Equality Duty, in your decision to bring possession proceedings. Now that went to trial and that trial judge agreed and said, yes, absolutely no evidence at all that you, Barnsley, have even thought about the Public Sector Equality Duty. The difference, however, is what the court decided to do as a result. The trial judge said, well I do not really think it matters because even if you had regard to the Public Sector Equality Duty everything would have been the same, you would have made the same decision. Now just think back to some of the principles I showed you a moment ago that had developed under the Public Sector Equality Duty, a very serious piece of legislation designed to ensure that discrimination is tackled, must be looked at with an open mind and you must have conscious regard to all the particular considerations. Manifest failure to comply with that public law obligation. It went to the Court of Appeal on appeal by Mr Norton where Barnsley said despite the decision in *Peiretti* that we will come on to in a moment, again you will all be familiar with it, how Public Sector Equality Duty does not apply here at all. This is not a decision about people with disability, this is not a decision about vulnerable people; this is just our exercise of our private law rights and really has nothing at all to do with our public law obligations and, entirely unsurprisingly, the Court of Appeal threw that argument out and said, no, it has already been established in *Peiretti*, it applies to all of your functions and the fact that this is about possession proceedings and not about Part VII decisions is irrelevant. In particular the Court of Appeal said that the Section 149 duty was not limited to the exercise of functions that explicitly bore on the rights of disabled people.

So the local authority was under a duty to contemplate this specifically when it was deciding whether or not to bring possession proceedings and the Court of Appeal agreed that it failed in that regard. In

particular in relation to the point taken by the trial judge the Court of Appeal said, oh no, it is not for the court to assume the decision would be the same even had the public authority had regard to the Public Sector Equality Duty. That is quite important too, for those of you who do homelessness work that is the other side of that horrible coin that we constantly come up against which is the judge saying, well I might have made a different decision but it is not for me to make that decision, pull off an argument, if you like. Similarly, where it is the public authority trying to persuade a court to say, well this decision would have been the same, wouldn't it? That is asking the court to do something that is impermissible, to step into the shoes of a decision-maker and make that decision itself, ie to perform the function required of the public decision-maker to see to the Public Sector Equality Duty. Furthermore, the Court of Appeal said in the context of this type of possession claim, it was not necessarily open to the local authority to simply say, well, our Part VII obligations will take care of all of this at the time they made their decision; they were still required to have explicit regard to the Public Sector Equality Duty at that point in the exercise of that particular function. But that whole conclusion was completely undermined by what the Court of Appeal then actually chose to do having found that ground of appeal made out, having decided that in fact there was an obligation to comply with the duty and the duty had not been complied with. It is one of the weirdest passages in a case I have ever read, which is why I like to cite it directly, because it became clear to the Court of Appeal judges as a side-effect of the relatively active debate between counsel and the Court, which is another way of saying a very heated discussion, about remedies in that case that what was needed is that both sides should address in a collaborative way the need for suitable alternative accommodation to be made available sooner rather than later. Which is exactly the sort of exercise we are engaged in day in and day out, a lovely collaborative exercise with a local authority about trying to find nice, suitable accommodation for our tenants. That is exactly what it feels like.

So, on that basis, the Court of Appeal decided to uphold the possession order but did at the very least say this, and Tony hinted at this point in his talk, that the duty did not start and stop at the point of making a decision to bring possession proceedings. If you like it is a continuous duty that would apply just as much to the decision to actually enforce the possession order as it did to the decision to bring possession proceedings. So while these rather wonderful collaborative efforts were underway between Mr Norton and the local authority about trying to secure alternative accommodation there might have been an argument that the local authority should not enforce a possession order until such time as that accommodation had been found. But similarly, just to highlight how difficult to understand the reasoning in this important case is, the Court also said that it would have been proper and rational for the decision-maker to say, well, we are only going to give the thinnest regard to Section 49 at this point, we will secure our possession order and thereafter we will sort out this mess. Which, if you ask me, is pretty similar to simply saying Section 49 in this context had no content to it whatsoever because the local authority could simply park all the tricky, difficult issues to a later stage once the possession order had been made. So in any event, the principle that is clear from that case, which again I reiterate, came out of private law proceedings for possession where a Public Law Defence was raised on the basis of the Duty. It is just in the same way as in application for judicial review, remedy was discretionary and the Court was entitled to say this possession order stands irrespective of the public law failing the Court of Appeal had clearly identified.

Now just before I come on to talk about that, it does seem to me that that really highlights a pivotal issue, which is the extent to which public authorities are entitled to ignore their public law failings and carry on regardless in the hope that by the time they get to court they will be able to show that everything is hunky dory and the way in which they will be able to do this is, of course, because when it comes to the test of proportionality it is absolutely trying to say that the court make that decision. The court decides de novo, if you like, not whether or not a local authority's decision that it is proportionate to seek possession is a reasonable one on public law principles but whether or not in a court's view it is proportionate. Basically, in effect, that is what happened in *Barnsley v Norton*; the Court said basically, yes, we see a public law failing here but the actual possession order is proportionate. We know that because the second round of appeal in Norton was to criticise the trial judge's conclusion who, of course, had rejected the public law challenge anyway, that the possession order itself was a proportionate interference with Article 8. Somehow the Court of Appeal decided it was not necessary for them to determine that issue, which must be read as saying this is clearly a case where it was proportionate to evict which is basically the same thing as the court said at the end; it was appropriate in the circumstances for the judge to make the possession order that he did.

The case of *R (Blake) v Waltham Forest LBC* is a case which actually concerns soup kitchens but it was an attempt by the local authority to do something similar, which was to effectively terminate the licence for a soup kitchen. When it came to their Public Sector Equality Duty obligations they said, well the

impact on or the adverse impact on people who share protected characteristics is going to be minimal because we have offered an alternative site for the soup kitchen to go to and therefore they can continue to use the service there so we do not need to ask ourselves what the consequence would be if we simply closed the kitchen. The problem was in that case that the soup kitchen organisers themselves said, well we do not really want to move to the alternative site, it is on a lay-by next to the motorway and we don't think that is an appropriate place to serve homeless people with much needed food. The argument in that case was, well therefore in the Public Sector Equality Duty they should have had practical regard to what actually was going to happen and not some notional reference to their duties to provide an alternative site which, in my view, is very similar to what a lot of landlords are now trying to do in claims for possession where the grounds are mandatory. They simply say, any concerns you have here about what is going to happen to these people who are going to be evicted are completely avoiding our Part VII duties without any reference to whether or not those Part VII duties would be good enough, how long they were going to take, how compliant the people were going to be, what other practical difficulties people may face, are they going to be in short-term temporary accommodation, bed and breakfast, for months and months, etc.? It seems to me that *Blake* is a good example of a case which establishes that you must still look at the practical implications, you cannot simply point to another statutory scheme and say that is good enough.

But all of this does raise a tactical question for us as advisors to tenants. As I said a moment ago, if you have a good public law defence it may become pretty irrelevant if the court ultimately is asked to determine proportionality because it is then open to the court to simply say, well, irrespective of the public law failing when I look at all these circumstances this is a proportionate eviction. *Barnsley v Norton* is quite a good example of that really because in fact what was happening there was they only had one piece of tied accommodation to the school and they had to have a caretaker living in that accommodation. You could just see how persuasive that would be before a judge, I know you haven't done everything you were supposed to do by this family that you are now evicting, I know things might not be great for them and nobody can be quite clear what is going to happen but there is a pressing need here to get a caretaker into this school. What worries me a little bit about that is to what extent then do you have to approach your public law obligations in a rigorous way if you know the ultimate conclusion is one the court is likely to uphold at the end of the day? Therefore, what do we do as advisors if we think we have a solid public law defence? Do we run a proportionality argument alongside that? Knowing that by doing so we invoke that jurisdiction, we ask the court to make that assessment itself. As we know, proportionality is always, always going to be hard and what we also know from *Akerman-Livingstone,* which I think is another point that Tony touched upon, is that Lady Justice Arden, that great fan of housing law and housing lawyers, concluded in that case that there was no difference at all in a proportionality exercise under the discrimination legislation as under Article 8. No difference at all between those two and the implications of that are twofold really.

Dealing with the second one first, the interest of the social landlord will always be very important, very strong and it will only be in a very rare case that the particular interests of the tenant can, if you like, trump the interest of the social landlord. This was a point that was definitely touched upon by Tony which was about the sequence of decision-making. Lady Justice Arden ignored Jan's argument, which was to say the big difference between discrimination and Article 8 was discrimination to a certain extent looks backwards and the discrimination requirements mean the court has to ask itself each step of the way has the public authority acted in a way which is non-discriminatory? Because if they have that ought to mean the court should not sanction the possession order, whereas under Article 8, so Jan described it, was forward looking, it was all about what the consequences would be for that particular tenant because what we know from the Article 8 jurisprudence is the basis upon which a tenant can raise an Article 8 defence, effectively about whether or not there is a factual dispute with the local authority about the reasons for the eviction or because their personal circumstances are so compelling that an exception should be made. That is much, much narrower than discrimination because discrimination can take many different forms and once you have established discrimination it ought to be much harder to justify one might think than a decision to bring possession proceedings against somebody who may have some particular vulnerability. So in my view this is a dangerous place at the moment for us as advisors because, of course, it is up to us to invoke a proportionality test if we wish. What happens in a case where we do not do that and you take a public law defence only all the way to trial? On what basis does the landlord have the right to say ignore all of that, judge, this is a proportionate eviction? What stops us from turning around and saying, we are not arguing proportionality here, this is just a pure *Barber v Croydon* public law defence. That is a question that has yet to be resolved but it speaks to the bigger issue here, which is, in my view at least, that this great development about allowing us to argue all of these different points in private law proceedings has still left some very tough procedural problems for us all to get our heads around and despite what was said by Lord Neuberger

in *Pinnock* which was effectively to say, here are the principles and you very wise County Court judges can try and sort out all the tricky gritty problems it produces, has not really happened.

There are some examples, I am unashamedly now raising a case I was in simply because I knew about it, a County Court case where the particular housing needs of some people who had no private law right to be in their short-life accommodation were extremely acute, so acute it simply could not be assumed that even under their Part VII obligations, or indeed their Part VI obligations because Lambeth accepted they had a duty to provide alternative accommodation, it was going to take Lambeth years and years to find something to meet the very acute specific needs of the Caruanas. The only needs the local authority asserted for the claim for possession was to raise capital funds, they wanted to sell their nice property on the open market. Now they definitely needed money but what the court effectively said was, well a financial need is all very well and normally would trump any defence raised by a particular tenant but where you, Lambeth, cannot show that anything like suitable accommodation is around the corner then I am going to refuse the claim for possession. In other words, that is very close to being a public law defence that is allowed to run all the way because they obviously had failed in their public law duty to secure suitable accommodation for the Caruanas by the time of the trial and the judge allowed that to then influence his determination of proportionality. But it is a rare case which I am raising just for that real example and that was the passage of the judgement where the judge basically gave his ratio which was because I had "not conducted a sufficient or adequate final review of the position of these two defendants, either with regard to their distinctive, if not unique, housing requirements as they stand today, or in the very recent past, etc."

So that was all I wanted to say about defending possession proceedings and using 149. I am going to say very little about Section 149 and Part VII, partly because I think you will know most of it and also because there is a case that has already been heard by the Supreme Court and we are waiting for the decision in that which is likely to change everything. On *Pieretti v Enfield BC*, the two key points that were established in the Pieretti case were, again, we have seen this principle already established, it applies to every single function and it also requires explicit consideration of all the three goals. It is not enough to simply say, ah but we are dealing with homeless people here, not even that, vulnerable homeless people, which of itself takes care of all of our obligations under the Public Sector Equality Duty. The second point which is far more practical and it is no doubt something that all of you have used in your Housing Act appeals is the rule in *Cramp v Hastings* which was somewhat modified. So *Cramp v Hastings* has established that when it came to criticism of the enquiries that were undertaken by a local housing authority in respect of a homeless application it effectively is not open to an applicant to complain that the local authority did not make an enquiry; that the applicant or the applicant's advisors did not explicitly ask the local authority to make as part of the review. What was established in Pieretti was that was not good enough, the Public Sector Equality Duty shifts the onus of enquiry squarely back on the local housing authority and if they have any reason to believe somebody might have a disability or any other protected characteristic and, critically, that might be relevant to the issues that they are required to determine in the context of that homeless application then the duty to make those enquiries is absolute and is not in any way displaced by failure by the advisors of the applicant to highlight a particular enquiry that should be undertaken.

Now *Kanu v Southwark LBC* which is the case that has now gone to the Supreme Court changed that, really, and said first and foremost in the context of vulnerability decisions, if the evidence, and inquiries, were sufficient for the purposes of the LA's decision (that there was no priority need) then Section 149 added nothing to that. And, second, the Public Sector Equality Duty could not extend to requiring a housing authority to secure accommodation for a disabled person in circumstances where their disability did not render them vulnerable. In other words, the Public Sector Equality Duty did not of itself trigger additional obligations to accommodate people even if they were vulnerable and shared a protected characteristic.

My final point is I still think there is a lot of mileage in the Public Sector Equality Duty but it is not necessarily in the areas of law that we spend most of our time looking at, or more particularly the decisions that we spend most of our time looking at. But there is plenty of scope, it seems to me, to enforce compliance with the duty in the context of the following decisions. The 190 Sub-Section (2)(a) includes a duty to provide accommodation to people who are intentionally homeless but have a priority need, for as long as they need to give them a reasonable opportunity to find alternative accommodation. Does a person with mental health problems need longer to try and secure themselves accommodation than somebody who does not have that protected characteristic, for example? Does the nature of the advice and assistance that they have to be given to help them find that accommodation radically change if they have mental health problems? They might even be like Mr Barber and have mental health

problems which cause them to act in anti-social way. Landlords might not like that very much; they might not be able to obtain references to get private sector accommodation. What kind of advice and assistance is required to those sorts of people? The nature of the housing needs assessment under Section 190 Sub-Section 4, whether or not to exercise the discretion to accommodate at all under Section 192 Sub-Section 3. Whether to discharge into the private rented sector; do some people with protected characteristics present in a way which just makes them unsuitable for private sector accommodation? Are they the sorts of people who really ought to be in social housing? Are they the sorts of people who are never going to be able to sustain a tenancy? Let us recognise that now.

Remember what I said about the duty of enquiry, you have to establish the information you need to make your decisions in such a way that you can show compliance with the duty. Have they thought about these sorts of things when they blithely just offer you a private sector discharge? Whether or not to discharge the duty at all in circumstances where the Act would otherwise allow them to do so? So where an applicant has been accepted for the main housing duty but is refused an offer of accommodation that the local authority thinks is suitable it is not obligatory on the local authority to actually discharge duty in those circumstances, as you all know. That is a decision in itself; a decision that must made having due regard to the needs under the duty. Particularly important now that Parliament has done away with the additional requirement for a Sub-Section 7 discharge that it was reasonable for the applicant to accept the offered accommodation when it was available for them. Does that person's disability, for example, undermine their ability to make a sound decision? Do they need more time to make a decision? Do they need to refer to more people, do they need more advice? Do they need to be given a better opportunity to understand what will happen to them in terms of moving to a different GP, moving to different schooling for their kids, etc? These are the types of issues that we all need to be thinking about now to challenge discharge decisions. We will never get anywhere anymore with a failure to notify people of the possible consequences because it is all written in those letters that are never read by anybody. You know, we have to think much more imaginatively about what kind of arguments we can raise on behalf of our vulnerable clients.

Providing accommodation pending review, have the Mohammed criteria been altered by the Public Sector Equality Duty? Well, absolutely, they have. What does that mean in terms of practical consequences? Extend the time for accommodating pending appeals too, extending the time for requesting a review, they have a discretion to accept a review out of time, have they thought about the Public Sector Equality Duty when they consider that request? Really important in my view, decisions to refer to other local authorities where the applicant has a local connection. If, for example, the only reason your client has a local connection with another borough is because that is where they spent time in a women's refuge and they were in that women's refuge because they had suffered domestic violence, women disproportionately suffer from domestic violence far more than men, it is a disadvantage attached to their protected characteristics of being a woman, is it therefore something the local authority should consider when contemplating referring somebody back to another borough where they do not want to be? Are you compounding the disadvantage rather than trying to remove or minimise the disadvantage, etc.?

A couple more which are slightly broader. The framing of their Part VI schemes and who should be a qualifying person under those schemes. As you all know now, local authorities have a really broad discretion to decide who gets to be a qualifying person on their allocation scheme. How long have they lived in the borough? Have they committed anti-social behaviour, etc? When they make those decisions, when they devise their scheme they must comply with the duty. Have they thought about the impact on particularly vulnerable people by, for example, bringing in a five year residency requirement? When they formulate the homelessness strategies in reviewing the particular people they try to prioritise, have they thought about their Public Sector Equality Duty? Whether or not they have fee finder schemes to allow people to enter the private sector, again that is a question which invokes the duty. Homelessness prevention generally, how many resources they chuck at that engages the duty and all other sorts of budgetary decisions.

So whilst it might be right to say the game might be up in terms of defending possession proceedings, we wait to see what the Supreme Court says about the relevance of the duty in the context of Part VII and decisions about vulnerable people. But we, as advisors, should be looking at any number of those other decisions that are routinely made by local authorities in the context of our clients and checking whether or not they have complied with the duty, because if they have not those decisions may be subject to challenge and you might achieve some very practical outcomes for your clients.

Chair: Thanks very much to both of our speakers. A lot of very useful and helpful information to get

your teeth stuck into. Are there any questions?

Stephen Cottle, Garden Court Chambers: Just a couple of points on the reasonable adjustments in relation to *Pieretti*. I think we do have to apply ourselves to the elements that have been identified but I think we can be more courageous because, of course, if you have rent arrears and somebody has a mental impairment that qualifies them as being disabled then they may be receiving assistance in making a housing benefit application. The persons assisting them will be aware that they have nil income and the application is being properly made and then a request pings back for some sort of documentary evidence to prove that nil income. A reasonable adjustment could be either copying in the person who assisted them in making the application or bring it to their attention that further information is still outstanding. Of course, it has relevance when a possession order is being made and if you are not there and there is a subsequent homelessness decision when the authority are looking at whether or not there are any disability implications for the purposes of the Public Sector Equality Duty when reaching their decision on intentionality, because in *Pieretti* the Court of Appeal was talking about whether or not it was a deliberateness that led to the arrears. But I think you could also look at it in terms of reasonable adjustments or a failure to make reasonable adjustments and you may have a client early enough to be able to take that in defence of the claim, but it could also be relevant in Part VII and I think that reasonable adjustments also may be relevant in mortgage possession claims where a disabled person is asking for a capital repayment to go over to interest only which would cover and the lender is refusing.

I think that reasonable adjustments are the area that we should be looking at in terms of what is sensible and small steps that could be made which are proportionate but which simply have not been canvassed. If they come back with some policy or practice or criteria that they are operating that prevents it then you turn to Section 19 and start looking in terms of indirect discrimination as to whether or not they are applying a practice or a criteria which you are unable to fulfil and it is causing indirect discrimination. The question, though, was in relation to assessors because I do think this is a new area and it is a matter of getting district judges to include that within the directions when they are setting down for trial. It is a question, really, as to where the assessors are going to come from if they are not going to come from the local employment tribunal? Who should we be looking at as candidates to be our assessors? Where can we get them from?

Tony Ross: I think in *Cary* there is reference in a fairly non-specific way to the Equality and Human Rights Commission but like you, Stephen, I could not really see who else was going to provide the assessors other than the REJ where there is a pool of trained lay members who are trained in equality and diversity. I could not, obviously, see who else would be invited to be an assessor. I do not know if you have any suggestions but it just seemed to me that there was the pool, that was an established practice, there would be a list held by the REJ or their office and it would be the mechanics of it as much as anything which would be difficult to set up if you were starting from scratch again unless the County Court system is to set up its own list of assessors.

Chair: I would like whether the likelihood of you raising your Equality Act defence is going to be more relevant in possession cases which are on mandatory grounds. In my experience, where it is a standard ASB case where there will be a consideration of reasonableness the practice is that we are still using the Equality Act defence. Does it really get us anything other than there is a reversal of burden of proof that they have to justify the treatment rather than you having to justify or does it really add much to it? It seemed to be that you thought perhaps not.

Tony Ross: I think it does add a factor that must be taken into account in reasonableness. At the very least, the fact that the tenant is a disabled person carries weight. If there is discrimination and it cannot be justified, it seems to be that is a trump card but even they can justify it what it ought to do is require greater scrutiny of the facts. That might help your client because in many cases it may be that when the judge opens the file the broad outline facts will not look too complimentary, for example the typical ASB case, so I think it will or it should lead to more careful analysis of the facts and it may give you an opportunity to ensure that some facts are at least weighed as heavily as they should be in the balance.

Chair: Thank you to both our speakers once again for very helpful talks which we can use, hopefully, in the future. The next meeting is on 18 March on the topic of Community Care and the Court of Protection.