# **DEVELOPMENTS IN HOUSING LAW:**

**POSSESSION, HOMELESSNESS & ALLOCATIONS**



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It has been a busy year for housing lawyers. The Homelessness Reduction Act 2017, a proposed new Homelessness Code of Guidance and numerous authorities across the board. John Gallagher’s paper will address the HRA 2017 and this paper aims to address some of the recent authorities.

**HOMELESSNESS**

**Priority need**

1. The law relating to priority need was, we thought, well established. The assessment of ‘vulnerability’ as set out in **R v Camden LBC ex p Pereira** (1999) 31 HLR 317 was applied by housing authorities in cases up and down the country for 17 years. However, with homelessness applications reaching new heights, increasingly narrow interpretations of the ‘Pereira test’ were being applied, making it harder for applicants to satisfy.
2. In Pereira, the Court held that “The council must consider whether Mr Pereira was a person who was vulnerable as a result of mental illness or handicap or for other special reasons and thus whether he was, when homeless, less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable man would be able to cope without harmful effects”. This pre supposed that there **was a** ‘**comparator**’ and that the ‘comparator’ was someone who was **already homeless and suffered from existing physical and mental problems**. In other words, there was already a ‘bar’ before an applicant’s own health could be properly considered.
3. Furthermore, it required the reviewing officer to focus on whether someone could ‘fend for themselves’ before considering whether they would suffer an injury/detriment rather than considering the injury or detriment itself.
4. In **Johnson v Solihull**, it was held that the ‘comparator’, the ‘ordinary homeless person’ was a ‘homeless person’ rather than an ‘ordinary person’. It was argued that a ‘homeless person’ would already have certain characteristics that an ‘ordinary person’ (who was not homeless) would not have. On the facts of Johnson (who was a recovering heroin addict), Solihull Metropolitan Borough Council’s review decision noted that ‘there is a chance that if you were street homeless or even accommodated that you would return to using drugs. Even if you do slip back to using drugs this would not necessarily be anything unusual in relation to homeless people…92% of homelessness services are working with people who are experiencing problems with drugs”.
5. In **Hotak v Southwark** the reviewing officer held that although Mr Hotak’s mental health was such that he would be vulnerable, the fact that his brother was present meant that the risk would not arise. Likewise, in **Kanuv Southwark**, the reviewing officer said that he would vulnerable if by himself (he suffered from physical illnesses and suicidal ideation), the existence of his son and wife in his life meant that he was not. They were able to offer the support he needed.
6. In light of the existing Pereira test, and the issues that arose in the aforementioned cases, the Supreme Court in the combined appeal above, **Hotak v Southwark** [2015] UKSC 30 addressed the following issues:
   1. Whether the test under s189 (1)(c) involved a comparator and, if so, who should that be?
   2. Whether assessing vulnerability, whether local authorities can take into account the support offered by family or a member of the household?
   3. What effect, if any, did the public sector equality duty have on the determination of priority need in the case of an applicant with a protected characteristic?
7. Lord Neuberger (with whom Lords Clarke, Hughes and Wilson agreed) stated:

“41. The expression “fend for oneself” was used by Waller LJ in R v Waveney

District Council, Ex p Bowers [1983] QB 238, 244H, and no doubt was a useful

way of expressing oneself in the context of that case (which was concerned with

section 2(1)(c) of the Housing (Homeless Persons) Act 1977, which was

effectively identical to section 189(1)(c) of the 1996 Act). However, it is not the

statutory test, and at least to some people a person may be vulnerable even though

he can fend for himself. Furthermore, the expression could mislead. For instance,

where, as in two of the instant appeals, the issue is whether an applicant is

vulnerable if he will be fully supported by a family member, the answer most

people would give would be “no”, if the test is literally whether he could fend for

himself.

51. Although the argument was advanced by Mr Luba QC with his usual ability

and fluency, it is not right. As Lord Wilson pointed out in argument, “vulnerable”,

like virtually all adjectives, carries with it a necessary implication of relativity. In

the very type of case under consideration, it can fairly be said that anyone who is

homeless is vulnerable, as Lord Glennie pointed out in Morgan v Stirling Council

[2006] CSOH 154, [2006] HousLR 95, para 4. Accordingly, as he went on to

suggest, it follows that section 189(1)(c) must contemplate homeless people who

would be more vulnerable than many others in the same position (especially given

the words “or other special reason” which show that vulnerability arising from

many causes is covered).

52. Mr Luba contended that anyone who cannot “cope without harm” with

homelessness is “vulnerable”. But that formulation merely restates the problem –

and does so by reference to non-statutory wording (including the word “cope”

which may have similar problems to the expression “fend for himself”). Virtually

everyone who is homeless suffers “harm” by undergoing the experience, and

therefore one is thrown back on the notion of a homeless person who suffers more

harm than many others in the same position.

53. Accordingly, I consider that the approach consistently adopted by the Court

of Appeal that “vulnerable” in section 189(1)(c) connotes “significantly more

vulnerable than ordinarily vulnerable” as a result of being rendered homeless, is

correct. But that leaves open the question of the comparator group. In Ex p Pereira

31 HLR 317, 330, as explained above, Hobhouse LJ suggested that the comparator

was “the ordinary homeless person”, which is, as I have mentioned, an

uncharacteristically imprecise expression. It could mean (i) the ordinary person if

rendered homeless, or (ii) the ordinary person who is actually homeless (a) viewed

nationally, or (b) viewed by reference to the authority’s experience.

54. At least judging from the decisions to which we were referred, this

uncertainty was initially not resolved – thus, it seems to have been left open in

Auld LJ’s summary of the legal principles in Osmani, at para 38(4) and (5).

However, shortly thereafter, in Tetteh v Kingston upon Thames London Borough

Council [2004] EWCA Civ 1775, [2005] HLR 21, para 21, Gage LJ seems to have

assumed that “the ordinary homeless person” was a notional homeless person

based on the particular authority’s experience. That also seems to have been the

approach of Arden LJ in Johnson [2013] HLR 524, at paras 18 and 20, as pointed

out by Gloster LJ in Ajilore, at para 14, an approach which she also adopted. While

it is not entirely clear, this suggests that the test being adopted is possibility (ii)(b),

but it may be (ii)(a).

55. Despite the argument of Mr Rutledge QC to the contrary, in my judgment

that is not the right approach. I do not consider that it would be right for the

comparison to be based on the group of people in England and Wales who are

homeless - ie possibility (ii)(a); still less do I consider that the comparison should

be based on the group of people who are homeless in the area of the relevant

authority– ie possibility (ii)(b). In my view, possibility (i) is correct.

58. Accordingly, I consider that, in order to decide whether an applicant falls

within section 189(1)(c), an authority or reviewing officer should compare him

with an ordinary person, but an ordinary person if made homeless, not an ordinary

actual homeless person”.

1. Lady Hale stated:

“93. To answer that, one needs to know what they will be vulnerable to or at risk

of harm from. The obvious answer is that they must be at risk of harm from being

without accommodation: the object of the section is to identify those groups who

have a priority need for accommodation. Is that enough by itself? The problem, of

course, is that we are all to some extent at risk of harm from being without

accommodation – women perhaps more than men, but it is easy to understand how

rapidly even the strongest person is likely to decline if left without anywhere to

live. So this is why a comparison must be implied. The person who is old, mentally

disordered or disabled, or physically disabled, must as a result be more at risk of

harm from being without accommodation than an ordinary person would be. This

is what I understand Lord Neuberger to mean by “an ordinary person if homeless”.

I agree. The comparison is with ordinary people, not ordinary homeless people,

still less ordinary street homeless people. And it is ordinary people generally, not

ordinary people in this locality”.

1. In summary, therefore, **Hotak** determined that:
2. There is a comparator. Without such, a person who suffered any harm would be considered vulnerable and that test would be too wide;
3. That comparator is an ‘ordinary person’ if ‘made homeless’. Rather than an ‘ordinary homeless person’. That ‘ordinary person’ is the ordinary, healthy, robust person, devoid of mental and physical disability (see extract above).
4. That ‘ordinary person’ is an ordinary person generally and not just an ‘ordinary person’ in the locality.
5. An applicant is vulnerable if he/she is ‘significantly more vulnerable’ than a ordinary person if made homeless, or more at risk of harm than a ordinary person if made homeless;
6. A person who can ‘fend from him/herself’ may still be vulnerable and, accordingly, this term should not be used. It is of no assistance.
7. Support can be taken into account if it is ‘consistent and predictable’ and if it sufficient to prevent an applicant from being vulnerable.
8. Statistical data should not be used.

1. However, advisors were left with two unanswered question:
   1. What does ‘significantly’ more vulnerable mean?.

This issue was resolved in **Panayiotou** (see below).

* 1. What is meant by ordinary person when made ‘homeless’?.

Does the term ‘homeless’ mean ‘without a home’ or ‘homeless pursuant to s175 of the HA 19996’. This is issue is yet to be resolved. Most advisors, adopting a practical and sensible approach, have focused on it as ‘without a home’ (Lady Hale’s use of the term).

**What does ‘significantly’ more vulnerable mean?.**

1. It is fair to say that local housing authorities would often approach the above as assuming that this meant that:
   1. The reference to ‘significantly’ meant that merely suffering ‘harm’ was not sufficient. Applying ‘significantly’ was to impose an extremely high threshold and often a requirement that the harm suffered by the applicant had to be of a different nature.
   2. This was reinforced by the passing acceptance (see extracts above) that virtually anyone who is homeless suffers ‘harm’ by merely undergoing that experience.
   3. Harm that was not ‘significantly more’ than the ordinary person could often be met by secondary referral services;
   4. It became apparent that housing authorities went back to their ‘tried and tested approach’ of imposing on the comparator an element of ‘harm’ and then requiring the applicant to suffer ‘significantly more’ harm than the harm that one already expects an ‘ordinary’ person to have when homeless. The ‘more harm plus’ approach.
2. The county courts often adopted inconsistent approaches and it is worth advisors ‘keeping an eye’ out should reviewing officers inadvertently seek to rely on their pre Panayiotou arguments:

* 1. **Mohamed v London Borough of Southwark** (County Court at Central London,

‘significantly’ as meaning ‘more than minor or trivial’ (s2121 Equality Act 2010).

* 1. **HB V Haringey London Borough Council** (Mayors and City County Court, Legal Action, January 2016, p46) the court held that the reviewing officer had to inform the applicant, in the decision letter, what he meant by the term ‘significantly’. Where on the spectrum of “noticeable” to “substantial” did he place it.
  2. **Eliot Warnt v London Borough of Haringey** (County Court at Central London, Legal Action, September 2016) the Court held that search for a precise meaning was fruitless as it was context specific.
  3. **Shaja Butt v London Borough of Hackney** (County Court at Central London, 22 February 2016) the Judge held that Lord Neuberger may have taken it to mean ‘something more than insignificantly different’. The reviewing officer had to explain in what sense she was using it.
  4. In **Qi v Southwark LBC** (County Court at Central London, September 2016) the Court held that it was for the reviewing officer to decide its meaning, not the Court. If Lord Neuberger wanted a more specific meaning, he would have included it.

1. In ***Panayiotou v Waltham Forest LBC; Smith v Haringey*** LBC [2017] EWCA Civ 1624, the Court of Appeal specifically addressed what the term ‘substantially’ meant.
2. Mr Panayiotou (P) and Mr Smith (S) were young single men. P suffered from depression and anxiety and lived in fear of reprisals from gangs and from his father. S suffered from mental health problems and chronic leg pain. Both of them applied as homeless to their respective local authorities, and in each case the authority decided that he was not vulnerable, and hence not in priority need.
3. As set out above, Lord Neuberger in Hotak said:

*“Accordingly, I consider that the approach consistently adopted by the Court of Appeal that “vulnerable” in section 189(1)(c) connotes “significantly more vulnerable than ordinarily vulnerable” as a result of being rendered homeless, is correct.”*

1. Lord Neuberger did not explain what he meant by “significantly” and the Court of Appeal in Panayiotou specifically asked the question: Does it mean any degree of comparative vulnerability which is more than trivial; or does it mean something different? If so, what?
2. In P’s case, the Court of Appeal repeated the reviewing officer’s decision:

13. She considered the original decision and although it had applied the pre-*Hotak* test, she was satisfied that it would have been the same even if the *Hotak* test had been applied. Having referred to statutory guidance she concluded once more:

“It is for the local authority to establish whether a person who is old, mentally disordered or disabled, or physically disabled is as a result at more risk of harm from being without accommodation than an ordinary person would be. It is a fact that everyone to some extent is at risk of harm from being without accommodation and to a certain degree “vulnerable” in the dictionary sense of being susceptible to harm. For this reason, the comparison must be considered with ordinary people generally.”

14. The reviewer went on to consider whether P might be “vulnerable for any ‘other special reason’ because of a combination of factors which taken alone may not necessarily lead to a decision that they are vulnerable”. She said:

“Having considered the totality of your medical problems, unsettled lifestyle singularly and as a composite and having applied all of the above facts to the question of vulnerability, I am satisfied that you do not have any illness [or] disability or special reason that taken individually or collectively would render you significantly more vulnerable than an ordinary person who is homeless as described in the test case above …

1. In S’s case, the Court of Appeal also repeated the reviewing officer’s decision:

*“3. Applying that test I must ask myself whether, as a result of being made homeless, you are significantly more vulnerable than an ordinary person. It is acknowledged that anyone who is homeless is vulnerable and that virtually everyone who is homeless suffers harm by undergoing the experience. However, I must consider whether you are significantly more vulnerable than the ordinary person if made homeless …*

*8 … I would like to deal with what ‘more vulnerable’ means. [He set out paragraphs 52 and 53 of Hotak, and continued:] This clearly shows that a person is not vulnerable simply because they will suffer from harm. They are vulnerable if, when homeless, they will suffer significant more harm or even more harm than an ordinary person if made homeless. It is without doubt that you will suffer harm by being homeless but I am not satisfied that this is to the extent that you will suffer from harm that means that you are significantly more vulnerable than ordinarily vulnerable. For this reason I do not consider that you [are] “vulnerable” within the meaning of Section 189 (1) (c) of the Housing Act 1996.”*

1. The Recorder in P, held that “significantly” was an ordinary English work that was to be interpreted by the decision-maker as he or she considered appropriate, subject only to rationality.
2. Lord Justice Lewison, giving the Court of Appeal’s judgment, noted that after *Hotak*, it was perhaps rather easier to say what the law is not rather than what it is. He then went on to consider what is meant by the term ‘vulnerability’. He stated:

*“[44] It seems reasonable to conclude, therefore, that the relevant effect of the feature in question is an impairment of a person’s ability to find accommodation or, if he cannot find it, to deal with the lack of it. The impairment may be an expectation that a person’s physical or mental health would deteriorate; or it may be exposure to some external risk such as the risk of exploitation by others”.*

1. He then went on to analyse the term ‘significantly’. He stated as follows:

*“[64] I do not, therefore consider that Lord Neuberger can have used “significantly” in such a way as to introduce for the first time a quantitative threshold, particularly in the light of his warning about glossing the statute. Rather, in my opinion, he was using the adverb in a qualitative sense. In other words, the question to be asked is whether, when compared to an ordinary person if made homeless, the applicant, in consequence of a characteristic within section 189 (1) (c),* ***would suffer or be at risk of suffering harm or detriment which the ordinary person would not suffer or be at risk of suffering such that the harm or detriment would make a noticeable difference to his ability to deal with the consequences of homelessness.*** *To put it another way, what Lord Neuberger must have meant was that an applicant would be vulnerable if he were at risk of more harm in a significant way. Whether the test is met in relation to any given set of facts is a question of evaluative judgment for the reviewer”.*

1. In summary, therefore, **Panayiotou** establishes that:
   1. Lord Neuberger did not use “significantly” in such a way as to introduce a quantative test;
   2. “significantly” is to be read as applying a qualitative test;
   3. The appropriate question is whether the applicant would suffer or **be at risk** of suffering harm (which the ordinary person, if homeless, would not) and such harm would make a noticeable difference to his ability to deal with the consequences of homelessness (as set out in para 44).
   4. It is a question of evaluative judgement for the reviewer;
   5. There should not be a ‘more harm plus test’ (para 70)
   6. Analogy with the term ‘substantial’ in the context of “disability” in the EQ 2010 was not helpful. ‘Substantial’ is a different word.

**What is meant by ordinary person when made ‘homeless’?.**

1. When in Hotak and in Panayiotou reference is made to the ‘ordinary person when homeless’, what is meant by the term ‘homeless’. Put shortly, is it a reference to someone who is ‘street homeless’ (or without a roof over their head’) or homeless by reference to the statutory meaning at s175 HA 1996.
2. It is fair to say that most people working within housing law have taken references to ‘homeless’ (whether applying the old Peirera test or since) to refer to ‘street homelessness’. The term ‘street homeless’ is not in statute but derives from ***Osmani v Camden LBC*** [2004] EWCA Civ 1706 Auld LJ.

*“38. 7) For the purpose of applying the vulnerability test a local housing authority should take care to assess and apply it on the assumption that an applicant has*

*become or will become street homeless, not on his ability to fend for himself while*

*still housed. In this respect, it should have regard to the particular debilitating*

*effects of depressive disorders and the fragility of those suffering from them if*

*suddenly deprived of the prop of their own home; see the observations of Brooke*

*LJ in R v Newham LBC, ex p Lumley (2003) 33 HLR 111, at para 63”.*

1. Lord Neuberger in Hotak stated that s189 (1)(c) is concerned with an “applicant’s vulnerability if he is not provided with accommodation”.
2. Baroness Hale in Hotak also uses the term ‘without accommodation’ (see para 93 where she states “ The person who is old, mentally disordered or disabled, or physically disabled, must as a result be more at risk of harm from being without accommodation than an ordinary person would be”.
3. Neither Lord Neuberger nor Lady Hale expressly states that reference to the word ‘homeless’, in this context, takes on its statutory meaning rather than without accommodation. Why then the sudden question? It appears to arise from Lord Neuberger concern about the expression “street homeless”.
4. The issue is raised in the cases of ***Dedani v Haringey LBC and Freeman- Roach v Rother*** *DC* and these appeals will be heard in the Court of Appeal in February 2018.

**Intentionality, s191 HA 1996**

1. In the homelessness context, it has been a while since the Courts have considered issues relating to ‘unaware of relevant fact’.
2. In ***Trindade v Hackney London Borough Council*** [2017] EWCA Civ 942, T was from the island of Sao Tome. She had lived in an apartment there until February 2013, when she came to the UK seeking better medical treatment for her disabled daughter. She and her daughter stayed with her sister at her rented accommodation in London. In September, the landlord terminated the sister's tenancy. T applied social housing. Hackney decided that they were intentionally homeless – T’s deliberate act for the purposes of s191 was leaving the Sao Tome apartment. It considered that when she had left Sao Tome she had had no agreement or expectation of how long she could stay with her sister, and accordingly no expectation that she would have permanent housing in the UK. The county court upheld that decision.
3. T argued that her actions were not to be treated as deliberate because:
4. When she left Sao Tome, she had not known that her sister would be evicted, meaning that she had been unaware of a relevant fact for the purposes of s.191 (2);
5. She had acted in good faith within s.191 (2), because she had not come to the UK expecting to apply for social housing, but had been motivated by a desire to seek treatment for her daughter.
6. The Court of Appeal held that when an expectation regarding what might happen in the future is falsified, what the court has to look for when assessing whether the applicant was “unaware of any relevant fact” is an active and informed understanding of the applicant, at the time she does or omits to do something within the scope of section 191(1), of the *current* prospects in relation to that expectation working out as anticipated, where in fact (as judged objectively at that time) there was no good foundation for the applicant’s assessment of those prospects. The Court held as follows:

*“26. Accordingly, an applicant who seeks to bring herself within section 191(2) where the future has not worked out as expected by her, has to show that at the time of her action or omission to act referred to in section 191(1), she had an active belief that a specific state of affairs would arise or continue in the future based on a genuine investigation about those prospects, and not on mere aspiration. Her belief about her current prospects regarding the future can then properly be regarded as belief about a current relevant fact (the apparent good prospects that the future will work out as she expects), such that if that belief can be seen to be unjustified by what a fully informed appreciation of her prospects at the time would have revealed, her mistake will qualify as unawareness of a relevant fact for the purposes of section 191(2)”.*

**Settled Accommodation**

1. Intervening settled accommodation could break the ‘chain of causation’ such that a person is no longer intentionally homeless. In ***Gilby v City of Westminster*** [2007] EWCA Civ 603, Westminster found G’s occupation of a flat had not broken the chain of intentional homeless as it had not constituted intervening settled accommodation. The court held that there was a difference between ‘settled’ (which was reasonably secure or permanent) and insecure accommodation (precarious, temporary or transient). The fact that occupation is under a ‘licence or a lease’ is in no way decisive:

*“9. The epithet “secure” connotes accommodation in respect of which there are solid grounds for the reasonable expectation of continuance of occupation for the foreseeable future or for a significant period of time”*

1. In ***Doka v Southwark LBC*** [2017] EWCA Civ 1532 the same issue arose. D was a secure tenant who fell into rent arrears and was evicted from his home in November 2010. He was found intentionally homeless as a result. In December 2010, he was offered a room at the home of his former employer, Mr Theobold. They entered into an arrangement whereby Mr Theobold allowed D to live in his son’s room at a rent of £500 per month for two to three years whilst his son was at university. D agreed to stay elsewhere on occasional nights when Mr Theobold’s son returned home and needed to use his room. In December 2012 Mr Theobold’s son returned home from university and D was asked to leave. He stayed with friends for nearly two years and then applied to the Council for housing assistance.
2. The Council decided that D was still intentionally homeless as a result of his earlier eviction in November 2010. On appeal, D argued that two years was a significant period of time and that living with Mr Theobold constituted settled accommodation that broke the chain of causation between his present state of homelessness and his earlier eviction from his secure tenancy.
3. Dismissing D’s appeal, the Court of Appeal held that the length of the period of accommodation is not conclusive as to whether it is settled. What an applicant needs to establish is a period of occupation under either a licence or tenancy that has at its outset or during its term a real prospect of continuation for a significant or indefinite period of time so that the applicant’s transition from his earlier accommodation cannot be said to have put him into a more precarious position than he previously enjoyed. Accordingly, the reviewing officer was entitled to conclude that the arrangement with Mr Theobold was at all times a precarious one in that it had a finite duration and priority was given to Mr Theobold’s son’s need for the room. D was required to vacate the room for the days when Mr Theobold’s son came home and when he ended his studies at university. This was an intermittent licence under which the prospect of continuation was always uncertain.
4. This is a concerning decision given the changing nature of occupation and private rented sector tenancies being occupied, on average, 18 months (NT: a large landlord insurance provider Direct Line Business recently found that the lowest tenant turnover was recorded in Birmingham, with tenants staying an average of two years and four months in the same property. This was followed by London (one year and nine months) and Leicester (one year and eight months), while Edinburgh, Liverpool and Sheffield all recorded average tenancies of one year and seven months. In contrast, Cardiff has the highest turnover, with the average property being vacated just 11 months after being filled, while its 12 months in Leeds and 14 months in Bristol. see Landlord Today website).

**Suitability**

1. Following ***Hotak v Southwark LBC*** [2015] UKSC 30, there have been two cases in the last year that are of clear significance:
2. Firstly, ***Hackney LBC v Haque*** [2017] EWCA Civ 4: H was a disabled person who was unintentionally homeless and was in priority need. He suffered severe back and neck problems that had resulted in depression. Hackney had provided him with temporary accommodation, to meet its duties under s193. The accommodation comprised a single room on the third floor of a hostel. H complained that it was unsuitable because its small size exacerbated his back condition; the "no visitors" policy isolated him and exacerbated his depression, and as there were no on-site laundry facilities. Hackney concluded that the room was suitable for his needs: the room was an adequate size, it was accessible by a lift, and the H could meet friends outside the hostel. Further, the "no visitors" policy could be relaxed to allow friends to collect and return the H’s laundry from a nearby launderette. The judge concluded that the reviewing officer should have spelt out that the protected characteristic of disability had been established, that the public sector equality duty was applicable and the effect the duty had on the exercise of his review function. He therefore quashed the reviewing officer's decision.
3. On appeal by H, Hackney argued that it was not necessary for the reviewing officer to expressly spell out his decision-making by reference to each of the requirements in the public sector equality duty. This was not a requirement of ***Hotak***.
4. The Court of Appeal held:
   1. The aim of the duty was to bring equality issues into the mainstream so that they became an essential element in public decision-making. The duty had to be exercised in substance, with rigour and an open mind. It was not a question of ticking boxes. It required the decision-maker to be aware of the duty and to have due regard to the relevant matters; and
   2. The general principle from ***Hotak*** was the sharp focus required of the decision-maker on the relevant aspects of the duty where it was engaged by the contextual facts in a particular case. The duty required: (a) a recognition that the respondent was disabled and had a protected characteristic; (b) a focus on the specific aspects of his impairments, to the extent relevant to the suitability of the accommodation; (c) a focus on the consequences of his impairments, both in terms of the disadvantages he might suffer in living in the accommodation, and by comparison with persons without those impairments; (d) a focus on his particular needs in relation to accommodation arising from those impairments, by comparison with the needs of persons without such impairments, and the extent to which the room met those particular needs; (e) a recognition that he might be required to be treated more favourably than other persons not suffering from disability or other protected characteristics; (f) a review of the suitability of the accommodation for him which paid due regard to those matters (paras 42-43).
   3. The judge was wrong to require the reviewing officer to spell out in express terms the reasoning about whether an applicant had a protected characteristic, whether the duty applied and if so its precise effect.
5. In ***Posteh v Kensington and Chelsea*** [2017] HLR 28, P had engaged in dissident activity in Iran, and had endured two periods of imprisonment during which she was tortured by the Iranian authorities. As a consequence, she subsequently suffered depression and Post Traumatic Stress Disorder. She had been granted indefinite leave to remain in the UK in 2009. The Council made a final offer of accommodation in accordance with their duty under s193 (7) Housing Act 1996. On viewing, she refused the offer as the property reminded her of the prison where she had been detained, which caused a panic attack. Her principal concern arose from a round window in the living room, which reminded her of the prison windows.
6. The Supreme Court considered whether there was a real risk that the appellant’s mental health would be damaged by moving into the accommodation offered, whether or not her reaction to it was irrational, and if so, whether he did in fact apply the right test.
7. The Supreme Court reiterated the guidance given by Lord Neuberger in *Holmes-Moorhouse v Richmond upon Thames*, warning against linguistic analysis of decision letters, and held that the length and detail of the decision showed that the reviewing officer was aware of his responsibility when viewing the letter as a whole. Although the officer did not expressly address P’s claim to have suffered a panic attack, it was hard to criticise him for giving little weight to an incident that she had not mentioned at the time, nor apparently to her medical advisers. **The issue for him was not her immediate reaction on one short visit, but how she would reasonably have been expected to cope with living there in the longer term.** On that issue, he was entitled to give weight to the medical evidence submitted by her, and consider how far it supported her case. There was no difficulty in understanding the officer’s reasoning overall, and it did not disclose any error of law.
8. In practical terms, this could work ‘both ways’. An applicant may visit accommodation and stay in it for 15 minutes or so whilst looking around. Their reaction at this time is not necessarily indicative of how they would be able to cope in such accommodation long term.
9. Lastly, the Supreme Court expressly held that it was no longer necessary to refer to R v ***Hillingdon London Borough Council ex part Puhlhofer [***1986] AC 484.

**Out of borough placements**

1. It is fair to say that most housing advisors are increasingly dealing with challenges to our of borough placements. ***Nzolameso v Westminster City Council*** [2015] UKSC 22 called for a short ‘pause and think’ in how people are offered accommodation.

*“27. The question of whether the accommodation offered is “suitable” for the*

*Applicant and each member of her household clearly requires the local authority to*

*have regard to the need to safeguard and promote the welfare of any children in her*

*household. Its suitability to meet their needs is a key component in its suitability*

*generally. In my view, it is not enough for the decision-maker simply to ask*

*whether any of the children are approaching GCSE or other externally assessed*

*examinations. Disruption to their education and other support networks may be*

*actively harmful to their social and educational development, but the authority also*

*have to have regard to the need to promote, as well as to safeguard, their welfare.*

*The decision maker should identify the principal needs of the children, both*

*individually and collectively, and have regard to the need to safeguard and promote*

*them when making the decision.*

*30. It is also the case that there will almost always be children affected by*

*decisions about where to accommodate households to which the main*

*homelessness duty is owed. Such households must, by definition, be in priority*

*need, and most households are in priority need because they include minor*

*children. The local authority may have the invidious task of choosing which*

*household with children is to be offered a particular unit of accommodation. This*

*does not absolve the authority from having regard to the need to safeguard and*

*promote the welfare of each individual child in each individual household, but it*

*does point towards the need to explain the choices made, preferably by reference*

*to published policies setting out how this will be done (as to which see further*

*below)”.*

1. In [**E, R (on the application of) v London Borough of Islington**](http://www.bailii.org/ew/cases/EWHC/Admin/2017/1440.html) [2017] EWHC 1440 (Admin) A, who was profoundly deaf and had no speech, and is almost illiterate, fled domestic violence with her children, including E aged 9. An applied to Islington as homeless.
2. In June 2015, A and her family were found a refuge place in Islington by SWA. Islington made no arrangements for E’s education until September 2015. E then started school in Islington, but only for 7 weeks, as at the beginning of November the Council provided temporary accommodation in London Borough of Hammersmith and Fulham (H&F) Islington sent a notice to H&F notifying them of the family’s presence in their area. The notice made no mention of education. Nothing was done by either Islington or H&F about E’s education until late December 2015.In April 2016, Islington transferred the family to temporary accommodation in Islington. But somehow again failed to make any arrangements for E’s education for another 8 weeks.
3. The Court held:
   1. Islington’s failings put it in breach of E’s right to education under article 2 of the First Protocol to the European Convention on Human Rights. This included its failure to adequately notify H&F or take any steps with H&F to ensure E’s education while in temporary accommodation in H&F;
   2. Referring to Chapter 4 of the Code of Guidance on out of borough placements; to the duty to safeguard and promote the welfare of children under section 11(2) of the Children Act 2004; and to the case of **Nzolameso v Westminster City Council**, the Court said:

“The upshot of this analysis is that any local authority contemplating the transfer of a school-age homeless child into temporary accommodation out of borough is under a Nzolameso duty to make contemporary records of its decision-making and its reasons, capable of explaining clearly how it evaluated the likely impact of the transfer on the educational welfare of the child, in accordance with its primary obligation under section 11(2)(a)…

Thus, one of the legal obligations binding on an authority proposing to transfer a homeless school-age child out of borough for the purposes of providing temporary accommodation is the obligation to liaise adequately with the education department of the receiving borough, for the purpose of ensuring that the receiving borough has put (or will put) working arrangements in place to maintain educational continuity for the child; coupled with a legal obligation to make adequate records of the steps it has taken in this regard, and of the process of reasoning by which it has concluded that educational continuity would be maintained.

1. This is particularly interesting in the homelessness context. Although, the Homelessness (Suitability of Accommodation) (England) Order 2012 refers to the need to take into account the education of a person residing with the Applicant, authorities all too frequently refer to the existence of schools in other areas that a child can attend. They pay less attention to the disruption that a move will have on a child’s education and even less attention to the need to work with other authorities. This decision requires the council to evaluate the impact on the education of school age children, to record that decision and reasoning, including how the receiving authority would secure the child’s educational welfare. It is essential, therefore, that this information is asked for in disclosure when considering any similar challenge.

**ALLOCATIONS**

1. There have been a number of recent High Court and Court of Appeal decisions in the field of allocations - this paper covers only some of them.
2. In ***R (on the application of H & ORS) v Ealing London Borough Council*** [2017] EWCA Civ 1127 the Court of Appeal allowed an appeal against a judge's findings that there had been unjustified indirect discrimination under the Equality Act 2010 s.19, a contravention of the ECHR art.14 in conjunction with art.8 and a breach of the Children Act 2004 s.11. This was in relation to a scheme introduced by Ealing, which set aside a proportion of its lettings for working households and model tenants.
3. Prior to October 2013, the housing policy operated by reference to four priority bands to which applicants were allocated according to the urgency of their housing needs. The changes to the housing allocation policy set aside a small, but not insignificant, proportion of lettings for "working households" and "model tenants".
4. The Respondents were two families which Ealing had a duty to house. It was their case that the working household priority scheme (WHPS) discriminated indirectly against women, the elderly and the disabled contrary to the Equality Act 2010 and the ECHR, and also that the model tenant priority scheme (MTPS) directly discriminated against non-council tenants.
5. Ealing conceded, on appeal, that each of the two priority schemes was a provision, criterion or practice (PCP) which, *if looked at in isolation*, gave rise to indirect discrimination. However, the scheme, taken as a whole, did not - there was a ‘safety valve’ (a concept that is repeated in a number of allocation cases – see XC below)).
6. Ealing further submitted that the claim was not within the ambit of art.8 and that the Judge was wrong to apply the proportionality test when considering justification under art.14 when he should have applied the manifestly without reasonable foundation test. Lastly, Ealing argued that it was not in breach of its public sector equality duty (PSED) obligations under s.149 or in breach of its duty in the Children Act 2004 s.11 (requirement to have regard to the need to safeguard and promote the welfare needs of children).
7. The Court of Appeal held:
8. The local authority accepted that women, disabled people and the elderly were less likely to be in work than others. In the light of that acceptance, and its concession that each of the two priority schemes was a PCP, it inevitably followed that the WHPS gave rise to indirect discrimination within s.19(2). It was contradictory of the local authority to concede, on the one hand, that for the purposes of s.19(2) the WHPS was a PCP, and, on the other hand, to seek to rely on its housing policy as a whole to rebut the PCP's discriminatory impact on the relevant protected groups (see paras 56-59 of judgment).
9. The judge’s rejection of Ealing’s justification defence under s.19(2)(d) was based entirely on his finding that he was not satisfied that the two priority schemes were the least intrusive way of achieving that aim. It was not open to him to form that view on the material before him (paras 78-85).
10. The link between art.8 and art.14 did not exist in relation to the MTPS, although there was such a link in relation to the WHPS. The judge made an error of principle on the issue of justification with regard to both schemes (paras 90, 95-99, 104-106).
11. There was no proper basis for saying that there had been a breach of the PSED so far as concerned the MTPS. The position concerning the WHPS was less straightforward, Hackney LBC v Haque [2017] EWCA Civ 4 applied. Accordingly, the appeal against the judge's declaration of a breach of the PSED was dismissed. However, in the circumstances, it was not necessary or appropriate to quash the WHPS (paras 110-111, 114-117).
12. The judge's view was expressed very briefly and was "too exacting". The appeal against the judge's findings was allowed (paras118-120).

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| 1. In **R (on the application of Osman) v L. B. Harrow [2017] EWHC 274,** O lived with her husband and four children (aged 1-6 years old) in a one bedroom privately rented flat which she rented privately. The four children shared the single bedroom and O and her husband. The accommodation was seriously overcrowded and O’s eldest child had a severe skin condition and allergy that was worsened by the housing conditions. She was O was placed in priority Band A under Harrow’s housing allocation scheme. Two years later, her priority was reassessed in accordance with an amended scheme which came into effect on 1 December 2015 and O’s priority was reduced to Band C. Essentially overcrowded occupiers of social housing who were seeking a transfer would remain in Band A but those in private rented accommodation, in the same circumstances, would be placed in Band C.      1. O applied for judicial review of the Council’s new policy on the grounds that it discriminated against those in the private rented sector by denying them equivalent priority to those in the public sector, contrary to Articles 8 and 14 ECHR and it failed to ensure that a reasonable preference was given to those occupying overcrowded housing or living in unsatisfactory housing conditions. 2. The High Court held that Harrow had a ‘legitimate aim’ – namely, to prevent applicants in overcrowded conditions from declining properties in the hope of obtaining a secure tenancy under the original scheme. The amended scheme did not unduly favour social tenants since they would have to give up their existing security of tenure and other benefits. 3. In ***R (on the application of XC) v LB Southwark*** [2017] EWHC 736 (Admin), Southwark awarded reasonable preference to people who work or who volunteer in the local community – they did this by virtue of being awarded a “priority star”. 4. XC was unable to work because she had a physical disability, claimed to have a mental and was a also a carer for her adult son who had Asperger Syndrome. She was therefore unable to qualify for a reasonable preference in Southwark’s allocations scheme and her prospects of being made an allocation of housing were slim. She argued that the scheme discriminated against disabled people who could not work or volunteer and that it discriminated against women because women were more likely than men to be carers, and that it was therefore unlawful under the Equality Act 2010. 5. The Court held that the scheme was indirectly discriminatory towards disabled people and women. It was irrelevant whether or not there had been any intention to discriminate. Southwark’s argument that the Court could only interfere if the discriminatory measure was “manifestly without reasonable foundation” was not the right test. Individual housing decisions made by local authorities are not matters of high policy. However, the Court held that while the scheme did indirectly discriminate against women and the disabled, such discrimination was justified and therefore lawful. 6. The courts should be slow to interfere with decisions about how local authorities choose to accord priorities in their housing allocations schemes since such decisions are better taken by the local authorities who are more aware of local needs and sensitivities. The discrimination was the least intrusive measure which could be used and statutory guidance to local authorities endorsed the idea of giving priority for housing to those in work or who volunteer. Furthermore, a housing allocations scheme by its very nature involves prioritising some to the detriment of others. The Court noted that the scheme included a discretion for any provision (including the ones under challenge) to be waived in exceptional circumstances. This provided a “safety valve” in the scheme (para 100). |

**POSSESSION**

**Water rates**

1. The case of ***LB Southwark v Jones*** [2016] EWHC 457 is likely to cost local authorities across London, and possibly nation wide, millions. Following *Jones,* Southwark will repay 48,000 current and former tenants £28.6m (representing the unlawful sums claimed) with interest calculated under the provisions of the Water Resale Order 2006. The refunds themselves covering the period 1 April 2001 to 28 July 2013, and with interest covering the period 1 April 2001 to 30 June 2016.
2. The amounts involved may only be minimal in the weekly rent for every tenant. However, it’s believed that this refund will be in the region of £600-£700 per tenant in occupation for the whole period of 2001 – 2013.
3. Given the number of tenants with social landlords, the length of time that the unlawful charges were being claimed, the interest payments, the possibility that this may affect Housing Associations also and the likelihood of unlawful charges being levied for gas and electricity, the implications of *Jones* cannot be underestimated. Thames Water has what they call "commercial agency arrangements" in place with 69 local authorities and housing associations and Southwark was just one of them. These arrangements cover some 375,000 properties. The case of *Jones* could, therefore, affect hundreds of thousands of people.
4. The case concerns the relationship between Southwark, Thames Water and Southwark’s tenants following an agreement between Thames Water and Southwark in 2000. In summary, Ms Jones was receiving water from Thames Water but did not have a metered system. Southwark collected water and sewage charges from Ms Jones and all the other unmeasured tenants and would pay the collective Thames Water bill.
5. Thames Water would bill Southwark for the unmeasured premises after it deducted 5% from the bill for void properties and 18% from its bill for Southwark’s commission. Thames Water was willing to make these deductions because (a) there were some properties that were void and not using water and (b) Southwark took a risk in that some occupiers would not pay their rates and, in any case, there was a cost in collecting them.
6. Miss Jones, argued that, unless and until varied by a Deed in 2013, the 2000 Agreement involved Thames Water supplying Southwark with water and sewerage services and Southwark's tenants, including Miss Jones, in turn buying such services from Southwark.
7. Southwark was hence a "re-seller" within the meaning of the 2006 Order. That conclusion was reinforced as regards the period from 1 April 2002 to 31 March 2010 by the fact that successive charges schemes served to deem Southwark to be the "occupier" of the relevant premises and so liable to Thames Water for water and sewerage charges. It was argued that the result was that Southwark was not entitled to recover from its tenants more than the maximum charges set by paragraph 6 of the 2006 Order and both the 18% "commission" and the 5% "voids allowance" had to be taken into account when calculating those charges. Miss Jones had therefore, it was contended, been overcharged for the water and sewerage services she has received.
8. Southwark maintained that it had neither bought any water or sewerage services from Thames Water nor re-sold any to its tenants. It argued that the 2000 Agreement operated to make Southwark an agent of Thames Water, not for it to purchase water and sewerage services from Thames Water, and the charges schemes did not alter that position.
9. The key issue was, therefore, whether Southwark were or had been liable under the statutory scheme to pay Thames Water for the water supply and sewerage services to Ms Jones home. If this were the case then it would be a resale as Southwark would be Thames Water’s “consumer” (sections 52/54 WIA 1991) and “customer” (section 219) and not Ms Jones. The consequence would be Ms Jones would be Southwark’s “purchaser” (clause 5 of the Order 2006) and entitled to the protection of the resale orders.
10. Clause 5 in the Water Resale Order 2006 (“2006 order”) identifies a “re-seller” providing a supply of piped water to any purchaser and provides to any purchaser a sewerage service. The purchaser is a person which occupies any dwelling and who buys from a re-seller any water or sewerage service.
11. The basic principle from these resale orders in that it is unlawful to make a profit from the water resale. Clause 6 in the “2006 Order: A reseller’s charge to a purchaser may not exceed the amount a reseller is liable to pay the relevant undertaker. Save that a reseller may in addition recover from a purchaser an administration charge of up to £5.48 per annum (Clause 8)”.
12. Mr Justice Newey ruled that:
13. Unless and until a 2013 Deed (stating that the council was not a water reseller under the relevant regulations) took effect, the relationship between Thames Water and Southwark was not one of principal and agent but involved Southwark buying water and sewerage services from Thames Water and re-selling them to its tenants. He stated as follows:

*“ In short, it seems to me that, until the 2013 Deed was executed at least, the relationship between Thames Water and Southwark was not one of true agency but rather involved Southwark buying water and sewerage services from Thames Water and re-selling them to its tenants. It must follow, I think, that the 2006 Order was applicable”.*

1. As a result, the Water Resale Order 2006 applied and served to limit what tenants could be charged;

and

1. The amounts that Southwark charged Ms Jones exceeded the "maximum charge" allowed under the 2006 Order. By virtue of paragraph 6(2)(b) of the 2006 Order, the "maximum charge" payable where the water supply of a "Purchaser" within the meaning of the Order is unmetered is to be calculated by deducting any amounts recoverable from "Purchasers" with meters and "any other person supplied" from the "amount payable by the Re-seller to the Relevant Undertaker" (paragraph 6(2)(b)(i)) and then apportioning the "amount still to be recovered after performing the deduction" among the relevant "Purchasers" (paragraph 6(2)(b)(ii)). The 18% "commission" and 5% "voids allowance" fall to be taken into account when determining the "amount payable by the Re-seller (Southwark) to the Relevant Undertaker (Thames Water).

**Post *Jones v. Southwark***

1. As set out above, the decision in *Jones* is likely to be far reaching. In ***London Borough Greenwich v Willis*,** County Court at Woolwich (Claim No: 2PA32115), the Court determined the lawfulness of water charges collected and sought by LB Greenwich.

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| 1. The case involved an application to suspend a warrant for possession concerning rent arrears – the rent contained a service charge for the provision of a supply of water and sewerage charges. Disclosure of the details of the agreement for water and sewerage charges with Thames Water was obtained and it was accepted that under its tenancy agreement the decision in *Jones v Southwark Council* [2016] EWHC 457 (Ch) applied in respect of the agreement for water charges they had with Thames Water from 2006. 2. In suspending the warrant for possession, Deputy District Judge White held (in open court) that although the term of the tenancy agreement for levying water service charges on unmetered tenants purported to be an agency term, the Royal Borough of Greenwich were, in fact, re-sellers of water and that the defendant had been overcharged unlawfully. 3. On the evidence presented KW was entitled, subject to a small administration fee, to a set-off of 20% with interest on all of the water charges from the outset of the tenancy. 4. Unlike in *Jones v Southwark Council*, where Southwark had purported to change their agreement with Thames Water, under the terms of the agreement between Thames Water and the Royal Borough of Greenwich, KW was entitled to the discount on future charges levied. 5. In his judgment, DDJ White stated that the overcharging and future overcharging for water services by Greenwich did not merely apply to this case but applied to all unmetered tenants of Greenwich who were paying for water services. Although the precise figure of how many people are affected is unknown, I suspect that it is likely to be high. |

***Limitation: Section 32 and s36 of the Limitation Act 1980***

1. Either water charges are a defence to a claim for arrears and there is no limitation period (*Henriksens v Rolimpex* (1974) 1 QB 233) or, arguably, a water charges defence is akin to an equitable set off - see *Filross v Midgeley* (1999) 31 HLR 465- a counterclaim for over paid service charges was an equitable set off) and such claims are not time barred - s36 (2) Limitation Act.
2. There is a potential difficulty if the overpaid water charges exceed the arrears – which might conceivably happen if you had someone with modest arrears who had been in the property for a very long time.
3. Note: limitation is a defence that must be pleaded.

***How to prepare for a Defence challenging water charges***

1. If you are considering such a challenge, you will want the following:
2. A full copy of rent schedule – if possible since the commencement of the tenancy (see below).
3. A copy of the Tenancy Agreement itself – is there term that the water charges are part of the rent and whether it appears that the landlord is acting as an ‘agent’ of Thames Water.
4. Seek disclosure of the agreement between the landlord and Thames Water
5. See if the agreement between Thames Water and LA has been terminated and, if so, when. If not, the claim will continue (see Greenwich v KW).
6. Ask for a witness statement exhibiting the agreement with Thames Water for the supply to and water and sewerage services to the tenants of the claimant and setting out how their charges for the supply of water and sewerage disposal by individual tenants is calculated (as ordered in Jones and KW). Consider looking at other potential and ‘live’ challenges.

***What to look out for***

* We know that this is not the first time this issue has come up, see <http://parkhomes.lease-advice.org/upper-tribunal-decision-re-administration-charges-on-utilities/>
* Other such like agreements? Lambeth, Haringey, Camden and Wandsworth? It is also understood that Lambeth, Haringey and Camden are settling cases quickly and before disclosure stage. Seek disclosure early.
* Disclosure under the Data Protection Act 1998.
* Water rates may just be the ‘tip of the iceberg’. Practitioners should consider also whether there are such agreements for gas and electricity. See <https://www.ofgem.gov.uk/publications-and-updates/resale-gas-and-electricity-guidance-maximum-resale-price-updated-october-2005>

1. It is becoming something which requires a Parliamentary question to be raised with SOS for Communities as it is something LA are continuing to resist disclosure on save for court orders citing commercial reasons but are profiting off people with families who are on the margins on the supply of essential services.
2. In some cases, it could mean the difference between an Outright Order and a Suspended Possession Order. There have been a series of helpful articles on this point – see posts on nearlylegal and Gareth Mitchell’s (DPG) talk for HLPA – currently on the HLPA website for members.

**Possession Orders**

1. In ***Birmingham v Stephenson*** *[*2016] EWCA Civ 1029 the Court held that the judge had been wrong in law to refuse an adjournment of possession proceedings where a local authority had sought to evict a tenant with a mental disability who had failed to file a defence. Neither proportionality nor alternative measures had been considered and there was sufficient information before the Judge to alert him to the fact that there was a possible defence and it will be for the council to show that nothing less than eviction will do.
2. In **Turley v London Borough of Wandsworth (Secretary of State for Communities and Local Government intervening) [2017] EWCA Civ 189, T sought to succeed to her partner’s property pursuant to s87 HA 1985 (requires that** a person can succeed to a secure tenancy if they occupied the property as their only or principal home at the time of the tenant’s death and either (a) they are the tenant’s spouse or civil partner or (b) they are another member of the tenant’s family and resided with the tenant throughout the period of 12 months ending with the tenant’s death.
3. **In** 1995, the Council granted a secure tenancy to Roger Doyle of a four-bedroom property, who lived at the property with his long-term partner T and their children. Mr Doyle moved out of the property in December 2010 after the relationship broke down but he returned to the property in January 2012 in poor health and died in March 2012.T claimed that she was entitled to succeed to the tenancy. T argued that unmarried couples living as man and wife (‘common law spouses’) should be treated the same. It would be a breach of Article 14 (prohibition of discrimination) and Article 8 (right to respect for private and family life) ECHR for the law to treat married and unmarried couples differently. Accordingly, she said that she had a right to succeed to the tenancy, or alternatively that the Council were obliged to grant her a fresh secure tenancy. The county court judge rejected these arguments and made a possession order.
4. **T was evicted as she did not satisfy any of the criteria pursuant to s87. The Court of Appeal dismissed T’s appeal -** the twelve months’ residence requirement served a legitimate aim and that it was a proportionate means of achieving that aim. Secure tenancies were a valuable and limited resource and the right of succession to family members must be balanced against the interests of others on the council waiting list and of the council themselves in making the best use of housing stock. For this reason, it was the policy of the Act to require a degree of permanence in the relationship.
5. S86A HA 1985, the 12 month residence requirement for unmarried couples has been removed (for tenancies granted after 1 April 2012). The Housing and Planning Act 2016 bring succession provisions for pre-April 2012 secure tenancies into line with those for tenancies granted since that date (see s.86G, HA 1985).

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| 1. In ***Dove and Dove v London Borough of Havering*** [2017] EWCA Civ 156   Sisters D and D were joint secure tenants of a flat owned by the Council. The evidence showed that neither sister occupied the property as their only or principal home: each lived for most of the week with their partners elsewhere and each gave their partner’s address for post, medical appointments and other purposes.  There was no suggestion that either sister intended to change their pattern of life in the foreseeable future. A possession order was made and, on appeal to the Court of Appeal, the Court held that that where a person ceases to physically occupy a property, the court must consider whether they have an intention to return.  That intention must be supported by the objective facts of the case (*Islington LBC v Boyle* [2011] EWCA Civ 1450 applied). The possession order was upheld. |
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1. In ***Gibson v Douglas*** [2016] EWCA Civ 1266 G occupied the property under an “excluded licence” for the purposes of the Protection from Eviction Act 1977. He had not been entitled to a formal notice to quit under the Act.  The Court of Appeal held that where the licence itself had not specified the relevant notice period, a licensee was entitled to “whatever in all the circumstances is a reasonable time to remove himself and his possessions.”  The period of notice depended on the circumstances and, on the facts of G, it is typically a period measured in weeks rather than months or years.
2. In ***Cardiff CC v Lee*** [2016] EWCA Civ 1034; the Court of Appeal considered whether a landlord needs permission to seek a warrant for possession.

Historically, where a landlord alleged a breach of any terms of a suspended possession order (i.e. failure to pay the required weekly sum towards arrears of rent or a breach of specified terms of the tenancy agreement in relation to anti-social behavior) they simply filed a form N325 with the court, along with the appropriate fee, and a warrant of possession is issued as an administrative process and served on all parties. The defendant could then, by using form N244, seek a stay of execution of the said warrant.

1. In the Court of Appeal it was common ground between the parties that CPR 83.2(3) was the relevant rule for obtaining a warrant for breach of a suspended possession order.  The issue on appeal was whether the court’s powers under CPR 3.1(2)(m) or 3.10 allowed the court to grant permission for a warrant after the event, or to waive the CPR 83.2(3) requirement.
2. The Court held:

“I have already set out the wording of CPR 3.10. The Rule expressly states that an error of procedure does not invalidate any step in the proceedings unless the court so orders. That means that the issue of the warrant was not invalid unless the court so ordered. The issue of the warrant was therefore voidable and not void, as the judge correctly held. CPR 3.10 also states that the court may remedy the error. Here it has remedied the error by hearing the appellant’s application to discharge the warrant, and, having rejected that application, validating the warrant despite the error in procedure I appreciate that there was no such application as is required by CPR 83.2. That application may be made by an application under CPR 23 but CPR 23.3(2)(b) states that the court can dispense with the making of an application in that form. What matters, therefore, is the substance and not the form of the application.”

1. HMCTS have introduced [Form N325A](https://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=4920), a combined application for permission and request for warrant. The new form is identical to the N325, except that the following certification has been added:

*“… a statement of the payments due and made under the judgment or order is attached to this request. (for rent arrears cases only)”*

1. The new forms only apply to rent and mortgage arrears cases. For SPOs made on the basis of anti-social behaviour, a separate application for permission will need to be made.

**The Equality Act 2010 in the possession context**

1. There has been considerable discussion about defences under the Equality Act 2010 following ***Akerman-Livingstone v Aster Communities*** Ltd [2015] UKSC 15. It is worth reminding ourselves of s15, s35 and the public section equality duty, s149 (copies attached).
2. In ***Akerman*,** the issue for the Supreme Court was whether the issues involved in an Article 8 human rights defence could be equated to that of an Equality Act defence and whether a defence under the EA could also be disposed of by summary assessment.
3. The Supreme Court held that the protection afforded by [s35 (1)(b)](https://www.lawtel.com/UK/Documents/AF0180676) of the Act extended to all disabled occupiers, irrespective of the status of the landlord, and was stronger than that afforded by Art.8. Parliament had given disabled people rights in respect of their accommodation that were different from and extra to the rights of non-disabled people. A landlord could evict a disabled tenant because of something arising in consequence of the tenant's disability, but only if he could show that eviction was a proportionate means of achieving a legitimate aim. It did not follow that because the twin aims of vindicating the social landlord's property rights and enabling it to comply with its statutory duties would almost always trump an occupier's Art.8 right, they would also trump his equality rights. The structured approach to determining proportionality had to be adopted (see paras 18-34 51-58, 64 of judgment).
4. However, that did not mean that a court could never summarily order possession against a residential occupier who raised a disability discrimination defence. Possession actions were governed by [CPR Pt 55](https://www.lawtel.com/UK/Documents/AQ0000631) and could be summarily disposed of at the first hearing. There might be rare cases in which the disability discrimination defence was so lacking in substance that summary disposal was merited - the test, as with all possession claims, was whether the claim was *genuinely disputed on grounds that appeared to be substantial*. Such rare cases could, for example, be cases where the tenant had no real prospect of proving that he was disabled within the meaning of the Act.
5. In ***Birmingham City Council v Stephenson*** [2016] EWCA Civ 1029 the tenant had an introductory tenancy with no security of tenure. His paranoid schizophrenia symptoms could be relieved, but not removed by regular anti-psychotic medication. His neighbour complained of noise nuisance, loud music, arguments, television etc. The Council served warnings, upheld its decision to seek possession on review and served a notice. The claim acknowledged the tenant’s disability for the purposes of the EQ. The Judge ordered the tenant to file a defence, which he failed to do. The tenant failed to turn up to the hearing, was living on benefits and had been seen begging locally – none of these facts were taken into account and proportionality was not mentioned.
6. The Court of Appeal held that the judge had been wrong in law to refuse an adjournment of possession proceedings where a local authority had sought to evict a tenant with a mental disability who had failed to file a defence. Neither proportionality nor alternative measures had been considered. The local authority had explained the basic framework of the law and the tenant's solicitor had repeatedly referred to proportionality, so the judge ought to have been alert to the possibility of at least a pleadable defence under the Act.
7. Approving [*R. (on the application of Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293](https://www.lawtel.com/UK/Documents/AC0111905), the Supreme Court had outlined the correct approach when a disabled defendant resisted an order for possession, Elias and [*Akerman-Livingstone v Aster Communities Ltd* (formerly Flourish Homes Ltd) [2015] UKSC 15](https://www.lawtel.com/UK/Documents/AC0145607) followed. If he had used that approach, the judge would have concluded that, as was common ground, the tenant was disabled and that it was at least arguable that there was a sufficient causal link between his mental disability and the conduct complained of. It would have been enough to raise a prima facie case of discrimination on the ground of disability and the burden of proof would have shifted to the local authority to establish that evicting him was a proportionate means of achieving a legitimate aim. It should have shown that alternatives had been considered and reasons given for their rejection. For example there could be help from social services with taking medication and from mental health professionals; agreed hours for music, sound attenuation measures, alternative accommodation, and an injunction with supervised compliance.
8. Lastly, it was unrealistic to have expected a full defence (paras 14-22). There was always the possibility that once a defence was filed a claim might be summarily decided, but such cases would be rare or relatively so, Aster followed (para.24). The judge had been wrong in law and the case was remitted for further directions (para.25).
9. In ***Barry Smith v Contour Homes CC*** (Manchester) ([Judge Main QC](https://www.lawtel.com/UK/Searches/For/UK/Cases?panel=Judge+Main+QC)) 01/04/2016 (reported on Lawtel), the Court held that a judge had been correct to uphold a possession order which had been sought by a social housing provider after a tenant with mental health problems exposed himself in public.
10. In [***Southern Pacific Mortgage Ltd v V***](http://www.bailii.org/ew/cases/Misc/2015/B42.html) [2015] EW Misc B42 (CC) (19 November 2015) posted on Nearly Legal on 3rd January 2016, the Court considered the issue of disability discrimination in mortgage possession proceedings. As it is not reported, I will take the facts directly from Nearly Legal and it is worth reading the comments made in respect of this case.
11. Ms V had a £96,000 repayment mortgage from Southern Pacific by a re-mortgage in 2004 with a 20 year term. The property was then valued at £185,000.In early 2007 Ms V became unemployed and was then diagnosed with depression in about April 2008. Her insurance paid the mortgage between February 2007 and November 2008, when it ran out. By mid-2008, Ms V had informed Southern Pacific that she was sick, signed off work and getting insurance payments.  Ms V applied for DWP SMI payments after the insurance ended. In March 2009, Southern Pacific began mortgage possession proceedings. In April 2009, DWP began to pay £79 per week.
12. It was clear that Southern Pacific “was aware of the Defendant’s disability by the time proceedings were issued and had chosen to proceed to Court nevertheless”. There was nonetheless, no reference to Ms V’s position as disabled person in any of the Claimant’s file notes, and it was found “that the Claimant gave no thought at all to the Defendant’s position as a disabled person and whether that should have given them pause for thought”.
13. By April 2009, Ms V’s CAB advisors had requested that Southern Pacific change the mortgage to an interest only one, which the DWP payments would indeed have covered. After initially saying they would consider this, Southern Pacific wrote saying simply “whilst we endeavour to assist our customers where possible, we are not obliged to alter the terms of the mortgage”, and that transfer to interest only ‘as not available’. In a further letter, they just said “you do not meet our assessment criteria”.
14. Ms V defended the possession claim on human rights and disability discrimination grounds. She also counterclaimed for disability discrimination.
15. Southern Pacific maintained up until trial that Ms V was not disabled, despite expert evidence. This position was dropped at the door of trial. Further, the Financial Services Ombudsman had made a recommendation in December 2011 for a 9-month interest only period (not on disability grounds), which Southern Pacific had accepted but, it appears, failed to implement because it did not show in the accounts provided.
16. As of the date of hearing, Southern Pacific were claiming £181,703.37 in arrears and legal costs, but they had failed to provide a breakdown of legal costs, in breach of two court orders. In the Defence, it was argued that the failure to convert was unlawful because it amounts to unlawful discrimination within section 19(1)(b) and section 20(2) of the Disability Discrimination Act 1995 and sections 15, 19 and 21 of the Equality Act 2010;. It was argued that any possession order should be suspended (especially in light of the fact that any sums awarded under the counterclaim may be set off against the arrears).
17. The Court held:
    1. It was an issue of an ongoing act, not just the date of the issue of proceedings, it being “incumbent on the lender to consider the appropriateness of proceedings at every stage”. Relying on *R (JL) v Secretary of State for Defence*[*[2013] EWCA Civ 449*](http://www.bailii.org/ew/cases/EWCA/Civ/2013/449.html)*the Court of Appeal confirmed that it is open to a Defendant to raise issues of human rights even at the stage of enforcement. The Court held that the question of discrimination must be considered at every stage from pre-action compliance with protocols to the decision to pursue the case to trial, and thence to possession.*
    2. Any steps before 1 October 2010 fell to be considered under the Disability Discrimination Act 1995, as per *Lewisham v London Borough of Malcolm* [[2008] UKHL 43](http://www.bailii.org/uk/cases/UKHL/2008/43.html), and thereafter under Equality Act 2010. Ms V was prevented from working by her disability and it was this that led to the arrears. However, commencing possession proceedings (under the old law in *Malcolm v Lewisham* and DDA 1995)  this was not for a reason related to Ms V’s disability as the Claimant would have brought proceedings for arrears against anyone, so no ‘less favourable treatment’ and no discrimination at that stage.
    3. Refusal to transfer to ‘interest only’. This was an issue of ‘reasonable adjustments’.
18. In respect of s.20 Equality Act, the ‘failure to make reasonable adjustment’ defence failed. The Judge stated as follows:

*“Again, it is clear that there was a practice: the refusal to change to interest only. I am prepared to accept for these purposes that the obligation to make monthly payments under the mortgage is a relevant matter for these purposes, and that the practice put the Defendant at a substantial disadvantage in relation to paying the mortgage as she was unable to work due to her disability. But then the Act only requires such steps as are reasonable to be taken. For the reasons I have already set out, I do not think that there was ever a time when it was a reasonable step for the lender to forgo its security, having regard to the Defendant’s disability. The security was too speculative. Although it is standard thinking to assume that the value of property will go up, that has not always been the case and the days of negative equity are not far away.*

1. In respect of direct and indirect discrimination – the issue was whether the blanket policy of refusing to transfer to interest only caused particular disadvantage to the disabled, and if so, whether it lacked objective justification. Assuming that it did cause particular disadvantage, the judge held that the policy would have objective justification.

**MARINA SERGIDES**

**Garden Court Chambers**

**15TH NOVEMBER 2017**