Housing and the Equality Act 2010

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1 INTRODUCTION AND SCOPE

1.1.1 This paper focuses on the substantive legal issues that may arise in relation to the Equality Act and housing in the County Court, in particular as regards on issues relating to disability. It looks first at discrimination and related public law defences, and then goes on to consider other possible grounds for making a claim or counterclaim in the County Court.

2 DISABILITY-RELATED DISCRIMINATION DEFENCES

2.1 A reminder – sections 15 and 35 Equality Act 2010

"15 Discrimination arising from disability

(1) A person (A) discriminates against **a disabled person** (B) if—
(a) A treats B unfavourably because of **something arising in consequence** of B's **disability**, and
(b) A cannot show that the treatment is a **proportionate** means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that **A did not know**, and could not reasonably have been expected to know, that B had the disability.

…

35 Management

(1) A person (A) who manages premises must not discriminate against a person (B) who occupies the premises—
(a) in the way in which A allows B, or by not allowing B, to make use of a benefit or facility;
(b) **by evicting B (or taking steps for the purpose of securing B's eviction);**
(c) by subjecting B to any other detriment." [emphasis added]

2.2 Disability

2.2.1 By section 6, "A person (P) has a disability if – (a) P has a physical and mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities".

2.2.2 See also:

a) Section 212, as to "substantial" (more than trivial).

b) Schedule 1, as to the meaning of "long-term" (generally 12 months or longer); the effect of "medical treatments" (beneficial effects not to be taken into account); progressive conditions; past disabilities and other matters.

c) The statutory guidance, *Equality Act 2010 Guidance - Guidance on matters to be taken into account in determining questions relating to the definition of disability,* ODI, including a non-exhaustive list of "normal day-to-day activities" in the appendix.

Excluded conditions

2.2.3 Regulation 3 of the Equality Act 2010 (Disability) Regulations 2010:

> "(1) Subject to paragraph (2) below, addiction to alcohol, nicotine or any other substance is to be treated as not amounting to an impairment for the purposes of the Act.
>
> (2) Paragraph (1) above does not apply to addiction which was originally the result of administration of medically prescribed drugs or other medical treatment."

2.2.4 By regulation 2, "'addiction' includes a dependency".

2.2.5 Regulation 4 further provides that:

> "(1) For the purposes of the Act the following conditions are to be treated as not amounting to impairments:—
> (a) a tendency to set fires,
> (b) a tendency to steal,
> (c) a tendency to physical or sexual abuse of other persons,
> (d) exhibitionism, and
> (e) voyeurism."

2.2.6 As to regulation 4(1)(c), the words "tendency to physical abuse", see *X v Governing Body of a School* [2015] UKUT 0007 (AAC) (and also *P v Governing Body of A Primary School* [2013] UKUT 154 (AAC)). As regards "physical abuse", at [116]:

> "… Parliament has chosen not to use the phrase 'physical violence'. We infer that there must always be an element of violent conduct. However, that on its own may not necessarily be sufficient to meet the definition. The greater the level of violence, the more readily it will fall within the meaning of 'physical abuse.'"

2.2.7 As regards "tendency", at [120]:

> '… it is not necessary for a tendency to physical abuse to be manifested frequently or regularly. It may be that the tendency is only displayed in response to certain trigger events, but that does not mean that it is not present at other times. In principle, in some circumstances such a tendency may be revealed in a one-off incident, so long as there is evidence of a tendency to physical abuse in the form of (for example) medical evidence. The regulation is less concerned with whether a particular incident constitutes actual abuse, but rather it focusses on whether the incident is indicative of a tendency to abuse."

2.2.8 The statutory guidance, *Guidance on matters to be taken into account in determining questions relating to the definition of disability,* states as follows.

> "A13. The exclusions apply where the tendency to set fires, tendency to steal, tendency to physical or sexual abuse of other persons, exhibitionism, or voyeurism constitute an impairment in themselves. The exclusions also apply where these tendencies arise as a consequence of, or a manifestation of, an impairment that constitutes a disability for the purposes of the Act. It is important to determine the basis for the alleged discrimination. If the alleged discrimination was a result of an excluded condition, the exclusion will apply. However, if the alleged discrimination was specifically related to the actual disability which gave rise to the excluded condition, the exclusion **will not** apply. Whether the exclusion applies will depend on all the facts of the individual case.
>
> *A young man has Attention Deficit Hyperactivity Disorder (ADHD) which manifests itself in a number of ways, including exhibitionism and an inability to concentrate. The disorder, as an impairment which has a substantial and long-term adverse effect on the young person's ability to carry out normal day-to-day activities, would be a disability for the purposes of the Act.*
>
> *The young man is not entitled to the protection of the Act in relation to any discrimination he experiences as a consequence of his exhibitionism, because that is an excluded condition under the Act.*
>
> *However, he would be protected in relation to any discrimination that he experiences in relation to the non-excluded effects of his condition, such as inability to concentrate. For example, he would be entitled to any reasonable adjustments that are required as a consequence of those effects."*

2.2.9 This aspect of the guidance has been approved by the Upper Tribunal: see *X v Governing Body of a School* [2015] UKUT 0007 (AAC). In that case the Tribunal confirmed that "regulation 4(1) does apply where the conditions specified therein arise in consequence of an impairment that is already protected under the provisions of section 6 of the 2010 Act." However, quoting and approving *Nuttal Edmund Ltd v Butterfield* [2006] ICR 77:

> "… if the legitimate impairment was a reason and thus an effective cause of the less favourable treatment, then prima facie discrimination is made out notwithstanding that the excluded condition also forms part of the employer's reason for that treatment."

C v Governing Boy of a School [2018] UKUT 269 (AAC)

2.2.10 This case concerned an 11 year old autistic child who had been excluded from school because of aggressive behaviour. A claim for discrimination based on section 15 of the Act was dismissed by the First-tier Tribunal (SEN) on the basis that regulation 4(1)(c) applied. UTJ Rowley overturned the decision on appeal. Regulation 4(1)(c) had to be read down or disapplied in this context in order to avoid a breach of Article 14 ECHR (read together the Article 2 of the First Protocol, the right to education). It discriminated unfairly between disabled children whose conditions disposed them to physical abuse, and children with other disabilities.

"52. The aim advanced by the Secretary of State for the difference in treatment in this case is, in short, a generic policy aim to ensure that the Equality Act does not provide protection for people where the effect of their condition involves anti-social or criminal activity which has an impact on others, whether by actual or potential harm to the others' health or safety, or to their property. …
…
87 … I believe that it would be highly inappropriate for me to consider the wider implications of regulation 4, for example in the context of employment or provision of goods and services, and I will leave open the question of the compatibility of the current interpretation of the remainder of regulation 4 with article 14 to other cases where the issue may arise.

89 … I am firmly of the view that regulation 4(1)(c) comes nowhere near striking a fair balance between the rights of children such as L on the one side and the interests of the community on the other…

90. … to my mind it is repugnant to define as 'criminal or anti-social' the effect of the behaviour of children whose condition (through no fault of their own) manifests itself in particular ways so as to justify treating them differently from children whose condition has other manifestations."

2.2.11 It remains to be seen how far this type of reasoning may apply in housing cases. Consider, for example, were an eviction is sought because of aggressive behaviour by a tenant's child.

2.3 Causation

2.3.1 When considering whether the adverse treatment is "because of something arising in consequence of B's disability" it is not necessary to show that disability was the only or even main cause. It is sufficient to show it was "a reason and thus an effective cause of the less favourable treatment": see e.g. *X v Governing Body of a School* [2015] UKUT 0007 (AAC) above.

2.4 Justification – section 15(1)(b)

2.4.1 The key case remains *Aster Communities Ltd v Akerman-Livingstone (ECHR intervening)* [2015] UKSC 15. In short, proportionality under section 15(1)(b) must be approached very differently from the issue of whether it is proportionate to make a possession order for the purposes of Article 8 ECHR [31], [43], [64], [77]. A four stage test applies:

"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? …

[and fourthly] …whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure" [28], [43], [64], [77].

Birmingham CC v Stephenson [2016] EWCA Civ 1029

2.4.2 This involved an introductory tenant with paranoid schizophrenia. There had been noise nuisance. A possession order was made at an adjourned hearing in the possession list, despite the claimant admitting that the defendant was under a disability and the defendant's solicitor arguing that eviction would not be "proportionate". The order was set aside by the Court of Appeal. The judge had failed properly to consider the proportionality test. Per Lewison LJ:

> "22 …the flaw in both the deputy district judge's approach and the council's respondent's notice is to treat the question of proportionality as a binary choice between eviction, on the one hand, and doing nothing on the other hand. Clearly something must be done for the well being of Mr Stephenson's neighbour. However there may well be intermediate steps that could be taken short of throwing Mr Stephenson out on the street. For example, he could be given support from social services in reminding him of appointments that have been made for him to receive medication. He might be given support from mental health professionals. His medication could be changed or its dosage increased. Sound attenuation measures could be installed in his flat. There could be specific agreement on permitted hours for the playing of music rather than the general prohibition on anti-social behaviour contained in the tenancy conditions. The council might seek an injunction prohibiting the anti-social behaviour under the Anti-social Behaviour Crime and Policing Act which would require supervised compliance. Or the council might provide him with more suitable alternative accommodation.
>
> 23. I do not say that all or indeed any of these steps are feasible. However, in my judgement, they cannot be summarily ruled out. It will be for the council to show that nothing less than eviction will do….".

2.4.3 Where eviction is sought against a tenant lacks some relevant mental capacity, it may be arguable that an application to the Court of Protection would provide an effective alternative solution. For example, in hoarding cases see *When protection matters* Robert Eckford, New Law Journal, Specialist Legal Update, 22 April 2011 and *Court of Protection powers that help vulnerable tenants who hoard or refuse access to remain in their homes,* Bethan Harris, Garden Court website, 13 July 2013.

2.5 Knowledge

Gallop v Newport City Council [2013] EWCA Civ 1583

2.5.1 This was an employment claim based on discrimination and a failure to make reasonable adjustments in respect of an employee with depression. The live issue was whether the employer had actual or constructive knowledge of the disability at the relevant time. The Court confirmed that what is required is more than knowledge of an impairment, but less than knowledge of the person's disabled status within the terms of section 6 of the Act; it is knowledge of the facts constituting the disability. Per Rimer LJ at §36:

> "… Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse

effect on (c) his ability to carry out normal day-to-day duties; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. Counsel were further agreed that, provided the employer has actual or constructive knowledge of the facts constituting the employee's disability, the employer does not also need to know that, as a matter of law, the consequence of such facts is that the employee is a 'disabled person' as defined in section 1(2). I agree…

…

44. I add that this case illustrates the need for the employer, when seeking outside advice from clinicians, not simply to ask in general terms whether the employee is a disabled person within the meaning of the legislation but to pose specific practical questions directed to the particular circumstances of the putative disability".

Knowledge acquired in the course of proceedings

2.5.2 In *Lewisham LBC v Malcolm (EHRC intervening) [2008] UKHL 43* it was held that a landlord should normally be treated as involved in a single exercise of "evicting" a tenant from the moment the notice to quit is served until the proceedings are concluded. At §133 Lord Neuberger went on to comment as follows:

> "...that does not mean that it would be wrong to treat different stages of the possession-seeking exercise differently. For instance, where the reason for seeking possession (or, if relevant, the landlord's knowledge), changes during the course of the procedure, it may be that an exercise, which had started off as lawful, could thereby become unlawful under the 1995 Act."

2.6 Summary determination

2.6.1 Again, the leading case remains *Aster Communities Ltd v Akerman-Livingstone.* Possession can be ordered summarily if the landlord can establish that:

a) the defendant has no real prospect of establishing that he is under a disability;

b) it is plain that possession is not being sought because of something arising in consequence of a disability; or

c) granting possession plainly represents a proportionate means of achieving a legitimate aim;

2.6.2 But in practice, each of the three issues will usually give rise to disputed facts or assessments so that it will rarely be appropriate to grant possession summarily [36], [60], [64], [77].

2.7 Applying to stay or suspend

Paragon Asra Housing Ltd v Neville [2018] EWCA Civ 1712

2.7.1 This was a claim against an assured tenant based on antisocial behaviour. The tenant filed a defence relying on sections 15 and 35 Equality Act 2010 but later submitted to a suspended possession order. Further allegations followed soon afterwards and a warrant was issued. The tenant applied to suspend the warrant,

seeking to rely again on sections 15 and 35. DJ Smart dismissed the application holding that, unless there had been a change in the defendant's circumstances after the possession order, it was not necessary to give any further consideration to whether eviction would amount to unlawful discrimination. The tenant's appeal was allowed by a Recorder but reversed by the Court of Appeal. Per Sir Colin Rimer at §51:

> "… When making the possession order, the court has undertaken the relevant proportionality inquiry. It has satisfied itself that possession must be given and that, if it is not, the order can lawfully be enforced. The order is binding between the parties. The tenant can have no right, absent any relevant change of circumstances, to require the court to re-consider the same question upon the landlord's claim to enforce the order…."

Midland Heart Ltd v Burns, County Court at Birmingham, 3 May 2019

2.7.2 The claimant obtained a suspended possession order based on rent arrears. This was breached and a warrant was issued. The defendant applied to suspend it. In opposing that application the claimant was given permission by a district judge to rely on new allegations of antisocial behaviour, based on *Sheffield v Hopkins* [2001] EWCA Civ 1023. The tenant appealed successfully to HHJ Murdoch. The tenant's son, who had been joined as a party to the proceedings, wished to raise a defence based on sections 15 and 35. Held that the summary process contemplated in *Hopkins* was not appropriate. If the claimant wanted to rely on the alleged antisocial behaviour, it should issue a fresh claim.

2.8 Other cases

Barry Smith v Contour Homes, County Court at Manchester, 1 April 2016

2.8.1 Held by HHJ Main QC that a district judge had been entitled to refuse to set aside a possession made under section 21 Housing Act 1988 against a "Starter" tenant who had exposed himself in public. The judge heard evidence. The tenant had previous offences. There was expert evidence from a consultant psychiatrist that his behaviour had been linked to schizophrenia. Nevertheless, the evidence was that tenant remained an unrepentant and habitual cannabis user and an injunction would not provide adequate protection against the risk of his re-offending.

Teign Housing v Lane [2018] EWHC 40 (QB)

2.8.2 This was claim against an assured tenant who was found to have carried out unauthorised alterations in his home and caused antisocial behaviour. There was evidence from a consultant psychiatrist that he suffered from a paranoid personality disorder, possible adult attention deficit hyperactivity disorder and harmful use of alcohol. The tenant raised a reasonableness defence as well as sections 15 and 35 Equality Act 2010. At first instance the Circuit Judge held that the tenant's behaviour had not been malevolent or deliberately confrontational, and that he had mistakenly believed he had been given permission to alter his flat as a result of his conditions (he had "heard what he wanted to hear"). On appeal the court agreed in principle that "it cannot be reasonable to make an order for

possession which would involve disability discrimination" [41]. However, that the judge had erred by disregarding some breaches as not "relevant", and erred in his treatment of the evidence. The matter was remitted, but with Dingemans J adding at [60]:

> "It is apparent from all the evidence in this case that Mr Lane does not want to be a tenant at the flat and wants to swop to other accommodation, and Teign Housing do not want Mr Lane to remain a tenant in the flat in Bovey Tracey. It is also apparent that a court considering issues of reasonableness and disability discrimination might consider whether alternative accommodation might avoid future problems, see *Aster v Akerman Livingstone* at [56]…."

Eaves v Havering [2018] EWHC 2423 (QB)

2.8.3 This was a claim for possession against a non-secure tenant accommodated under section 193 Housing Act 1996. The local authority had already obtained an injunction based on antisocial behaviour. There was psychiatric evidence that the defendant had a personality disorder exacerbated by drug and alcohol misuse. In the County Court it was conceded that she was disabled. However, the judge held that the matters complained of had not arisen in consequence of her disability, and that the order would be proportionate in any event. This was upheld on appeal:

> "37. In terms of the causation argument, the learned judge, as it seems to me, was entitled to say that the anti-social behaviour arose out of a combination of a psychiatric condition coupled with the drug and alcohol use which the appellant, certainly at that time, was not capable of addressing.
> …
> 40. In my judgment the district judge did not impose a test of strict or sole causation, but he was not required to do so, and he approached the matter assessing the nature of the causal link. He was entitled to hold that the formulation, 'because of something arising in consequence of the disability', had not been met in this case."

2.8.4 As regards causation, it is difficult to see how this decision can be reconciled with the *X v Governing Body of a School* and *Nuttal v Butterfield* cases cited above.

3 DEFENCES BASED ON PUBLIC SECTOR EQUALITY DUTY

3.1 Public functions

R(Macleod) v Peabody Trust Governors [2016] EWHC 737 (Admin)

3.1.1 The claimant had been granted a tenancy but the Crown Estate Commissioners as part a key worker scheme. The scheme properties had since been sold to Peabody, who agreed not to charge more than 80% of the market rent. He sought judicial review of Peabody's refusal to approve his request for a mutual exchange, relying inter alia on an alleged breach of the PSED. The claim was refused on the basis that Peabody had not been exercising any public function and their decision was not amenable to judicial review. The reversion had been purchased not with any subsidy but with funds raised on the open market; although the properties were not let at full market rent, the rent levels were above those for most social housing

and the properties could be let to families with an income of up to £60,000; the transferred properties were not social housing for the purposes of section 69 of the Housing and Regeneration Act 2008.

3.2 Continuing duty and curing a breach

Powell v Dacorum BC [2019] EWCA Civ 23

3.2.1 This case involved a claim for possession against a secure tenant based on antisocial behaviour and cannabis growing. The defendant filed a defence alleging physical and mental disabilities and relying on section 149 (but not sections 15 or 35) of the Act. He later submitted to a suspended possession order. There were then further allegations of drug dealing. A closure order was obtained and a warrant issued to enforce the possession order. The defendant's application for a stay was listed for a one day hearing. Five days before the hearing, psychiatric evidence was served stating the defendant's condition had deteriorated and that he was suffering from paranoid delusions. The claimant only then carried out a "proportionality assessment" referring to the PSED. In refusing a stay the district judge found that if there had been any breach of the PSED at the stage when the warrant was issued, it had been cured by the recent assessment. Held by the Circuit Judge and Court of Appeal that:

a) There had been no breach of the PSED when the warrant was issued – the claimant had attempted to make inquiries before issuing, no change of circumstances had been disclosed, and the claimant had been entitled to conclude that the order was still enforceable.

b) The DJ had been right to hold that any breach of the PSED had been cured by the later assessment in any event.

London & Quadrant Housing Trust v Patrick [2019] EWHC 1263 (QB)

3.2.2 The defendant was an assured tenant. L&Q obtained an injunction based on antisocial behaviour. This was breached within days and the defendant was given a suspended sentence. The landlord had already applied for possession on discretionary grounds but sought to amend their claim to include Ground 7A of Schedule 2 Housing Act 1988. The case was listed for a preliminary hearing before the Circuit Judge who had dealt with the committal. The defendant then sought to rely on sections 15, 35 and 149 of the Act. He served, less than 48 hours before the hearing, a psychiatric report stating that he had paranoid schizophrenia. The judge made an outright order based on a summary ruling that the making of an order would be proportionate and that there had been no breach of the PSED. The defendant appealed to the High Court in respect of the PSED point only. By the time the appeal was heard, the claimant had conducted a further "proportionality and PSED assessment" and confirmed its decision to enforce the order.

3.2.3 At [42] (i) to (viii) the judgment contains a useful summary of the legal principles which apply to the PSED in the context of possession proceedings. As regards the "Continuing nature of the duty" Turner J summarised as follows:

"(v) The PSED is a continuing one and is thus not discharged once and for all at any particular stage of the decision making process. Thus the requirement to fulfil the PSED does not elapse even after a possession order (whether on mandatory or discretionary grounds) is granted and before it has been enforced. However, the PSED consequences of enforcing an order ought already to have been adequately considered by the decision maker before the order is sought and, in most cases, in the absence of any material change in circumstances (which circumstances may include the decision maker's state of knowledge of the disability), the continuing nature of the duty will not mandate further explicit reconsideration."

3.2.4 As regards "timing of formal consideration of PSED" he continued:

"Generally, the public sector landlord must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before seeking and enforcing possession and not merely as a 'rear-guard action' following a concluded decision. However, cases will arise in which the landlord initially neither knew nor ought reasonably to have known of any relevant disability. The duty to "have due regard" will then only take on any substance when the disability becomes or ought to have become apparent. In such cases, the lateness of the knowledge may impact on the discharge of the PSED. For example, cases may arise in which countervailing interests justify a less formal PSED assessment than would otherwise have been appropriate. Thus a tenant whose anti-social conduct has already been adversely affecting his neighbours for a considerable time but whose disability is raised at the eleventh hour may well find that the discharge of the PSED does not necessarily mandate a postponement of the date or enforcement of a possession order. Of course, the obligation to have 'due regard' still arises but the result of the discharge of that obligation may well be less favourable to the person affected where, through delay, the landlord's options have been limited and the rights and reasonable expectations of others have assumed a more pressing character. Each case will, of course, depend on its own facts."

3.2.5 In the circumstances Turner J concluded there had been no breach of the PSED. At [44],

"… Had the issue of Mr Patrick's mental health been sufficiently salient at an earlier stage of the proceedings then a more formal and analytical approach to the performance of the PSED would have been appropriate. The Trust was entitled to consider whether the evidence relating to Mr Patrick's disability was such as to cast any doubt upon the continued appropriateness of its decision to seek a possession order. It took the view that it did not and this approach was mirrored by the Judge … Furthermore, the regard which is due must be proportionate to the significance of the step under consideration. In this context, it is relevant to note that, by reason of the continuing nature of the duty, the course taken by the Trust in continuing to press for an order for immediate possession would nevertheless leave open an opportunity for it subsequently to consider the appropriateness of a decision to enforce the order following a more detailed and nuanced assessment. Indeed, this is an opportunity which it took."

3.3 Consequences of breach

3.3.1 In *Patrick* Turner J gave a further reason for dismissing the appeal, namely that any breach of the PSED had been immaterial; there was no reason to believe that a full consideration of the PSED would have led the claimant making any different decision. This accords with the Court of Appeal's approach in the next case.

Forward v Aldwyck Housing Group Ltd [2019] EWCA Civ 1334

3.3.2 The defendant was an assured tenant with severe mobility problems as well as depression, anxiety and a personality disorder. The police obtained a closure order against him based on suspected drug use. He sought to defend a subsequent claim for possession based on sections 15, 35 and 149 of the Act. As to sections 15 and 35, the judge found that the tenant was disabled as a result of physical impairments only, and that there was no connection between his physical disability and the anti-social behaviour. She found the association had failed to comply with the PSED. However, it was common ground that they judge erred in concluding that such a breach was never capable of giving rise to a defence.

3.3.3 The defendant appealed unsuccessfully to the High Court ([2019] EWHC 24 (QB)). On a second appeal the Court of Appeal confirmed there is no general rule that, if there is breach of the PSED, any decision taken after the breach must necessarily be quashed. It may well be right that major governmental decisions affecting numerous people may be liable to be quashed if the government has not complied with the PSED [22]. However, per Longmore LJ:

> "24 … In the context … of a typical possession action the court, while having regard to the importance of the PSED, will also have available to it the facts of the particular dispute and be able to assess the consequence of any breach of the duty more easily than in the context of a wide-ranging ministerial decision.
>
> 25 … Rather than acting as some sort of mentor the court should, in deciding the consequence of a breach of PSED, look closely at the facts of the particular case and, if on the facts it is highly likely that the decision would not have been substantially different if the breach of duty had not occurred, there will (subject to any other relevant considerations) be no need to quash the decision. If, however, it is not highly likely, a quashing order may be made."

3.3.4 He went on to quote and approve (at [26] and [36]) a statement by Turner J in *Patrick* that section 31(2A) of the Senior Courts Act 1981 should be applied by analogy. The test is not whether the decision to seek possession or to evict would inevitably have been made, despite compliance with the PSED. It is whether this would have been "highly likely".

3.3.5 On the facts as found by the judge, any breach of the PSED had been immaterial. There was no viable option for the landlord other than to seek possession.

3.4 A duty to inquire

3.4.1 In *Pieretti v Enfield LBC* [2010] EWCA Civ 1104 it was held that a homelessness review officer had acted in breach of her public sector equality duty by failing "to make further inquiry in relation to some such feature of the evidence presented to her as raised a real possibility that the applicant was disabled" in a relevant sense (Per Wilson LJ at [35]).

3.4.2 However, in *Swan Housing Association v Gill* [2013] EWCA Civ 1566 the Court of Appeal overturned a finding by a DJ that a housing association had acted in breach of the PSED when deciding to pursue injunction proceedings against a tenant with Asperger's Syndrome. There had been no evidence of actual disability. The PSED was not engaged by the "mere likelihood of the existence of a disability": [40-41]. Wilson LJ's observation in *Pieretti*, "relates to a duty to enquire in a case in which the applicants were in fact disabled and hence did in fact have a protected characteristic. It is wrenching that statement completely out of context to seek to suggest that the public sector equality duty is engaged when on the proven facts there is no protected characteristic."

3.4.3 The more recent cases have tended to confirm that an obligation to make inquiries may arise:

a) In *Powell v Dacorum BC* the Court referred to the possible application of the "Tameside" principle in PSED cases, namely that "the duty of due regard under the statute 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 and this will frequently mean than some further consultation with appropriate groups is required" ([33](ii)).

b) In the *Patrick* case, Turner J included the *Pieretti* point in his summary of the principles relevant to possession proceedings, as follows:

"iii) The public sector landlord is not required in every case to take active steps to inquire into whether the person subject to its decision is disabled and, if so, is disabled in a way relevant to the decision. Where, however, some feature or features of the information available to the decision maker raises a real possibility that this might be the case then a duty to make further enquiry arises."

c) In the *Forward v Aldwyck*, Cheema-Grubb J held in the High Court that, "A duty of inquiry may well arise: it depends on the context, see *R. (on the application of Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin). In the current case the appellant was well aware of the necessity to furnish some evidence to establish that he had a mental disability. He failed to provide it. It is still not clear what the respondent could have obtained by further inquiry, albeit [the housing officer] did not engage in any, as she could have done."

4 REASONABLE ADJUSTMENTS – LET PREMISES

4.1 A reminder – sections 20, 21 and 36

4.1.1 Section 20 states relevantly as follows:

> "(2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a **provision, criterion or practice** of A's puts a disabled person at **a substantial disadvantage** in relation to a relevant matter in comparison with persons who are not disabled, to take **such steps as it is reasonable** to have to take to avoid the disadvantage.
> …
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an **auxiliary aid**, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

4.1.2 Section 21(2) provides that "A discriminates against a disabled person if A fails to comply with that duty in relation to that person".

4.1.3 Section 36 provides relevantly:

> "(1) A duty to make reasonable adjustments applies to—
> (a) a controller of let premises;
> …
> (2) A controller of let premises is—
> (a) a person by whom premises are let, or
> (b) a person who manages them"

4.1.4 By Schedule 4:

> "(1) This paragraph applies where A is a controller of let premises.
>
> (2) A must comply with the first and third requirements.
>
> (3) For the purposes of this paragraph, the reference in section 20(3) to a provision, criterion or practice of A's includes a reference to a term of the letting.
>
> (4) For those purposes, the reference in section 20(3) or (5) to a disabled person is a reference to a disabled person who—
> (a) is a tenant of the premises, or
> (b) is otherwise entitled to occupy them.
>
> (5) In relation to each requirement, the relevant matters are—
> (a) the enjoyment of the premises;
> (b) the use of a benefit or facility, entitlement to which arises as a result of the letting.
>
> (6) Sub-paragraph (2) applies only if A receives a request from or on behalf of the tenant or a person entitled to occupy the premises to take steps to avoid the disadvantage or provide the auxiliary aid.

(7) If a term of the letting that prohibits the tenant from making alterations puts the disabled person at the disadvantage referred to in the first requirement, A is required to change the term only so far as is necessary to enable the tenant to make alterations to the let premises so as to avoid the disadvantage.

(8) It is never reasonable for A to have to take a step which would involve the removal or alteration of a physical feature."

4.2 Enjoyment of the premises

Beedles v Guinness Northern Counties Ltd [2011] EWCA Civ 442

4.2.1 This was a case as to what constituted enjoyment of the premises under section 24C Disability Discrimination Act 1995. The terms of the claimant's tenancy made him responsible for internal decoration. He claimed he was unable to decorate because of epilepsy, and that the landlord should do so as a reasonable adjustment. At first instance the judge refused the claim, having found that the condition of the house was not such that it was unreasonably difficult or impossible for the claimant to continue living there. The tenant's appeal was dismissed. "Enjoyment" in this sense did not mean "gain pleasure from" but bore the same meaning as in the usual covenant to give "quiet enjoyment". Per Moses LJ, the words 'enjoy' and 'enjoyment':

> "…require an assessment to be made as to whether the auxiliary aid or service requested by the disabled tenant would enable him to live as would any other typical tenant in the let premises. This construction derives from Lord Hoffman's recognition that 'quiet enjoyment' connotes an ability to use the premises in 'an ordinary lawful way'".

4.2.2 On the facts as found by the judge, the condition of the flat was not such as to prevent its enjoyment in this sense.

4.2.3 The court referred to examples of relevant auxiliary aids from an earlier code of guidance issued in relation to the 1995 Act. These were the provision of an adapted chair for a tenant in furnished accommodation with arthritis; the provision of earphones to enable a deaf tenant to watch TV without disturbing his neighbours; and the replacement of fuses.

4.2.4 See also *Birmingham CC v Stephenson* above.

4.3 Physical feature

Smailes & Poyner-Smailes v Clewer Court Residents Ltd, County Court at Cardiff, 30 January 2019

4.3.1 The claimants were leaseholds who sought permission to carry out alterations to their home to account for Mr Smailes' disabilities. The defendant sought to oppose the claim on the basis that the proposed works involved the alteration of a physical feature, albeit by the claimant and not the defendant. HHJJ Jarman QC conducted a detailed review of the 2010 and 1995 legislation before concluding that,

"…the exclusion is limited to circumstances where the step to be taken by the controller would involve the removal or alteration of a physical feature. Consent for the claimants to carry out the works does not involve such removal or alteration. It involves only a decision to consent to such works."

5 SERVICES AND PUBLIC FUNCTIONS

5.1.1 Section 29 of the Act prohibits discrimination by both a service-provider, and by any person exercising a public function that is not the provision of a service (section 29(1) to (6)).

5.1.2 The duty to make reasonable adjustments applies to both (29(7)).

5.1.3 The following forms of discrimination are most likely to be relevant:

a) Disability-related discrimination – see section 15 above.

b) Indirect discrimination – section 19.

c) Breach of the duty to make reasonable adjustments.

5.2 Indirect discrimination

5.2.1 Section 19 provides relevantly as follows:

"(1) A person (A) discriminates against another (B) if A applies to B a **provision, criterion or practice** which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a) A applies, or would apply, it to persons with whom B does not share the characteristic,
(b) it puts, or would put, persons with whom B shares the characteristic at **a particular disadvantage** when compared with persons with whom B does not share it,
(c) it **puts, or would put, B at that disadvantage**, and
(d) A cannot show it to be a **proportionate means of achieving a legitimate aim**."

5.3 Reasonable adjustments – sections 20, 21 and 29

5.3.1 The requirements of section 20 are modified by paragraph 2 of Schedule 2, so that in effect the requirements are as follows:

"(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts [disabled persons generally] at a substantial disadvantage in relation to [the provision of the service or the exercise of the function] in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts [disabled persons generally] at a substantial disadvantage in relation to [the provision of the service or the exercise of the function] in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage or [to adopt a reasonable alternative method of providing the service or exercising the function].

(5) The third requirement is a requirement, where [disabled persons generally] would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to [the provision of the service or the exercise of the function] in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."

5.3.2 Paragraph 2 of Schedule goes on to expand on the application of the duty, including as to the meaning of "being placed at a substantial disadvantage" in this context.

5.3.3 Detailed guidance is also given in the EHRC's *Services, public functions and associations Statutory Code of Practice.*

5.3.4 A key point is that there may be a breach of duty even without any prior request for the adjustment. Per the Code:

"7.20 In relation to all three areas of activity (services, public functions and associations) **the duty is anticipatory** in the sense that it requires consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service, avail themselves of a function or participate in the activities of an association.
…
7.26 Once a service provider has become aware of the requirements of a particular disabled person who uses or seeks to use its services, it might then be reasonable for the service provider to take a particular step to meet these requirements. This is especially so where a disabled person has pointed out the difficulty that they face in accessing services, or has suggested a reasonable solution to that difficulty."

5.3.5 For examples of the disadvantages encountered by many disabled people, and of adjustments that may reasonably be expected, see *Housing and disabled people: Britain's hidden crisis*, May 2018. There are other useful materials available on the EHRC website.

5.3.6 The key case on reasonable adjustments in respect of public services is *Paulley v FirstGroup plc* [2017] UKSC 4. Mr Paulley, a wheelchair user, was unable to board a bus because the allocated wheelchair space was occupied by a child in a pushchair, and the child's mother refused to fold it down when asked to do so by the driver. The defendant's policy at the time was that wheelchairs did not have priority over pushchairs. Mr Paulley issued a claim for breach of sections 21 and 29. At first instance a Recorder allowed his claim on the basis that the bus company's terms of carriage should have required the mother to move her buggy

when asked. He made an award at the top of the lowest of the three *Vento*[1] bands for general damages for injury to feelings (then £5,500). The Supreme Court analysed the case differently; it held that it would not have been reasonable for the terms of carriage to require pushchairs to be moved on request, but that it would have been reasonable for the bus company to have trained its drivers to do more than merely ask. It therefore reinstated the Recorder's judgment on liability (which had been reversed by the Court of Appeal). However, absent any finding below that there was a real prospect that this more limited adjustment in policy would have made any difference to Mr Paulley, it declined to reinstate the award of damages.

5.4 Homelessness appeals

Adesotu v Lewisham LBC [2019] EWCA Civ 1405

5.4.1 On Friday 25 May Ms Adesotu, who had mental health issues, was offered of temporary accommodation under section 193 Housing Act 1996. She was told she must accept it before 12pm on the next working day, Tuesday 29 May. The deadline was later extended by a day. Thereafter she was treated as having refused the offer and Lewisham decided that their duty under section 193 had ceased. Ms Adesotu appealed under section 204 of the Act and argued inter alia that (i) there had been indirect discrimination in the offer process, in breach of section 19 Equality Act 2010; and/or that (ii) the making of the cessation of duty decision was unlawful for breach of section 15 of the Act. HHJ Luba QC struck out the relevant grounds of appeal and his decision was upheld by the Court of Appeal. First, jurisdiction to deal with Equality Act claims was limited by section 113 of the Act, and a section 204 appeal did not amount to a "judicial review" so as to fall within that provision. Secondly, on a section 204 appeal the court could not decide disputed issues of fact. Thirdly, the alleged discrimination was not a matter "arising from the [council's section 202 review] decision" so as to fall within the scope of section 204. Fourthly, the alleged discrimination had not been relied on by Ms Adesotu in the course of the review. Neither was it an obvious point that the review officer had been required to address.

5.5 Mortgages

Green v Southern Pacific Mortgage Ltd [2018] EWCA Civ 854.

5.5.1 This involved a claim for possession against a mortgagor. The defendant had taken out a repayment mortgage but suffered severe depression and lost her job. The lender refused her request to convert the mortgage to an interest-only mortgage. She sought to defend the subsequent claim for possession on the basis

[1] *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871. The current *Vento* bands have since been uprated to take account of inflation and *Simmons v Castle* [2012] EWCA Civ 1039. They are currently £800 to £8,400 for less serious cases "such as where the act of discrimination is an isolated or one off occurrence"; a middle band of £8,400 to £25,200 for other cases that do not merit an award in the upper band; and an upper band of £25,200 to £42,000 for the most serious cases - see the Tribunal Presidents' Guidance, *Employment Tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879*, 5 September 2017.

that this was an actionable failure to make a reasonable adjustment. Note that because a mortgage lender is not a "manager of premises", section 35 of the Act did not apply. The defence failed and the defendant's appeal was dismissed. The Recorder and Court of Appeal were critical of the lenders' conduct (and in particular the level of legal costs incurred). However, held that (i) (by a majority in the Court of Appeal) the relevant service being provided was limited to the provision of a repayment mortgage, so that it could not be said that the lender's policy of not converting repayment mortgages into interest-only mortgages made it impossible or unreasonably difficult for the defendant to make use of that service; (ii) alternatively, that even if the defendant was correct that the service being provided included the provision of interest-only mortgages, there was no evidence that it was impossible or unreasonably difficult for disabled persons to make use of the service when compared to the access to such mortgages offered to other members of the public; (iii) that the proposed adjustment would not be reasonable; and (iv) the provision of an interest-only mortgage would amount to a fundamental change within the terms of section 21(6) in any event.

BEN CHATAWAY
NOVEMBER 2019