



Neutral Citation Number: [2019] EWHC 24 (QB)

Case No: QB/2018/0075

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/01/2019

Before :

MRS JUSTICE CHEEMA-GRUBB DBE

Between :

Mr Steven Forward
- and -
Aldwyck Housing Group Limited

Appellant

Respondent

Mr Toby Vanhegan Mr Nick Bano Ms Hannah Gardiner (instructed by **Arkrights Solicitors**) for the **Appellant**
Mr Ben Maltz (instructed by **Devonshires Solicitors**) for the **Respondent**

Hearing dates: 11 October 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MRS JUSTICE CHEEMA-GRUBB DBE

Mrs Justice Cheema-Grubb DBE :

1. Aldwyck Housing Group Limited (Aldwyck) is a housing association. Stephen Forward was one of its tenants under an assured tenancy. This is an appeal against a possession order made by Judge Wood at Watford County Court on 12 March 2018. The only ground of appeal is that the judge was wrong to have rejected a defence to the possession claim based upon the public sector equality duty in section 149 of the Equality Act 2010 (“PSED”). Which provides

“s.149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity

in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—

- (a) tackle prejudice, and
- (b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.

(8) A reference to conduct that is prohibited by or under this Act includes a reference to—

- (a) a breach of an equality clause or rule;
- (b) a breach of a non-discrimination rule.”

2. The act defines the protected characteristic of disability in section 6.

“6. Disability

A person (P) has a disability if –

P has a physical or mental impairment, and

The impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”

- 3. By s.136 of the act, if there are facts from which the court could decide, in the absence of any other explanation, that the provision has been contravened, the burden shifts to show that this did not happen.
- 4. *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15 is the leading case on disability discrimination. It mandates a four-stage approach which applies (assuming that there is a disability within the meaning of the act): what are the aims or objectives in taking the action of securing eviction; is there a rational connection between the objectives and the eviction; is the eviction no more than is necessary to accomplish the objectives and is the eviction proportionate in the wider sense, that is striking a fair balance between the advantage of achieving the objective and the disadvantage of eviction to a disabled person?
- 5. The law relating to s.149 is well established. In *Bracking v Secretary of State for Work and Pensions* [2013] EWCA 1345 the court considered submissions focussing on the application of the PSED in the context of a government decision to close the Independent Living Fund which aimed to combat social exclusion on the grounds of disability. At paragraph 26 the court reviewed authorities on relevant duties and requirements placed on public authorities. A useful summary of the principles was also provided by Simler J. at paragraph 54 of *Blake & others v London Borough of Waltham Forest* [2014] EWHC 1027 (Admin).
- 6. Whenever the s.149 duty arises *Barnsley MBC v Norton* [2011] HLR 46 is authority for the proposition that in seeking a possession order it is necessary to take steps to have such regard to the tenant’s disability as is appropriate in all the circumstances. What is appropriate must depend, amongst other things, on the evidence before the public authority (and the court) of the degree of both the disability and the likely impact of the granting and enforcement of a possession order.

Background facts

7. The facts are set out in the reserved judgment promulgated by Judge Wood on 8 March 2018 and are taken mainly from that source. The possession order relates to 34 Wilmington Close, Watford let to the appellant under an assured tenancy which began on 8 November 2013. The present notice seeking possession was served on 7 April 2017. By claim issued on 19 July 2017, possession was sought on grounds 12 and 14 Schedule 2 Housing Act 1988. A possession order may be granted if such grounds are proved.
8. In a witness statement dated 1 May 2015 prepared for previous proceedings to set aside a possession order, the appellant referred to severe back, hip and knee pain but not to any mental health issues. By the time of the trial the appellant's GP had made an urgent referral to the community mental health team and it was asserted on his behalf that mental ill-health had had a 'substantial and long-term adverse effect on his ability to carry out normal day-to-day activities: in this case refusing admission to drug users, controlling the behaviour of his visitors, and safely using his home.'
9. The predicate circumstances were that the appellant himself and by visitors to his home had engaged in nuisance and anti-social behaviour. A schedule of allegations was relied on. The appellant agreed that he had been a class A drug user consuming heroin and crack cocaine at his flat but, with one exception, denied that he had misbehaved, as alleged in the schedule. As to the allegations about the behaviour of others associated with his flat, but, he said, not there with his permission, he claimed that he was vulnerable to exploitation by reason of physical and mental disability. These problems arise from a degenerated disc resulting in severe pain and mobility difficulties as well as depression, anxiety and a personality disorder. He was able to rely on evidence from two PCs Heaney and Neal who expressed their opinion that the appellant and his flat had been used by others for drug dealing. The appellant thus disassociated himself from the antisocial behaviour associated with his flat and also raised defences based on disability discrimination, indirect discrimination and breach of PSED.
10. The relevant defence, for the purposes of this judgment, was that alleged anti-social behaviour at or connected to his flat, must have been a consequence of his mental impairment. The appellant being a disabled person under the act, it was necessary for the respondent to have regard to the PSED in deciding whether to seek a possession order. Such regard required more than lip-service.
11. It is not necessary to summarise the litigation history in this judgment. Prior to the possession proceedings the police had obtained a closure order following the execution of a warrant at the flat on 23 May 2017. Amongst the police evidence in support of that application were statements from PC Andrew Heaney in which he described being called to an incident in which a man was allegedly hit with a metal baseball bat at the appellant's flat. The officer expressed his opinion that the appellant was a vulnerable man who has been known to have been taken advantage of. When officers arrived in the early hours of 20 February 2017 five other people were in the flat which had signs of class A drug use and dealing. A number of arrests were made. The appellant's car was seen bearing damage. The police considered what was happening at the appellant's flat to be typical of cuckooing (where those operating a drugs line run by mobile telephone take over the address of a vulnerable person and use it to deal drugs.)

12. No Equality Act assessor was appointed before the trial was heard. No PSED assessment was carried out prior to the issuing of the notice but one was prepared by the time of the trial. The author of the assessment was cross-examined. By the closing submissions there was common ground that there had been a failure to have due regard to the respondent's PSED. Nonetheless the respondent continued to seek possession on the basis that the breach was not material, there was no other viable option and the application for possession was the only proportionate response.
13. The respondent's area housing manager and local housing officer gave evidence as well as PC Simons, a police officer from the Watford Neighbourhood Team. None of these had witnessed the alleged anti-social behaviour themselves. The appellant gave evidence.
14. The respondent's staff had had two meetings with the appellant: one at his home in March 2017, the other at their offices in May. They had compiled an anti-social behaviour log which included complaints made by third parties, including neighbouring tenants. The housing officer Anne Ronan said she had been told by the appellant that he had mental health difficulties, but she had not seen any medical evidence. She had 'signposted him appropriately' but there was no evidence that she, or anyone else, had sought medical evidence despite her recording in May 2017 that he had told her he was depressed following the death of his girlfriend and did not want to live.
15. During cross-examination the area housing manager Sharon Savage accepted that a PSED assessment carried out by her prior to trial had been inadequate. Amongst her concessions she accepted that she could see when she met him that the appellant has a physical disability, but she had not taken it into account (as she had obtained no medical evidence about it). She had been told that he had mental ill-health but she hadn't paid heed to it for the same reason. She also admitted she had not arrived at the assessment with an open mind because she considered no alternative to the possession proceedings which were already in train. She knew that the local police believed the appellant was being exploited and his home used by others for dealing in drugs as a cuckooing operation, but she preferred the evidence of neighbours who thought that he was dealing drugs himself.
16. PC Simons, who had considered the collated evidence and intelligence available to the police expressed her view that the appellant was aware of his actions, had invited the drug dealers into his home and was an active participant. Amongst other material she relied on a response that he had given PC Healey on 19th February. When asked whether he was happy with the people in the flat the appellant replied, "Yes, at the moment."
17. The appellant told the court he was not involved in drug dealing and had never been arrested of any offence relating to drugs at or near his home. He had no control over the anti-social behaviour of those who attended his property without his permission, instruction or knowledge. His evidence was summarised in the judgment as follows:

"Mr Forward stated that he had a number of very severe health problems. He suffers with severe back, hip and knee pains on his right side, and is awaiting an operation on his back. He also suffers with depression, anxiety and a personality disorder. He

stated that his GP had made an urgent referral for him to the Community Mental Health Team. He is prescribed Naproxen (500mg), Tramadol (50g), Methocarbamol (750g), Gabapentin (300g), Promethazine and Zopiclone.

Mr Forward stated that if evicted, he is likely to face street homelessness, because it is likely that the local authority would find him intentionally homeless because of the allegations against him. He has no friends or family with whom he could stay. Since the closure order was obtained, he has been sleeping rough, sofa surfing or staying at the Grow Hostel.

Mr Forward went through each of the allegations in turn in his statement and provided his version of events.....

Mr Forward adduced no medical evidence in relation to his physical disability or his alleged mental health disability. He adduced no evidence as to his current drug status and no evidence as to his engagement with CGL (Change, Grow, Live) or any other drug agency. When asked in cross-examination about the referral to the Community Mental Health Team referred to in his defence, he produced a letter relating to a referral made on 23rd November 2017. His evidence was that he had not yet attended an appointment with the Community Mental Health Team.

In oral evidence Mr Forward agreed that he has a history of drug and alcohol misuse. He stated that he had first undergone detox for drink when he was 16. His drug use came later, when he was 30-35 [2003-2008]. He agreed that he had been using illegal drugs when he met with Ms Savage and Ms Ronan in May 2017. He stated that he is now engaging with CGL and is on a methadone prescription. He had been on prescription in the past, and had lapsed back into use. He agreed it was quite possible that he had been on a prescription in 2015.

Mr Forward agreed that Aldwyck had offered to help him if he had issues with people coming to the flat. He agreed that Aldwyck had not penalised him in 2015, when he had issues with two men who were staying at his flat, because he called the police and engaged with Aldwyck. He understood that Aldwyck had not taken formal action in relation to his tenancy because he had engaged with them.

Mr Forward's evidence was internally contradictory. In oral evidence, it was apparent that the true position in relation to the various people who were alleged by C to be D's visitors was substantially more nuanced than appeared from Mr Forward's statement: whereas in his statement he suggested that none of the people who attended his flat were visitors or friends, whereas he readily accepted in cross-examination that some of the individuals were friends."

18. The judge concluded, in summary, that the residents of the block in which the appellant had lived were subjected to "a substantial amount of anti-social behaviour in the early part of 2017. Furthermore,

"Some of that behaviour appears to have been linked to the occupants of a homeless encampment underneath a nearby building. D was acquainted with at least one person living in the encampment and allowed him and others into his flat. There was no complaint of anti-social behaviour by any homeless individual on any occasion on which D invited such a person into his flat. Inviting homeless people into the flat was not a nuisance, but it may have encouraged some individuals make a nuisance of themselves seeking to gain entry to the communal parts of the block and using those areas for drug taking and other undesirable activities. This behaviour was not behaviour for which D was responsible.

D took Class A drugs in his flat himself and allowed his flat to be used for drug taking by friends and acquaintances. This is behaviour for which D is responsible under the terms of his tenancy agreement because those friends and acquaintances were his visitors. Allowing premises to be used for drug taking is a nuisance and annoyance to others living in the locality, and carries an obvious risk of further linked anti-social behaviour from people who have been invited in on one occasion seeking to gain entry to Mr Forward's flat on other occasions, such as the disturbances reported from people seeking entry to D's flat on 12th February 2017, and on 28th March 2017.

D allowed his flat to be used by Mr Davis to cut drugs. This is behaviour for which D is responsible under the terms of his tenancy agreement because Mr Davis was D's visitor. Allowing premises to be used for the preparation of drugs for sale is a nuisance and annoyance to others living in the locality and carries an obvious risk of further linked anti-social behaviour, nuisance and annoyance to neighbours. D's visitor

Mr Davis assaulted D's visitor Mr Colhane at D's property on the afternoon of 19th February 2017 as a result of an argument over drugs."

19. The judge dealt with some specific allegations in more detail. She noted the evidence of PC Heaney and PC Neal summarised above. She also referred to the fact that the appellant had told PC Neal that he had only allowed the man (who had attacked the complainant late on 19 February) to enter his flat because he had felt intimidated by him. He had found the man, Mr Davis, very threatening but agreed he had not reported him to the police even though such reporting had helped him in 2015. After the attack, which happened when the appellant was in another room, he had been beside himself, scared and intimidated.
20. As for the cuckooing she found,

"Mr Forward has evident potential vulnerabilities arising out of his physical disability, his mental state and his drug addiction. Although I am persuaded that Mr Davis's activities at Mr Forward's flat do have the appearance of a cocooning (sic) operation, there was very little evidence from Mr Forward as to what vulnerability was being exploited and how his vulnerability had been exploited. D's case, as put in closing, was that I should find that the cause of Mr Forward being taken advantage of was that his mental health was particularly bad following the death of his girlfriend. In my judgment the evidence simply did not support such a finding. Neither of the police officers whose statements dealt with this issue were called: Mr Forward could, had he wished to do so, have called the officers. In my judgment Mr Forward's case placed more reliance on PC Heaney and PC Neal's written statements than those statements could support: had Mr Forward called the officers their statements could have been clarified and they could have explained what vulnerability they were referring to, and how they considered that vulnerability had been exploited.

Mr Forward himself gave no specific evidence as to what vulnerability had been exploited: his evidence in essence amounted to an assertion that he found Mr Davis intimidating, with no explanation as to why, or on what basis. I am not satisfied, having heard the evidence, that Mr Forward was forced to allow Mr Davis into his flat either on the first occasion he was there, or on any subsequent occasion the subject of the specimen allegations. It was open to D to refuse Mr Davis entry to the property and to have called the police if he did not wish him to come in. He did not do so. Mr Forward was offered police assistance in removing Mr Davis and the other people who were at his property on 20th February 2017, and he did not accept that assistance. I am not satisfied in either instance

that the reason he did not act to exclude Mr Davis and others from his flat was because of his poor mental health.

I was not convinced by Mr Forward's evidence that people were coming into his property without his permission: his evidence was unsubstantiated, unsupported and at odds with his acceptance that he was the person who opened the door to admit Mr Davis. I accept PC Simons' evidence that it appears on consideration of all of the evidence that Mr Forward had allowed the people who visited in to his property. I find therefore that Mr Davis can properly be described as D's visitor."

21. Later the judge noted the respondent's reliance on police intelligence that Mr Davis was operating in Watford selling cocaine and heroin, that he was storing the drugs at an address then transferring them to 34 Wilmington Close where he was cutting them in preparation for selling. She noted Ms Savage's acceptance that the description of Davis activity matched the mode of operation described by PC Neal and was indicative of a cuckooing operation. The appellant accepted that Davis might have been doing that; he tried not to get involved, he found the situation "awkward." Nonetheless the judge found that he had allowed his premises to be used. She rejected another allegation, that the appellant himself was dealing drugs, noting that Ms Savage accepted that there was no suggestion from the police that he was dealing and he had not been arrested.
22. The judge summarised the evidence she accepted about the meeting between the appellant and the respondent's housing staff on 21 March 2017,

"...a friend of Mr Forward's, Nicola McCall, was also present at the meeting. Mr Forward told Ms Ronan and Ms Savage that he had been depressed since his girlfriend died. Mr Forward was asked if he was using illegal drugs. He said he was not, but he was on a lot of medication for his back pain. Ms McCall said that people took advantage of Mr Forward. Ms Ronan and Ms Savage asked whether there was any support they could provide to Mr Forward to help him keep certain people away from the property, and the possibility of the claimant seeking an injunction to prevent certain people coming to the property. They asked Mr Forward for the details of any people he would like excluded from the property. Ms McCall was willing to provide names, but Mr Forward said that he would think about it and come back to them. I accept Ms Ronan's evidence that Mr Forward did not in fact come back to them."
23. The same month that the respondents served the notice seeking possession Watford Borough Council arranged for a security officer to monitor access to the block. He was engaged from 26 April to 10 May 2017. The situation concerning the appellant's flat improved during that period. Nonetheless, he was invited to a meeting which took place on 11th May. He accepted that he was allowing known drug users and street

drinkers access to his flat and into the communal areas of the block. The housing officer's notes included the following,

“...advised that we are still receiving reports of people trying to access the property. In 8 days there have been 10 attempts. It was said to [D] that we suspect he is dealing drugs and a user. He denied this and said that since we saw him he had stopped people coming, that he is vulnerable to them as [he is] seen as a soft touch and said that he cannot help it if they call at the block. He was asked if he was using drugs again directly. He said he was. He said that he is depressed and does not want to be living. He was asked if he is receiving support. He said he is not, nobody wants to help. He said he would see his GP and gave permission for [named individual] to contact his GP. Suggested he shows the GP his letter re asb issues and explain that he needs support. He said that he thinks the best thing would be evicted as this would make him sit up and change. Advised that if we did evict him he would not be rehoused through SS. He said that he understands that he must keep his home. He was told that we would send a final warning giving details of the people who must not visit the block and if he continues to associate with them in the block then we would take possession proceedings. His daughter joined the meeting and we explained the issues to her. It was agreed that we could take down her details as NOK”.

24. Thereafter, on 18 May a neighbour complained that although things had been a lot better the appellant was still bringing homeless people into the block. The respondent informed the complainant that a list of names had been sent to the appellant of people he must not admit. The respondent continued to receive complaints that the appellant was letting homeless people into the block. A warrant was executed at the flat on 23 May 2017. No arrests were made but there was evidence of class A drug use. A closure order was sought on 25 May and granted at Central Hertfordshire Magistrates Court that day. It was extended on 23 August 2017 for a further three months. The appellant has not returned to the property since the expiry of the extension.
25. The judge concluded that although she did not accept every allegation made by the respondent, grounds 12 and 14 were made out. She recognised the appellant is physically disabled but was not satisfied that he suffered from any disability by reason of mental impairment. This was because he had produced no medical evidence in that respect and the appellant had ticked ‘no’ in reply to a question on the nomination form when applying for housing in 2013, about whether he had ‘a history of mental health problems – including depressions, anxiety or other problems.’ Furthermore, she was not persuaded that there was any causal link between the appellant’s physical disability and the anti-social behaviour.
26. She also rejected the indirect discrimination arguments deciding that the respondent’s decision to seek possession was a proportionate means of achieving its legitimate aims. She did not accept that steps short of an order could have achieved the aim of

reducing the incidence of anti-social behaviour, nuisance and annoyance at the block for the benefit of other tenants. The steps suggested on behalf of the appellant included an injunction to exclude named individuals responsible for anti-social behaviour; an acceptable behaviour contract; giving him a further opportunity to comply with the letter sent to him in May with the names of those he should not allow into the flat; allowing the closure order to run its full course before testing his ability to comply with the requirements of the tenancy agreement and seeking medical or occupational health advice as to further measures to help him be a satisfactory tenant.

27. The judge said,

“I remind myself that the burden is on the claimant to show that no alternative measure other than taking possession proceedings was reasonably possible.

C had sought D’s co-operation in seeking an injunction at the meeting on 21st March 2017 and he had not responded to that invitation. I accept the submission on behalf of C that, without D’s co-operation, an injunction would have been impossible to enforce: neither party suggested that continuing to employ a security guard to regulate entry would have been a proportionate or reasonable step for C to take. In view of my decision that Mr Forward had agency in relation to the decision to admit or refuse to admit the individuals he did admit to his flat, such a step would not have been appropriate, in my judgment, in any event. I do not accept the submission on behalf of D that he wasn’t given the opportunity to co-operate with the claimant in recovering control of the premises.

I am not satisfied that an acceptable behaviour contract would have had the desired effect: it was put to Mr Forward very clearly in the correspondence that unless the behaviour improved, his tenancy was at risk, and he accepted at the 11th May 2017 meeting that, in spite of those warnings, although things had improved for a period, he had allowed the situation to deteriorate again. Mr Forward showed little sign of being willing or able to comply with an acceptable behaviour contract.

There was no basis in my judgment for optimism that following the expiry of the closure order, D’s behaviour and the behaviour of his visitors would improve. D had accepted at the 11th May 2017 meeting that he was using illegal drugs, and the fact that the flat continued to be used for drug-taking was further evidenced by the finding of drugs paraphernalia when

the warrant was executed. Despite the warnings given at the meeting on 11th May 2017, Mr Forward continued to consort with people who were living in the homeless camp near the block: although there were no reports of anti-social behaviour between the 11th May 2017 meeting and the date on which the closure order was granted, for the reasons identified above, Mr Forward's decision to continue to invite people into his flat who he had been warned against allowing in, suggested that he was not willing or able to comply with the strictures that would have been necessary to eliminate the anti-social behaviour and nuisance at the block. For the same reasons, I am not satisfied that allowing further time to see whether Mr Forward could comply with the letter setting out the names of those he should not allow access would have had a positive outcome. I accept the Claimant's submission that, given Mr Forward's behaviour in the days after the meeting, it was unrealistic to think that there would be a change in Mr Forward's conduct or in his habitual associations.

Given my finding that there was no causal link between D's disability and the anti-social behaviour and nuisance, I am not satisfied that any medical or occupational health advice would have provided a solution which made it unnecessary to take possession proceedings.

The Claimant, in my judgment, made substantial efforts to persuade Mr Forward to engage and provided all appropriate support and advice to Mr Forward, including support in keeping people away from the property, with little response on the part of Mr Forward. I bear in mind the adverse effect on neighbours if conduct of the type proved were to be repeated.

I accept Ms Savage's evidence that in light of the seriousness of the breaches and the fact that Mr Forward appeared to show no insight into his conduct or accept any responsibility for it, there was no other viable alternative to seeking possession proceedings. I am satisfied on the evidence that it was necessary to seek D's eviction to accomplish C's objectives.

Standing back and considering the question whether the eviction is proportionate in the wider sense, I am satisfied that the decision to take possession proceedings did strike a fair balance between the claimant's need to reduce the incidence of

anti-social behaviour and nuisance from D and his visitors, and the disadvantages that D would suffer as a disabled person by reason of his eviction.

Reasonableness

I am satisfied that it is reasonable in the circumstances to make a possession order for the reasons set out above.

I have considered whether it is appropriate to suspend that order on conditions which seek to regulate Mr Forward's behaviour, but Mr Forward has not adduced cogent evidence to show that if I were to suspend the behaviour would not recur or would be unlikely to do so. In the circumstances, suspension is not appropriate.

The burden is on Mr Forward to show that has been or is likely to be any improvement in his behaviour since the matters the subject of specimen allegations. There was very little evidence to suggest that Mr Forward's behaviour is likely to be better in the future than it was in the past. No evidence was adduced as to how Mr Forward has conducting himself in the hostel during the period he has been staying there.

Although Mr Forward's evidence was that he is not currently using illegal drugs, but is taking methadone on prescription, that evidence was completely unsupported. There was no evidence from any professional in relation to D's drug use, either to confirm that Mr Forward is on a prescription, or to provide information as to his engagement with drug addiction support agencies. Mr Forward has been drug-free in the past and has relapsed. Given Mr Forward's own account of the long-standing nature of his addiction problems, both in relation to alcohol and drugs, and in the absence of any supporting evidence for his assertion that he is currently drug-free, I accept the claimant's submission that there is no cogent evidence which demonstrates a sound basis for optimism about his future ability to refrain from abusing drugs and alcohol.

By extension, there is no sound basis for optimism that he will in future refrain from consorting with and permitting in his flat

others who are similarly addicted, and whose behaviour causes a nuisance to the other residents of the block. This is not the first occasion on which there Mr Forward has allowed anti-social behaviour at the property. On the previous occasion the behaviour was also connected to his own drug-addiction. I concur with the view expressed by Ms Savage, that in continuing to put forward the case that he did, denying responsibility for the behaviour of visitors to his flat, Mr Forward demonstrated a lack of insight into how his own behaviour gave rise to the nuisance, and failed to demonstrate that he would be able to act responsibly in future to ensure that his visitors did not cause nuisance.”

28. The judge went on,

“Breach of public sector equality duty

Breach of the public sector equality duty does not give rise to a private law defence: *Herts CC v Davies*. Were it to do so, the considerations would be the same as those addressed above.”

The Appeal and subsequent PSED assessments

29. The appellant’s notice was served on 4 April 2018 accompanied by an application for a stay of the warrant of possession. The stay was refused. The grounds of appeal have remained consistent and can be succinctly described. Firstly, there being common ground that there had been a breach of the PSED, the judge failed to consider what, if any, relief to grant. Secondly, the judge wrongly followed a decision under appeal, *Hertfordshire County Council v Davies* [2017] EWHC 1488 that a public law defence had to be linked to a private law right in order to defend a possession claim, even though the decision had been overturned by the time of Judge Wood’s judgement. And finally, the judge wrongly relied upon her findings as to proportionality in the direct and indirect discrimination defences, in concluding that the order should be granted despite the PSED breach.
30. In a respondent’s notice filed on 24 July 2018 it is argued that the breach of the PSED was immaterial as proper compliance would not have altered the respondent’s decision to proceed with the possession claim. The respondent also relied upon a post-trial assessment dated 20 July 2018 which determined the claim for possession was justified.
31. The July 2018 document describes itself as a “review” of the decision to seek possession against the appellant “having due regard to our PSED under s.149 Equality Act 2010.” I have considered the applications to admit this fresh evidence on the appeal in support of the respondent’s submissions, *de bene esse*. It consists, in the main, of a justification for its original process and decision, as found by Judge Wood. There are numerous references to the judgment and the concern of the police officers that the appellant was the victim of cuckooing and its potential to explain the anti-

social behaviour is dealt with in a single sentence, “*The judgment of HHJ Wood made findings that the ASB was proved and rejected Mr Forward’s defence that he was the victim of a ‘cocooning’ (sic) exercise.*” In the same way I have considered material put forward by the appellant, in support of the appeal. This latter included medical records which confirm a history of depression, drug abuse and describe a post-judgment diagnosis of Emotionally Unstable Personality Disorder F60.3 for which he was (by then) receiving medication and out-patient appointments.

32. Shortly before the appeal hearing the respondent provided yet another PSED assessment, dated 10 October 2018. This document referred to the medical evidence provided by the appellant. Ms Savage stated in it, “*In light of this additional information I am of the view that Mr Forward could be vulnerable and prone to being taken advantage of. The judge’s previous findings confirms (sic) there is nothing further we could have done to minimise discrimination.*”
33. I heard applications for admission of the fresh evidence at the start of the hearing. I indicated at that time that I would consider it. I have regard to the overriding objective in the Civil Procedure Rules and to CPR 52.21. I have also applied the established principles touching the admission of evidence which could have been obtained prior to the trial. The special grounds for admission of evidence not before the lower court were set out in *Ladd v Marshall* [1954] 1 WLR 1489. I do not give permission to admit the fresh evidence on either side. It has no material bearing on my judgment which focuses on the correctness of the approach and decision of the judge, on the evidence put before her by both sides. The quality of the evidence, in the sense of compelling impact on the decision the judge had to make, is weak. The post judgment reviews are both poor documents: the medical evidence as to physical disability goes little further than that which was agreed between the parties at the trial and the evidence of long-standing depression and diagnosis of a personality disorder could easily have been obtained prior to trial. In short, there is nothing compelling in the fresh evidence supporting the likelihood that a fresh PSED assessment will give rise to a different outcome.
34. Turning to the substantive appeal. In oral submissions Mr Vanhegan argued that Ms Savage’s response to the s.149 duty (to which she had to be alerted by a defence pleading) was surprising, and she failed to carry out any enquiries. While she noted the lack of medical evidence: for physical or mental health disability, she made no attempt to seek any. The judge, in turn, concluded that she was not entitled to become ‘a self-appointed medical expert’ and held that without more the appellant’s evidence that he suffered from depression, anxiety and personality disorder did not amount to evidence of disability as defined by the Equality Act. She was wrong to accept the respondent’s evidence that there was no causal link between the appellant’s physical impairment and the anti-social behaviour she had found proved. She erred in finding that the respondent had not sought eviction because of something arising from the appellant’s disability. All of this was compounded by the respondent’s breach of its PSED in failing to carry out a proper assessment. The failure should have been fatal to the respondent’s case, instead the judge gave it short shrift.
35. The respondent resisted these grounds, essentially arguing that Judge Wood approached and conducted the proportionality balance in respect of the disability discrimination ground reasonably and reached the correct conclusion on the evidence. The outcome on a consideration of the s.149 duty, would have been the same, had she

approached it on the necessary wider basis including impact rather than simply proportionality, but broadly for the same reasons she had given. Although I have refused to admit the post-judgment assessments it is argued that even without reliance on the ground that defects have been remedied, the judge was right to refer to her conclusions on proportionality which were relevant to the test under the duty. An inadequate PSED assessment was a breach which made no material difference to the respondent's decision to continue to pursue eviction. The appellant knew that there was a challenge to his assertion that he was disabled by reasons of physical and mental health impairment to such a degree as would constitute a disability within the meaning of s.6 Equality Act 2010. He failed to meet the evidential threshold required. The appellant did not call any evidence, even of the police officers who had experienced and described his 'vulnerability.' The only police officer called was PC Simon who had a broader understanding of the impact of anti-social behaviour through her neighbourhood policing role. The judge was entitled to rely on her evidence and give less weight to the hearsay evidence of the other officers. This was a careful judgment reached after hearing extensive evidence and this court should not interfere.

Conclusion.

36. The problems thrown up by the apparently growing phenomenon of cuckooing for those who provide housing such as local authorities and housing associations does not appear to have been considered in the context of the PSED before now. The sharp point is that bad anti-social behaviour, such as that found proved by Judge Wood in this case may turn out to be a consequence of the exploitation of a susceptible tenant by criminals. Susceptibility may arise from a number of sources, some may be inter-linked with each other. The PSED adds value to disability discrimination legislation in that it requires a broad impact assessment of proposed action. The duty is positive in its drafting and should provide a real aid to authorities when they step back and assess whether it is appropriate to proceed with their plans. As ever, the duty must be applied in a specific context for it to have life.
37. This appeal flounders on the inescapable fact that the appellant did not provide any support for his assertion that he had mental health difficulties to such degree as to enable the judge to conclude that the eviction should not be granted against him. Although police officers who attended at his home and saw it was being used for selling drugs did not pursue him as a defendant and considered he was vulnerable to a cuckooing operation, the actual permitting of drug dealing from his home could have arisen from a number of circumstances. For example it is hard to see why, if mental ill-health was the real reason for his vulnerability to being targeted as someone to house a cuckooing operation, rather than (as PC Simons believed) the fact that he was himself a drug addict, obtaining drugs from the dealers he allowed to use his property to engage in the sale of drugs, cogent evidence of such could not have been produced at trial. Even the (bare) diagnosis of personality disorder post-dates the judgment.
38. More generalised evidence of a degree of less than severe, long term depression was potentially available by calling witnesses or seeking an adjournment to await the outcome of an urgent referral to the community mental health team (this latter was mentioned in the particulars of defence dated 18 September 2017.) Disclosure could have been made of the appellant's medical records, as they stood at the time of trial, if they added anything. In the circumstances the appellant had not demonstrated that he

was someone acting under a disability and the disability was associated with, or at least likely to be associated with the anti-social behaviour proved against him.

39. The appellant correctly identifies flaws in the judge's approach, in particular her conclusion that breach of PSED was incapable of being raised as a defence to possession proceedings unless connected to a private law right. The respondent made the appropriate concession although Mr Maltz did not go on to concede that the judge's error was compounded by her reliance on the proportionality assessment she had made. There can be no question that a simple proportionality assessment is not what the PSED requires. A rigorous consideration of the impact of the decision to commence eviction proceedings, against the equality objectives encapsulated in the PSED is required. It must be done with an open mind and not as a defensive 'sweep-up'. This consideration must itself be set in the context of promoting the statutory objectives.
40. A duty of inquiry may well arise: it depends on the context, see *Hurley & Moore v Secretary of State for BIS* [2012] EWHC 201 (Admin, Div Court). 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 Ms Savage did not engage in any, as she could have done.
41. The PSED assessment carried out prior to trial on the respondent's behalf by Ms Savage was plainly inadequate but that does not necessarily result in a successful appeal. The judge knew of its poor quality and earlier admitted failure to have regard to the PSED. If there had been clear evidence of disability and significant impact arising from the disability the judge's conclusion based on proportionality may have been over-turned but there was a substantial body of evidence that the appellant had been complicit in what had been going on at the flat for a substantial period of time. The judge was entitled to have regard to that evidence. The respondent had engaged with him and steps had been taken to intervene and assist him. The judge carefully assessed the alternative measures, short of eviction, suggested to her and reached rational conclusion on each one. When faced with an intransigent tenant whose behaviour causes distress to fellow residents over an extended period of time it cannot be necessary for the respondent to have tried every single option prior to seeking eviction. References to other agencies, including mental health services, may assist the tenant but such efforts must be seen within context. In this case there was, and remains, minimal evidence of material mental disability.
42. In *Regina (West Berkshire District Council and another) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441 the court provided some guidance on the correct approach when a satisfactory PSED assessment was not made at the correct time, before the action was taken which engaged the duty. Should inadequacy lead to the quashing of a decision even if the court concluded that the authority had subsequently complied with the duty? Although it underlined the importance of a proper and timely compliance with the PSED, the court refused to countenance the quashing of a decision based on a subsequent assessment which it considered adequate, as a form discipline against public authorities.
43. The current case provides a more fundamental challenge for the appellant. Although there was no PSED assessment prior to the application for a possession order and the

assessment seen by the judge was inadequate, there is nothing in the material before me to suggest that had Ms Savage carried out a proper assessment it would have necessarily reached a different conclusion or, more importantly that there was (or on reasonable inquiry) could have been any evidence on which it could have reached a different conclusion.

44. Equally, I am satisfied that even if the fresh evidence including the medical evidence and diagnosis were to be admitted, a statutorily compliant PSED relying on them would inevitably lead to the same outcome as to the decision to seek eviction.
45. In my judgment therefore, whilst of course Judge Wood did not carry out a structured enquiry, believing that it was unnecessary, her judgment shows that she regarded the enforcement of a possession order as a proportionate means of achieving a legitimate aim. She had to consider the reasonableness of permitting the order, and enforcement if necessary in due course. If she had applied her mind to the broader considerations of s.149 Equality Act she would inevitably have come to the same answer. The failure to have due regard to the important matters set out in s.149 in the structured way required by the legislation was not a material error in this case. Looked at from the other end of these proceedings, it would be wholly unfair and disproportionate for me to allow this appeal because of the errors in Judge Wood's approach when the entitlement of the respondent to seek eviction and the reasonableness of making the order sought, have already been clearly established on the facts of this case. For these reasons I conclude that there is no merit in the appeal and I dismiss it.
46. The parties should agree matters consequential to this judgment including costs. The appellant is to file an agreed order; alternatively, the parties are to lodge short (no more than 2 sides) submissions on consequential issues within 7 days of handing down of this judgment, failing which this appeal will stand dismissed with no further order.