Neutral Citation Number: [2023] EWHC 1902 (Ch)

Appeal No. CH-2023-000001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
On appeal from the order of Her Honour Judge Melissa Clarke made in the County Court at Reading (sitting in the County Court at Oxford) on 15th December 2022 - Claim Number H00RG424

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

24th July 2023

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

READING BOROUGH COUNCIL

Claimant/ Respondent

and

TINA HOLLAND

Defendant/ Appellant

Daniel Clarke (instructed by **Turpin & Miller LLP**) for the Defendant/Appellant
Sarah McKeown (instructed by **Legal Services of Reading Borough Council**) for the Claimant/Respondent

Hearing date: 21st June 2023

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JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.30am on Monday 24th July 2023 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

Introduction

1. This is an appeal against an order made by Her Honour Judge Melissa Clarke on 15th December 2022 in the County Court at Reading (sitting in the County Court at Oxford). By paragraph 1 of that order the Judge ordered the Defendant/Appellant, Ms Tina Holland, to give the Claimant/Respondent, Reading Borough Council, possession of the flat known as Flat 24, Liebenrood Road, Reading RG30 2DX (**"the Flat"**) on or before 4.00pm on 11th January 2023.

2. By appellant's notice filed on 4th January 2023 the Defendant/Appellant, to whom I will refer as **"the Appellant"**, sought permission to appeal against the order for possession (**"the Possession Order"**). I refused permission to appeal on the paper application, by an order made on 23rd February 2023. The Appellant exercised her right to renew the application for permission at an oral hearing. At the oral hearing on 2nd May 2023, where the Appellant was represented by counsel (Daniel Clarke), I was persuaded to grant permission to appeal, by an order of 2nd May 2023.

3. At the hearing of the appeal (**"the Appeal"**) the Appellant was again represented by Mr Clarke. The Claimant/Respondent, to which I will refer as **"the Respondent"**, was represented by Sarah McKeown, counsel. I am most grateful to both counsel for their written and oral submissions in relation to the Appeal.

4. The trial of this action was heard by Judge Clarke (**"the Judge"**) over two days on 10th and 11th November 2022. The Judge handed down her reserved judgment (**"the Judgment"**) on 14th December 2022. For the reasons set out in the Judgment, the Judge concluded that the Respondent was entitled to possession of the Flat pursuant to Section 127 of the Housing Act 1996.

5. The Appellant contends that the Judge was wrong to dismiss the two grounds upon which the Appellant resisted the making of a possession order at trial. The first ground was that the Respondent, in seeking possession of the Flat, breached its public sector equality duty under Section 149 of the Equality Act 2010. The second ground was that the claim for possession constituted discrimination against the Appellant, who has a disability, contrary to Section 15 of the Equality Act 2010. As such, the Appellant contends that the Judge was wrong to make the Possession Order, which should be set aside.

6. As matters stand the Appellant remains in occupation of the Flat pursuant to a stay of execution which I granted, and which continues until the determination of the Appeal.

7. Unless otherwise indicated all references to Paragraphs in this judgment, without more, are references to the paragraphs of the Judgment. Italics have been added to quotations.

Relevant background

8. The Judge set out the factual background and evidence in the case, with commendable detail and clarity, in Paragraphs 29-89. I am substantially indebted to the Judge for the following summary of the relevant background to the Appeal. I have confined the summary to that which is necessary to set the scene for what I have to decide in the Appeal. The full factual background is to be found in the Judgment.

9. The Appellant has a disability, within the meaning of Section 6 of the Equality Act 2010 (**"the Act"**). Specifically, the Appellant, who is aged 62, has a diagnosis of emotionally unstable personality disorder (**"EUPD"**). The Judge had the benefit of expert evidence in respect of this disability at the trial. This evidence, in the form of a written report and addendum report, was provided by Dr Iles, a specialist in forensic psychiatry. Dr Iles was appointed as a joint expert, to give evidence of whether the Appellant had a disability within the meaning of Section 6 of the Act, as part of a set of case management directions given in the action by Judge Rochford, by order made on 23rd August 2021. Quoting directly from Dr Iles' report to the court dated 9th December 2021, EUPD is a condition characterised by traits including *"impulsive behaviour, a tendency to verbal outbursts (particularly when one is criticised for* [or] *one's actions are thwarted), difficulty maintaining enduring relationships, disturbances in self-image, emotional dysregulation, and threats of* [or] *recurrent acts of self-harm"*.

10. I mention the Appellant's EUPD at the outset because it is central to the history of this case, and to the issues which the Judge had to decide at the trial, and to the issues which I have to decide in this Appeal.

11. The Appellant was originally living in a privately rented flat in Reading. Her three year tenancy of this flat came to an end on 25th February 2019. As the Judge recorded, at Paragraph 30, a notice seeking possession of this flat from the Appellant was given against a background of complaints of anti-social behaviour from other residents in the same block of flats, and complaints made by the Appellant against the other residents. On the termination of this tenancy, the Appellant lived first in temporary accommodation in Reading, for a period of about five months. The Appellant made an application for sheltered housing with the Respondent and, on 7th November 2019, the Appellant was granted an introductory tenancy (**"the Tenancy"**) of the Flat by the Respondent. In referring to an introductory tenancy, I should make it clear that the Tenancy was an introductory tenancy within the meaning of Chapter 1 of Part V of the Housing Act 1996.

12. The Flat is a studio flat on the first floor of a two storey block of flats, all of which comprise sheltered accommodation. A particular feature of this block of flats (**"the Block"**) and other sheltered accommodation provided by the Respondent is that it has the Tunstall system installed. This is a physical communications system with a speech module activated by a pull cord or push button installed in each flat. This connects the tenants in the Block to a 24-hour emergency call monitoring service provided by a third party called Forest Care. The Respondent pays a fee to Forest Care for every call made through the Tunstall system. The Tunstall system also connects to and monitors the fire alarm and lift in the relevant blocks of flats, including the Block.

13. From the outset of the Tenancy the Appellant's behaviour gave rise to substantial problems for the Respondent, the other residents in the Block, and those involved in the management and provision of services to the Block. The latter category of persons

included, in particular, those at Forest Care responsible for dealing with the Block. This was because the Appellant's conduct included repeated interference with the Tunstall system, and repeated abuse of Forest Care's operators. The Appellant's conduct is described in detail in the Judgment. For the purposes of the trial the allegations of anti-social behaviours and breaches of the Tenancy were reduced to a Scott Schedule of 15 items. The order of 15th December 2022, made by the Judge consequential upon the Judgment (**"the Order"**), recited that the Appellant admitted breaching the terms of the Tenancy *"largely as alleged"*.

14. The Judge provided the following summary of the Appellant's conduct, at Paragraph 109. I will need to return to Paragraph 109 later in this judgment. For present purposes I only quote from this Paragraph for the purposes of the setting out the Judge's summary of her findings in relation to the conduct of the Appellant:

> *"I have set out the history of allegations of antisocial behaviour and other complaints and behaviours very extensively – perhaps too extensively – for fear of not painting a fair picture of what the Claimant's staff and contractors, neighbours and others such as Forest Care staff have had to deal with from the Defendant over the years. In fact it does not paint a full picture because the sheer volume of calls, voicemails, texts and their abusive content to staff and contractors cannot be understood from my history, and nor, no doubt, can the extent of difficulties, disruption and abuse that has been experienced by the neighbours. The Defendant has made those over-55 neighbours, some elderly and vulnerable themselves, who have been assessed as suitable for sheltered housing, feel unsafe and insecure in their homes such that some of them have asked to leave it. They and other users of the Tunstall system have been put in danger by the Defendant's excessive use of, and damage to the Tunstall system. When it is damaged it cannot be used by some residents to call if they fall or have another emergency, it puts the fire warning and monitoring system at risk: these are real dangers."*

15. On 10th February 2021 there was a multi-agency meeting (**"the Multi-Agency Meeting"**) for the purposes of discussing the Appellant's situation. Those attending the Multi-Agency Meeting were as follows:
    (1) Kane Roberts-Doyle, Sheltered Support Team Leader employed by the Respondent, who chaired the Multi-Agency Meeting. Following the Multi-Agency Meeting Mr Roberts-Doyle circulated action points and a note of the meeting.
    (2) Hannah Lindsay and Emma Langran, ASB (anti-social behaviour) officers of the Respondent.
    (3) Nicola Rogers, a Duty Team Lead in the Crisis Resolution and Home Treatment Team, Berkshire Healthcare NHS Foundation Trust and a qualified mental health nurse of over 25 years. Ms Rogers had been heavily involved in the provision of mental health treatment and support to the Appellant.
    (4) Brandan Charles, a police community support officer.

16. On 22nd March 2021 Ms Langran carried out a formal Equality Act and Disability Discrimination Assessment in relation to the course of action which was proposed by the Respondent; namely to serve the Appellant with a notice of proceedings for possession (**"the EA Assessment"**). A copy of the EA Assessment was included in

certain additional documents which were added to the bundle for the hearing of the Appeal.

17. On the same date, 22nd March 2021, the Respondent served a formal notice on the Appellant seeking possession pursuant to Section 128 of the Housing Act 1996. The Respondent commenced this action (**"the Action"**), seeking an order for possession of the Flat, by claim form issued on 26th April 2021. The Respondent has also sought injunctive relief, on various occasions, to restrain the Appellant's anti-social conduct. On 25th May 2021 District Judge Parker granted an interim injunction, on a without notice basis, imposing various restrictions on the Appellant's conduct. A final injunction was granted by District Judge Harrison on 10th June 2021, to 25th May 2022. In claim JO1RG306 Deputy District Judge Nicholson granted an interim injunction restricting the Appellant's conduct, on 2nd September 2022. In the same claim a final injunction was granted by the Judge on 15th December 2022, following the trial. This final injunction, which continues the order made by Deputy District Judge Nicholson in a modified form, remains in place until 23rd August 2023 or, if earlier, the date on which possession of the Flat is given up to the Respondent.

18. As I have mentioned, case management directions were given in the Action by Judge Rochford, by an order made on 23rd August 2021. The order contained the direction for the appointment of a joint expert on the question of whether the Appellant had a disability, together with supplementary directions for the provision of the joint expert evidence. These expert directions, at paragraphs 6-9 of the order, were in the following terms:

> *"6. The expert evidence on the issue of whether the Defendant has a disability within the meaning of s.6 Equality Act 2010 shall be limited to a single expert Consultant Psychiatrist jointly instructed by the parties. If the parties cannot agree by 17 September 2021 who that expert is to be, either party may apply for further directions. Unless the court orders otherwise, the cost of the psychiatrist shall be borne by the parties equally;*
>
> *7. The parties are to send a joint letter of instruction to the expert by 4pm on 22 October 2021 (in default of agreement as to the letter, separate letters of instruction are to be send, but copied to the other party);*
>
> *8. The report of the expert shall be filed at the court no later than 4pm on 26 November 2021;*
>
> *9. The time for service of questions to the expert is not later than 4pm on 10 December 2021. Any such question shall be answered by 4pm on 7 January 2022;"*

19. Following these directions a joint letter of instruction, prepared by the parties, was sent to Dr Iles, pursuant to which Dr Iles produced his principal report, dated 9th December 2021 (**"the Report"**). In paragraph 5 of the Report Dr Iles identified the issues he had been instructed to consider in the following terms:

> *"i. Does Miss Holland have a disability within the meaning of s6 Equality Act 2010? i.e.*
>
> *a) Does she suffer from a mental and/or physical impairment? If so, please identify the impairment/impairment(s);*
>
> *b) Does the impairment have an adverse effect on her ability to carry out day-to-day activities? (or would it be likely to have such an effect*

but for any measures- e.g. medication or counselling being taken to treat or correct it?);

c) If applicable, is this adverse effect substantial, i.e. more than minor or trivial? (or would it be likely to have such an effect but for any measures - e.g. medication or counselling being taken to treat or correct it?);

d) If applicable, has the impairment lasted, or is likely to last, for 12 months or more?

ii. If the Defendant has a mental and/or physical impairment(s), please set out the symptoms of the impairment(s), including any affect these symptoms may have on her behaviour?

iii What is the prognosis in respect of any impairment(s)?

iv. Is there any recommended treatment and/or support, and how would this affect that prognosis? If so, what is the treatment/support, who would provide it and what input would be required from Ms. Holland.

v. If Ms Holland does have a disability within the meaning of section 6 Equality Act 2010, to what extent do the allegations against her set out in the enclosed schedule of allegations arise as a consequence of her disability as per section 15 of the Equality Act 2010?

vi. In your opinion, and in light of any disability that Ms Holland suffers from, is her current accommodation suitable for Ms Holland and, if not, what accommodation would be more suitable for her?"

20. The Report is lengthy, and it is difficult to do justice to the Report by any form of summary. For present purposes I need only mention two of the conclusions in the Report. First, Dr Iles concluded that the Appellant should be considered to have a disability within the meaning of Section 6 of the Act, in the form of EUPD; see paragraphs 70-76 of the Report. Second, Dr Iles did consider that there was a connection between the Appellant's conduct, as alleged by the Respondent in the Action and the Appellant's EUPD, although not one which absolved the Appellant from responsibility for her actions; see paragraph 79 of the Report.

21. The Appellant's case, as explained by Mr Clarke, is that her solicitors sought to include in the joint letter of instruction to Dr Iles, the following two additional questions (**"the Additional Questions"**):

"1. What effect do you consider these proceedings and/or the threat of homelessness proceedings have had on Ms Holland, in light of her disability?

2. What impact would homelessness have on Ms Holland, in light of her disability?"

22. The Appellant's case is that the Respondent refused to agree to the Additional Questions being included in the joint letter of instruction. As a result, the Appellant applied to the court, by application notice dated 11th February 2022, for permission to put the Additional Questions to Dr Iles. I refer to these events in terms of the Appellant's case because I was not taken through the exchanges between solicitors concerning the preparation of the joint letter of instruction, and I am not clear whether and, if so, to what extent the situation was one of outright refusal or blocking (as Mr Clarke put it) by the Respondent. I do not think that this matters, because it is clear (i) that the Appellant did wish to put the Additional Questions to Dr Iles, (ii) that the

Respondent was not willing to agree to this, and (iii) that the Appellant was obliged to make the application to court for permission to put the Additional Questions to Dr Iles (**"the Expert Evidence Application"**).

23. In the event the Expert Evidence Application was dismissed by an order made by District Judge Harrison on 17th March 2022. The recitals to this order record that both parties attended the hearing of the Expert Evidence Application by counsel. Unfortunately, I have seen no note or other record of the reasons why District Judge Harrison dismissed the Expert Evidence Application. Neither Mr Clarke nor Ms McKeown attended this hearing. All I know is that the Expert Evidence Application was dismissed. In any event, the overall result was that the Additional Questions, as identified above, were not put to Dr Iles.

24. The Action came on for trial before the Judge, for a two day trial, on 10th November 2022. 10th November 2022 was a Thursday. On the previous Friday, 4th November 2022, the Appellant's solicitors wrote to the Respondent, by email, with an open offer of settlement. The proposed terms of settlement were contained in a draft consent order. The body of this draft consent order (**"the Draft Order"**) provided for the trial to be vacated, and for the possession claim to be adjourned to the first open date after three months, with a time estimate of three hours. The Appellant's counterclaim, for damages for alleged discrimination, was to be dismissed. The injunction was to be extended to 4.00pm on 10th May 2023, but with the power of arrest discharged. There was to be no order as to costs.

25. There was also a lengthy list of recitals to the Draft Order. The key recitals, for present purposes, were contained in paragraphs (5)-(8), and were in the following terms:

> *"(5) The Defendant's eviction from the Property without suitable alternative accommodation being available to her on eviction would not be a proportionate means of achieving a legitimate aim*
>
> *(6) If the Claimant secures that suitable alternative accommodation in Reading will be available to the Defendant upon her eviction, then eviction will be a proportionate means of achieving a legitimate aim*
>
> *(7) The Claimant will arrange a multi-agency meeting to consider options for securing suitable accommodation, inviting representatives of its homelessness prevention team and social services department, and the Community Mental Health Team, together with Ms Nicola Rogers and the Defendant's legal representatives*
>
> *(8) In the event of a dispute as to the suitability of alternative accommodation, the issue may be determined by the court, in accordance with the principles set out in HA 1985, Schedule 2, Part IV, read as though paragraph 1(1) of that Part referred to "a secure tenancy or an introductory tenancy"*

26. It will be noted that recital (6) to the Draft Order made specific reference to suitable alternative accommodation in Reading. This was said to be significant by Mr Clarke because, prior to this date and as recorded by the Judge, the Appellant had expressed a desire to move to North Devon. In fact, the Respondent had previously supported a bid by the Appellant to move to North Devon. The Respondent was contacted by Sanctuary Housing on 24th March 2021, which stated that it was considering offering the Appellant a flat in Barnstaple. Sanctuary Housing did however require a reference for the Appellant. The questions on the form of reference required the Respondent to

disclose that reports of anti-social behaviour had been made against the Appellant. As a result, the offer of accommodation from Sanctuary Housing, and a move to North Devon fell through.

27. I have not seen the response to the offer of settlement made by the letter of 4th November 2022 (**"the Offer"**), if there was one. It is however clear that the Offer was not accepted by the Respondent.

28. At the trial Ms McKeown appeared for the Respondent. Mr Clarke appeared for the Appellant. In terms of witness evidence, the Judge received and heard the following evidence.
    (1) The Respondent called two witnesses, both of whom provided witness statements. The first witness was Kane Roberts-Doyle, Sheltered Support Team Leader employed by the Respondent, who attended the Multi-Agency Meeting to which I have referred above. The second witness was Siobhan O'Connell, Anti-Social Behaviour Officer employed by the Respondent. Both witnesses gave oral evidence and were cross examined. The documents for the appeal bundle included a transcript of the oral evidence of Mr Roberts-Doyle at the trial; principally comprising Mr Clarke's cross examination of Mr Roberts-Doyle.
    (2) The Appellant provided a witness statement. The Appellant gave oral evidence at the trial and was cross examined. The Appellant also called Nicola Rogers, who also attended the Multi-Agency Meeting. As I have said, Ms Rogers was a Duty Team Lead in the Crisis Resolution and Home Treatment Team, Berkshire Healthcare NHS Foundation Trust and a qualified mental health nurse for over 25 years. Ms Rogers made two witness statements. She also gave oral evidence at the trial and was cross examined.
    (3) The Judge also had the benefit of expert evidence from Dr Iles, in the form of the Report and the addendum report (**"the Addendum Report"**). Dr Iles was not required to give any oral evidence.

29. Although the statements of case in the Action raised a wide variety of issues, by the time the Action came to trial, these issues had significantly reduced. As recorded by the Judge at Paragraph 3, the position was as follows, in terms of matters conceded:
    (1) The Appellant did not pursue a counterclaim which she had made for damages for discrimination.
    (2) The Appellant did not resist the Respondent's claim for a final injunction to restrain her anti-social behaviour, subject to a dispute over whether a power of arrest should be attached to the injunction.
    (3) The Appellant accepted that the Respondent had a right to possession of the Flat pursuant to Section 127 of the Housing Act 1996, but subject to her defences based upon Section 149 of the Act (alleged breach by the Respondent of its public sector equality duty), Section 15 of the Act (alleged disability discrimination) and alleged breach of the Appellant's rights under Article 8 of the European Convention on Human Rights.
    (4) The Appellant admitted that she had breached the terms of the Tenancy, largely as alleged by the Respondent. In consequence, the Appellant admitted that the Respondent's claim for possession constituted the pursuit of a legitimate aim and was rationally connected to that aim.
    (5) The Appellant accepted that eviction would be proportionate, if suitable alternative accommodation was available, but denied that eviction would be

proportionate unless and until suitable alternative long-term accommodation was available for her. As matters stood at trial, and still stand, there is no offer of suitable alternative accommodation available to the Appellant from the Respondent.

30. Leaving aside the dispute over whether a power of arrest should have been attached to the injunction sought by the Respondent, and concentrating on the possession claim, this left the Judge to decide the issues in relation to Section 149 of the Act (**"Section 149"**), Section 15 of the Act (**"Section 15"**) and Article 8. It was however agreed between the parties that the defence based on Article 8 did not add anything to the defence based on Section 15. Accordingly, the defence based on Article 8 was not pursued before the Judge and is not pursued in the Appeal. In Paragraph 4 the Judge identified the following three issues which she had to resolve:
    (1) Had the Respondent complied with its public sector equality duty (**"PSED"**) under Section 149, in relation to its decision to seek possession?
    (2) Were the breaches of the Tenancy something arising in consequence of the Respondent's disability, within the meaning of Section 15(1)(a)?
    (3) If so, had the Respondent proved that eviction without suitable alternative accommodation being available for the Appellant was a proportionate means of achieving a legitimate aim for the purposes of Section 15(1)(b)?

31. The specific issue in relation to the third of the above issues was proportionality. The Appellant accepted that the claim for possession constituted the pursuit of a legitimate aim, and that eviction would be proportionate if suitable alternative accommodation was available. The issue was whether eviction was proportionate, within the meaning of Section 15(1)(b), in circumstances where suitable alternative accommodation was not available.

The Judgment

32. The Judge commenced the Judgment with an introduction section, at Paragraphs 1-7. The Judge then proceeded to a summary of the witness evidence, at Paragraphs 8-20, including her evaluation of the witnesses. The Judge then summarised the legislative framework, at Paragraphs 21-28. The Judge then dealt, in detail and at length, with the factual background and evidence.

33. The Judge came to her determination of the issues at Paragraph 90. I will need to consider the Judge's findings and reasoning in more detail later in this judgment. For present purposes the following summary will suffice.

34. The Judge dealt first, at Paragraphs 90-104, with the question of whether the Respondent had acted in breach of its PSED. The Judge's ultimate conclusion, for the reasons set out in the Judgment, was in the following terms, at Paragraph 104:
    "I am satisfied in reaching the decision to seek possession, and to continue with the possession proceedings, they [the Respondent] *did give due regard to the factors and have complied with the PSED."*

35. The Judge then turned, at Paragraphs 105-110, to the questions of (i) whether the Appellant's breaches of the Tenancy were something arising in consequence of her disability and (ii) whether the Respondent had proved that eviction without suitable

alternative accommodation being available to the Appellant was a proportionate means of achieving a legitimate aim.

36. At Paragraph 105 the Judge found, on the basis of the evidence of Dr Iles, that the Appellant's breaches of the Tenancy were arising in consequence of the Appellant's disability, within the meaning of Section 15(1)(a). Accordingly, the causal connection required for a claim of discrimination under Section 15 was established.

37. This left the question of whether the Respondent had proved that eviction without suitable alternative accommodation being available for the Appellant was a proportionate means of achieving what was admitted to be the legitimate aim of the Respondent. At Paragraph 110, for the reasons set out in the Judgment, the Judge reached the following conclusion on the issue of whether the Respondent had proved that eviction without suitable accommodation was proportionate:

> *"110.I am satisfied after considering all the evidence and carrying out a balancing exercise that eviction of the Defendant without alternative suitable accommodation is a proportionate means of achieving what is accepted to be a legitimate aim, and maintaining her tenancy until suitable alternative accommodation can be found in the Borough of Reading would be disproportionate and cause unacceptable risk to the neighbours and others, and to property, all of which rely on the Claimant to protect them from those risks."*

38. The Judge thus rejected the Appellant's defence that the Respondent, in pursuing the possession claim, was in breach of its PSED and rejected the Appellant's defence that the possession claim constituted unlawful discrimination. The Judge therefore made the Possession Order, which required the Respondent to give up possession on or before 4.00pm on 11th January 2023. An application for permission to appeal was made to the Judge by the Appellant, but was refused.

<u>The grounds of the Appeal</u>

39. There is no challenge, in the Appeal, to the Judge's finding that the Appellant's breaches of the Tenancy arose in consequence of the Appellant's disability, within the meaning of Section 15(1)(a), so that the causal connection required for a claim of discrimination under Section 15 was established.

40. Although the grounds of appeal attached to the appellant's notice were not drafted in precisely these terms, Mr Clarke concentrated his oral submissions on what were, in essence, two grounds of appeal. Before I come to these two grounds of appeal, I need first to establish what I mean when I refer to the eviction of the Appellant.

41. In order to avoid excessive repetition, and unless otherwise indicated, my references to the eviction of the Appellant, in the remainder of this judgment, mean eviction without suitable alternative accommodation being available to the Appellant, thereby resulting in the Appellant being left homeless. My reference to the Appellant being left homeless requires a further qualification. As Mr Clarke put the Appellant's case, eviction of the Appellant without suitable alternative accommodation being available meant and entailed homelessness for the Appellant. Ms McKeown's submission was that this was potentially misleading, or at least ambiguous. Her submission was that, in the context of public housing law, a state of homelessness could have different meanings. It did not

necessarily mean that the Appellant, if described as homeless, would be a person without a home or without the right to be rehoused.

42. The submissions which I heard on this particular issue were not such as to permit me to make a decision on whether the eviction of the Appellant from the Flat would mean that the Appellant would be left without a home and without a right to be rehoused, or whether the Appellant would have some right to be rehoused, albeit not necessarily in accommodation such as the Flat. So far as I am aware, both the Respondent, at the times material to the question of whether it had complied with its PSED, and the Judge, considering matters at the date of the trial, approached the question of the consequences of eviction for the Appellant on the basis that eviction would leave the Appellant either with no home or, at best, in unsuitable private accommodation. There appears to have been no assumption made that the Appellant would have a right to be rehoused. Indeed, this seems to me to be corroborated by the note of the Multi-Agency Meeting, which records the following assessment of the Appellant's position, if she was to be evicted:

> *"If TH is evicted she would have to present to our Housing Advice team as homeless and then they would have to make decision whether or not we have duty to house but, on the basis that TH is to be evicted on breach of tenancy through ASB grounds, the likelihood is that she would be found intentionally homeless and would need to seek alternative accommodation herself more than likely through the private sector, which will not work well for TH."*

43. In these circumstances it seems to me that I have to approach the Appeal on the basis that the Appellant's eviction will either leave the Appellant without any home or, at best, will leave the Appellant in unsuitable private accommodation. I do not think that I can assume that the Appellant will have any right to be rehoused by the Respondent. My references to eviction leaving the Appellant homeless should be read on this basis.

44. Returning to the two grounds of appeal, they can be summarised as follows.

45. First, Mr Clarke contended that the Judge had gone wrong in relation to the question of the effect of eviction upon the Appellant, bearing in mind her particular disability.

46. So far as this ground of appeal related to the issue of whether the Respondent had complied with its PSED, Mr Clarke contended that the Judge had gone wrong in the following ways:

(1) The Respondent, in order to demonstrate compliance with its PSED, had to be able to demonstrate that it had considered, with sharp focus, the question of the specific effect an eviction (with consequential homelessness) would have on the Appellant, bearing in mind the particular disability from which the Appellant suffered. In particular, and on the facts of the present case, further expert evidence was required from Dr Iles in order to consider this question.

(2) The Respondent did not carry out a consideration of this kind which, on the facts of the present case, was required. At best, the Respondent could demonstrate no more than a general consideration of the effect of eviction, which (i) took no, or no proper account of the specific effect of eviction on a person, in this case the Appellant, suffering from the Appellant's specific disability and (ii) was conducted without the required expert advice or evidence.

(3) As such, the Respondent was in breach of its PSED in its decision to make a possession claim against the Appellant.

(4) The Judge was wrong to decide that the Respondent had complied with its PSED in this respect. The matters relied upon by the Judge in support of this decision, fell short of the specific consideration, by the Respondent, of the effect of eviction on the Appellant which was required in the present case.

47. So far as this ground of appeal related to the issue of whether eviction was proportionate, Mr Clarke contended that the Judge had gone wrong for essentially the same reason as the Respondent had gone wrong in its own consideration of the effect of eviction on the Appellant:
    (1) The Judge, in order to assess the question of proportionality under Section 15(1)(b), had to consider, again with sharp focus, the question of the specific effect an eviction (with consequential homelessness) would have on the Appellant, bearing in mind the particular disability from which the Appellant suffered. In particular, and on the facts of the present case, further expert evidence was required from Dr Iles in order to consider this question.
    (2) The Judge was not able to carry out a consideration of this kind because the Appellant had adduced no, or no sufficient evidence which permitted consideration of this question. At best, the Judge had before her at the trial evidence which permitted only a general consideration of the effect of eviction, which (i) took no, or no proper account of the specific effect of eviction on a person, in this case the Appellant, suffering from the Appellant's specific disability and (ii) was conducted without the required expert evidence.
    (3) As such, the Judge failed to carry out the specific consideration of the effect of eviction on the Appellant which was required in the present case, for the purposes of deciding the question of proportionality.
    (4) The Judge was thus wrong to decide that it was proportionate to evict the Appellant. The matters relied upon by the Judge in support of this decision, so far as they concerned the effect of eviction on the Appellant, fell short of what was required in order to carry out the specific consideration of the effect of eviction on the Appellant which was required in the present case.

48. Second, Mr Clarke contended that the Judge had gone wrong in relation to the question of suitable alternative accommodation.

49. So far as this ground of appeal related to the issue of whether the Respondent had complied with its PSED, Mr Clarke contended that the Judge had gone wrong in the following ways:
    (1) By the time of the trial the Appellant had, by the Offer, demonstrated a willingness to move to suitable alternative accommodation within Reading. The Respondent, in order to demonstrate compliance with its PSED, had to be able to demonstrate that it had considered all the options in this context, and specifically the question of whether there was suitable alternative accommodation available for the Appellant in Reading.
    (2) The Respondent did not carry out a consideration of this kind which, on the facts of the present case, was required.
    (3) As such, the Respondent was in breach of its PSED in its decision to make a possession claim against the Appellant.
    (4) The Judge was wrong to decide that the Respondent had complied with its PSED in this respect. The Judge failed to take into account the implications of the Offer and the failure of the Respondent to consider all the options in this context, and

specifically the question of whether suitable alternative accommodation was available for the Appellant in Reading. If the Judge had taken these matters into account, she should have decided that the Respondent was in breach of its PSED.

50. So far as this ground of appeal related to the issue of whether eviction was proportionate, Mr Clarke contended that the Judge had gone wrong for essentially the same reason as the Respondent had gone wrong in its own consideration of the question of suitable alternative accommodation.
    (1) The Judge, in order to assess the question of proportionality under Section 15(1)(b), had to consider all the options in this context, and specifically the question of whether there was suitable alternative accommodation available to the Appellant in Reading.
    (2) The Judge was not able to carry out a consideration of this kind because the Appellant had adduced no, or no sufficient evidence which permitted consideration of this question.
    (3) As such, the Judge was wrong to decide that it was proportionate to evict the Appellant. The Judge failed to take into account the implications of the Offer and the failure of the Respondent to consider all the options in this context, and specifically the question of whether suitable alternative accommodation was available for the Appellant in Reading. If the Judge had taken these matters into account, she should have decided that the Respondent had failed to demonstrate that eviction was proportionate.

The legislation

51. Section 149(1) sets out the basic PSED in the following terms:

> *"(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."*

52. This is then further explained and amplified in subsections (3)-(6), as follows:

> *"(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."

53. Mr Clarke also drew my attention to the Equality Act 2010 Code of Practice, Services, Public Functions and Associations. The Code is concerned with services and public functions. There is no statutory code of practice specific to premises, which are dealt with in Part 4 of the Act. I accept however the submission of Mr Clarke that the guidance on general principles set out in the Code can and should be applied, with appropriate modifications, where necessary. As I understood this submission, the Code was relevant to both grounds of appeal; that is to say the issue of whether the Respondent had breached its PSED and the issue of whether the eviction of the Appellant was proportionate. Mr Clarke drew my attention, in particular, to paragraphs 5.25 and 5.36 of the Code. As Mr Clarke submitted, paragraph 5.36 demonstrates the link between questions of compliance with the PSED and questions of discrimination:

"A significant factor in determining whether a public authority is able to justify what may be indirect discrimination is the extent to which the authority has complied with their public sector equality duties."

54. At the trial the burden was on the Respondent to satisfy the Judge that it had complied with its PSED. I will refer to the issue of whether the Respondent had complied with its PSED as **"the PSED Issue"**.

55. Turning to Section 15, it provides as follows:

"(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."

56. In the Appeal, Section 15(1)(b) is engaged. As I have already noted, it was not, at trial, disputed that the Respondent's claim for possession constituted a legitimate aim and was rationally connected to that aim. The position remains the same in the Appeal. The remaining issue is whether the Judge was right to conclude that the Respondent had demonstrated that the possession claim, and thus the eviction of the Appellant was a proportionate means of achieving its legitimate aim.

57. The burden was on the Respondent to demonstrate that the eviction of the Appellant was a proportionate means of achieving its legitimate aim. It will be recalled that this reference to eviction means eviction without suitable alternative accommodation being available to the Appellant resulting in homelessness. I will refer to this issue as **"the Proportionality Issue"**.

Case law

58. In support of his arguments in the Appeal, and in terms of relevant case law, Mr Clarke cited six authorities to me, which are useful in understanding the linked questions of the nature and content of a PSED and how to apply the proportionality test in Section 15(1)(b).

59. The first of these cases was *Birmingham City Council v Stephenson* [2016] EWCA Civ 1029 [2016] HLR 44. The case involved a possession claim by the relevant local authority against an introductory tenant of a flat. The tenant had a disability. At the second hearing of the possession claim the Deputy District Judge hearing the claim refused to adjourn the hearing, so that the tenant could put in a defence, on the basis that the tenant had no substantial arguments to advance. This decision was upheld on appeal to a Circuit Judge, but an appeal against that decision was allowed by the Court of Appeal. In his judgment Lewison LJ quoted extensively from the decision of the Supreme Court in *Aster Communities Limited v Akerman-Livingstone* [2015] UKSC 15 [2015] AC 1399, which had not been cited to the Deputy District Judge. I will come back to *Aster*, but for present purposes I can go straight to [22] of Lewison LJ's judgment, where the Lord Justice explained what was required of the local authority on the facts of the case. In the first half of [22] the Lord Justice explained what was required in the following terms:

> *"Understandably the Deputy District Judge in this case did not approach the question in the structured way laid down by the Supreme Court. Had he done so he would, in my judgement, have reached the following conclusions at least at the summary stage. First, as was common ground, Mr Stephenson was disabled. Secondly, based on Ms Burrows' evidence it was at least arguable that there was a sufficient causal link between his mental disability and the conduct on which the decision to evict him was based. That was enough to raise a prima facie case of discrimination on the ground of disability. The burden would then shift to the council to establish that evicting Mr Stephenson was a proportionate means of achieving a legitimate aim. It must not be forgotten that the deputy district judge was told that in Mr Stephenson's case eviction meant that he would be homeless. The deputy district judge did not mention the question of proportionality at all. By a respondent's notice the council argued that the case on proportionality both was and is overwhelming and seeks to rely on further instances of noise nuisance. Mr Baker said that the fact of the anti-social behaviour was not contested. Mr Stephenson had simply apologised. In view of his medical condition he said it was unlikely that the behaviour would abate. He argued that the nature of the anti-social behaviour was so serious and prolonged and had had such a serious effect on Mr Stephenson's neighbour that eviction was the only real solution. He may turn out to be right. Since the burden was on the council to show that no less drastic action would be appropriate, it is in my view incumbent on the council to at least show that alternatives have been considered and reasons given for their rejection."*

60. In the second half of [22] Lewison LJ gave the following warning against treating the question of proportionality as a binary choice between eviction and doing nothing:

> *"Thus, in my judgement, 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."

61. At [23] the Lord Justice stated the following conclusion:

> *"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. I do not consider that it is so obvious that Mr Stephenson should be deprived of the opportunity to defend the claim."*

62. The key principle which seems to me to emerge from the judgment of Lewison LJ in *Stephenson* is that it is wrong to treat proportionality as a binary choice. The burden is on the landlord to show that no less drastic action would be appropriate.

63. Turning to *Aster*, this was another case concerned with disability discrimination. The question of how to approach proportionality, in the context of Section 15, was considered by Baroness Hale DPSC and Lord Neuberger PSC. Lord Neuberger summarised the position, in terms of the additional protection given by Section 15 to those with a disability in the following terms, at [56]:

> *"56 All this is very different from the home-related, but otherwise far less specific and targeted, article 8 defence. Thus, the protection afforded by section 35(1)(b) is an extra, and a more specific, stronger, right afforded to disabled occupiers over and above the article 8 right. It is also worth mentioning that this conclusion ties in with what was said in the Pinnock case [2011] 2 AC 104, para 64, namely that as suggested by*
>
> > *"the Equality and Human Rights Commission . . . proportionality is more likely to be a relevant issue _in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty", and that "the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases"".*
>
> *In other words, where the occupier is disabled, it is significantly less unlikely than in the normal run of cases that an article 8 defence might succeed."*

64. Next, Mr Clarke referred me to *Paragon Asra Housing Ltd v Neville* [2018] EWCA Civ 1712 [2018] HLR 39, another disability discrimination case. Mr Clarke relied upon this case as authority for the proposition that even the enforcement of a possession order, previously determined by the court to be proportionate, may become disproportionate,

as a result of a material change of circumstances; see the judgment of Sir Colin Rimer at [34] and the judgment of Asplin LJ at [52]. This in turn derives from the principle that the landlord's duty not to discriminate is a continuing one, so that a claim which starts off being lawful may become unlawful, as a result of subsequent developments. On the facts of *Paragon*, the Court of Appeal were of the view that there had been no such change of circumstances. I did not understand Mr Clarke to submit that the present case was one where a material change of circumstances resulted in what had been a lawful claim for possession becoming unlawful. As I understood the Appellant's case on the Proportionality Issue, the claim for possession constituted unlawful discrimination against the Appellant from the outset of the Action. The Action was not one which involved no unlawful discrimination when it was commenced, but subsequently came to engage unlawful discrimination by reason of subsequent events. *Paragon* was cited to me in the context of an issue, to which I will come later in this judgment, as to what the implications would have been, so far as the possession claim was concerned, if the Respondent had accepted the Offer and agreed the terms of the Draft Order.

65. Turning to the content of a PSED, Mr Clarke referred me to *London & Quadrant Housing Trust v Patrick* [2019] EWHC 1263 (QB) [2020] HLR 3. In his judgment, at [42], Turner J set out a list of factors *"which are likely, at least in many instances, to be the most relevant to be considered in the context of possession cases"*, in terms of the nature of the PSED. These factors provide an invaluable guide, for the purposes of determining whether a public sector landlord has complied with its PSED. For that reason, and with one exception, I set out the factors in full, as follows:

> ***"Application of the PSED***
>
> *(i) When a public sector landlord is contemplating taking or enforcing possession proceedings in circumstances in which a disabled person is liable to be affected by such decision, it is subject to the PSED.*
>
> ***Nature and scope of the PSED***
>
> *(ii) The PSED is not a duty to achieve a result but a duty to have due regard to the need to achieve the results identified in section 149. Thus when considering what is due regard, the public sector landlord must weigh the factors relevant to promoting the objects of the section against any material countervailing factors. In housing cases, such countervailing factors may include, for example, the impact which the disabled person's behaviour, in so far as is material to the decision in question, is having upon others (e.g. through drug dealing or other anti-social behaviour). The PSED is "designed to secure the brighter illumination of a person's disability so that, to the extent that it bears upon his rights under other laws it attracts a full appraisal".*
>
> ***Making inquires***
>
> *(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.*
>
> ***The importance of substance over form***
>
> *(iv) The PSED must be exercised in substance, with rigour and with an open mind and should not be reduced to no more than a "tick-box" exercise.*
>
> ***Continuing nature of the duty***

(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.

The timing of formal consideration of the PSED

(vi) 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. [I omit the remainder of this factor, given that the present case is not one where the Respondent was unaware that the Appellant had a disability when the Respondent decided to make the claim for possession]

Recording the discharge of the duty

(vii) An important evidential element in the demonstration of the discharge of the PSED is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements.8 Although there is no duty to make express written reference to the regard paid to the relevant duty, recording the existence of the duty and the considerations taken into account in discharging it serves to reduce the scope for later argument. Nevertheless, cases may arise in which a conscientious decision maker focussing on the impact of disability may comply with the PSED even where he is unaware of its existence as a separate duty or of the terms of section 149.

The court must not simply substitute its own views for that of the landlord

(viii) The court must be satisfied that the public sector landlord has carried out a sufficiently rigorous consideration of the PSED but, once thus satisfied, is not entitled to substitute its own views of the relative weight to be afforded to the various competing factors informing its decision. It is not the court's function to review the substantive merits of the result of the relevant balancing act. The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors."

66. It will be noted, by reference to factor (iv) above, that the *"PSED must be exercised in substance, with rigour and with an open mind and should not be reduced to no more than a "tick-box" exercise"*. The need for rigour in the exercise of the PSED is further brought out in *Kannan v Newham LBC* [2019] EWCA Civ 57 [2019] HLR 22. The appellant in *Kannan* suffered from a number of medical conditions which restricted his mobility. The appellant requested a review by the respondent authority of the flat

which had been provided to him. The appellant contended that the flat, which was a first floor flat above commercial premises, was unsuitable for his needs. The respondent took medical advice, which effectively confirmed that the flat was not suitable for the appellant. The respondent's reviewing officer decided however that the flat was suitable for the appellant's housing needs. The appellant appealed this review to the county court, but the appeal was compromised on the basis that the respondent would conduct a fresh review. This further review also concluded however that the flat was suitable for the appellant's housing needs. An appeal against this further review was unsuccessful in the county court, but succeeded in the Court of Appeal.

67. In his judgment Lewison LJ, with whom Moylan LJ agreed, explained why the reviewing officer had failed to carry out an adequate review. It is not necessary to set out the detail of the criticisms of the review made by Lewison LJ. The key point is that the reviewing officer had not carried out the review with *"the required sharp focus"*. Lewison LJ concluded his judgment in the following terms, at [23]-[24]:

> *"23 While it is legitimate for a reviewing officer to consider housing conditions in the locality, when he does so through the lens of the public sector equality duty it is not adequate simply to refer to the generality of persons who are not living in ideal conditions. The reviewing officer did not consider whether any of those who were not living in ideal conditions had disabilities. That, too, shows that there was not the required sharp focus on Mr Kannan's disability and the impact it had on his housing needs.*
>
> *24 As in Lomax, I do not consider that the decision is saved by the reviewing officer's subsequent reference to the public sector quality duty. The mere recitation of Lord Neuberger's formula in para.28 of the decision letter is no substitute for actually doing the job."*

68. In his submissions Mr. Clarke stressed the need for sharp focus on the part of the Respondent, in considering the impact of eviction, not upon any person or upon any person with a disability, but upon the Appellant with the particular disability (EUPD) to which the Appellant was subject.

69. The sixth and final case to which Mr Clarke referred me, in his submissions on the authorities, was *Barnsley MBC v Norton* [2011] EWCA Civ 834 [2011] HLR 46. In this case the claimant authority sought possession of a house which had been occupied by the first defendant, in his role as school caretaker. The first defendant lived in the house with his wife and daughter, who were also defendants to the claim for possession. The daughter had a disability. The defendants contested the claim on the basis that the claimant, in deciding to seek possession had acted unlawfully because it had failed to have regard to the daughter's disability. The judge at first instance made a possession order. An appeal to the Court of Appeal was dismissed.

70. The fact that the appeal was dismissed in *Norton* needs to be put into context. An important feature of the case was that the situation of the daughter, who had a disability and was also pregnant, meant that she was likely to be given high priority, in terms of rehousing. It was this feature of the case which caused the Court of Appeal to come to the conclusion that the possession order did not need to be set aside.

71. The particular point which Mr Clarke derived from this authority was the need for the public sector landlord, when considering whether to commence possession proceedings

against a person with a disability, to consider what the position will be following the eviction of that person from their current accommodation. Lloyd LJ explained this point in the following terms, at [28]-[30]:

> *"28 As I have said, I reject the submission that functions in s.49A(1) are limited to functions under some particular aspect of a public authority's operations. The decision to seek possession of the school house was an exercise of a function of the public authority. It seems to me that knowing, as the Council did, that if successful this could pose potentially serious problems for Sam, who had been safely housed at the school house with the help of adaptations provided by the Council itself, it was incumbent on the Council to have regard to the need to take steps to take account of her disability. To what conclusion this would lead the Council is not for the court to say and of course the need for the premises to be used by a new caretaker was highly relevant.*
>
> *29 In support of that approach, Mr Read referred us to [64] of Lord Neuberger's judgment in Manchester City Council v Pinnock [2010] UKSC 45; [2010] 3 W.L.R. 1441, which was said about art.8 but seems to me to be relevant also by analogy to section 49A of the DDA:*
>
> > *"Sixthly, the suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue 'in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty', and that 'the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases' seem to us well made."*
>
> *30 For his part Mr Fullwood referred us, by contrast, to [52] and [54] of the same speech. I accept that, as he submitted, there is a high burden on a defendant who relies on art.8 as a defence to a claim for possession. Nevertheless, in relation to a disabled person for whose benefit the s.49A(1)(d) duty has to be undertaken, in the present sort of context, the obvious question is where that person is going to live after the possession order to be sought has been obtained and has taken effect. Of course, Pt 7 is particularly relevant, as it would not always be for a defendant to possession proceedings, because Sam would be a person in priority need for the purposes of Pt 7. But it does not follow that s.49A(1)(d) allows the Council to leave the question of her future accommodation and provision over to be coped with under Pt 7 in the end, if it comes to that."*

72. On the facts of *Norton* the Court of Appeal concluded that the possession order should not be set aside, notwithstanding that the decision of the Court of Appeal was that the claimant authority had breached its PSED. This was because the Court of Appeal considered that it was better to leave the claimant to deal with the consequent issue of the daughter's need for new accommodation, which was likely to be available, given her situation. This did not however alter the fact that the claimant's PSED included the duty to consider the question of what would happen, in terms of suitable alternative accommodation, following the eviction of the daughter from her home.

73. With the above summary of the relevant legislation and case law in place, I turn to my analysis of the grounds of the Appeal.

The first ground of appeal – the effect of eviction on the Appellant bearing in mind her specific disability - analysis

74. I take first the PSED Issue, and the Appellant's argument that the Respondent failed to consider, with the required sharp focus, the effect of eviction upon the Appellant, bearing in mind the specific disability (EUPD) to which the Appellant was subject. Put more simply, the argument is that the Respondent failed to consider the specific effect of homelessness on the Appellant, bearing in mind the Appellant's disability. Mr Clarke contended that the evidence before the Judge demonstrated that this question was, at best, only considered in generic terms, with none of the sharp focus on and inquiry into the effect of eviction upon the Appellant which, on the authorities referred to in the previous section of this judgment, was required.

75. The Judge dealt with the question of whether the Respondent was in breach of its PSED at Paragraphs 90-104. The Judge commenced this section of the Judgment by setting out the criticisms made by Mr Clarke of the EA Assessment. The Judge accepted all these criticisms, save one. The criticisms which the Judge did accept, at Paragraph 91, included the complaint that the EA Assessment was deficient because Ms Langran's *"consideration of proportionality failed to give any proper consideration to the likely effects of* [on] *the Defendant of eviction"*.

76. The Judge then however continued in the following terms, in the remainder of Paragraph 91 and in Paragraph 92:

> *"However I accept the submission of Ms McKeown for the Claimant that the EA and PSED should not be looked at in isolation. As Mr Clarke accepts in closing, compliance with the PSED does not have to be achieved by a formal document and can even be achieved without the employees of the public sector body understanding that they are complying with the PSED, per Hotek* [Hotak].
>
> *92. What can be seen from the comprehensive review of the history and documentation of this case is that by the time Ms Langran carried out this assessment and a decision was made the same day to serve a notice seeking possession, the Claimant knew the Defendant very well. They had been involved with her and supporting her even before the tenancy of Flat 24."*

77. In Paragraph 93 the Judge reviewed the circumstances in which the Appellant had come to be offered the Flat. As the Judge noted:

> *"93. In fact the tenancy of Flat 24 was offered to her after her tenancy at Chartfield Road broke down because of antisocial behaviour and threats against her neighbour, and her temporary accommodation gave rise to similar problems as those that she went on to have at Flat 24. The evidence is that she was offered it after much thought and a full assessment of her needs, as I have set out, which included her diagnoses, her mental health issues, behaviours arising from her disabilities including difficulties in managing her anger. It was considered to be suitable because it was in a small block of 4 so there were few neighbours; it was on the first floor which she preferred; it was sheltered housing which would provide support staff on site and support services such as the emergency Tunstall system and where it was hoped that the older age of the neighbours would provide a calmer environment; because it had green space around and was set back from the road which it was hoped would be quieter than other blocks, and it*

was hoped that it would build up her confidence. In my judgment, that shows the Claimant putting in sharp focus, and taking steps to meet, the specific needs of the Defendant arising from her disability and to remove or minimise disadvantages arising from her disability. Once in Flat 24 the Claimant sought to put in place access to volunteering opportunities which it had been advised would be beneficial and go to Reading Recovery College: that is in my judgment encouraging the Claimant to participate in public life."

78. At Paragraph 94 the Judge reviewed the support which the Appellant had received, and drew the following conclusions:

> *"94. Before coming to Flat 24 she had support from Alana house, was known to CMHT, and Crisis, had input from psychiatry; afterwards the Claimant made multiple referrals to CMHT and Crisis, Talking Therapies and Reading Recovery College, tried to assist her to have medication reviews, access therapy, reduce or manage her alcohol intake, put in place identified support workers who rang and visited her regularly, reminded her about medication, etc. The documentation shows that all of this was with a sharp focus on the Defendant's diagnoses including EUPD and that they did so to try and improve the Defendant's ability to manage her relationships with neighbours, support staff and others; to improve her confidence and mood, settle her emotionally, etc. That, in my judgment, shows continuing compliance with the PSED whether or not all or any of the Claimant's employees labelled her diagnoses and difficulties as a disability under section 15 EA, and that continued throughout her tenancy."*

79. The reference to *"a sharp focus"* in this Paragraph was not an accident. At Paragraph 28 the Judge made reference to the case of *Hotak v Southwark* [2015] UKSC 30 [2016] AC 811. This case was not amongst the authorities cited to me in the Appeal, but the following extract from the judgment of Lord Neuberger PSC, at [78], which the Judge quoted at Paragraph 28, is entirely consistent with the case law to which I was referred:

> *"the equality duty, in the context of an exercise such as a section 202 review, does require the reviewing officer to focus very sharply on (i) whether the applicant is under a disability (or has another protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is as a result 'vulnerable'."*

80. This led the Judge to the following conclusion, at Paragraph 95:

> *"95. The Defendant engaged and then disengaged with support workers and services and mental health services; took medication when she felt she needed it but often did not and still does not really believe that she needs it; failed on occasion to attend medical and support appointments so they were closed to her, etc. The Claimant sought to support her, change their approach, have discussions with various services, try again. I have set out the history. I am satisfied that at all times during her tenancy at Flat 24 up to the decision to begin possession proceedings the Claimant knew of the Defendant's mental health issues, focussed on those in substance and with rigour and did so with due regard to the section 149(1) aims, thus satisfying the PSED."*

81. The Judge then came, at Paragraph 96, to the decision of the Respondent to make the claim for possession:

> *"96. What of the decisions to serve a NOSP and then issue possession proceedings? That is what I must determine. Those decisions were taken in the context of the history I have set out and the findings that I have just made."*

82. At Paragraph 98, the Judge recorded the submission which now forms the part of the Appeal which I am considering:

> *"The Defendant submits that the Claimant has failed properly to consider the likely effects of eviction on the Defendant in light of her disability. I do not agree that this is so."*

83. The Judge did not accept that submission, for the reasons she set out in the remainder of Paragraph 98:

> *"98. The whole focus of the Claimant's employees in dealing with the Defendant is to seek to support her to manage her relationships, anger, emotional lability, drinking etc to enable her to keep her tenancy and avoid eviction, because it is understood that settled accommodation is important for her management of her vulnerabilities arising from her disability. It is acknowledged in documented discussions that eviction would "not go well" for her and would be "catastrophic" for her. It is important to remember the context: the Defendant has been evicted once before, and it was the Claimant who had to house her in temporary accommodation. That did not go well. The Defendant criticises the Claimant for not documenting anywhere exactly what the effect of eviction will be, but even the two medics in this case do not speak in specifics. Dr Ahmad said he was "very concerned" about a possible eviction given the Defendant's vulnerability and mental state. Dr Iles says that eviction without alternative accommodation "would not be helpful". The Defendant criticises the Claimant for resisting the Defendant's attempts to get Dr Iles to put in a further report addressing this question, but he had two opportunities to provide this information and given the Claimant's long involvement with the Defendant, I agree it was not necessary. The Claimant has treated this case as one where eviction should try to be avoided at all costs (that, too is documented) because of the detrimental impact it will have on the Claimant's mental health."*

84. The Judge then turned to consider the question of suitable alternative accommodation, which is the subject matter of what I have summarised as the second ground of appeal. I should however set out Paragraph 104, where the Judge stated her final conclusion on the PSED Issue:

> *"104. The Claimant is very concerned about the neighbours, some of whom have asked to be moved out of the property; it is also very concerned about the effect of the Defendant's use and abuse of the Tunstall system on the ability of others to use it in case of emergency, and for it to be an effective fire monitoring and lift monitoring service. These are all material countervailing factors which the Claimant has weighed up against waiting for the Defendant to be offered, access and complete further therapies over*

an unknown time period as is the fact, that Mr Iles makes clear, that the Defendant must take personal responsibility for her choice to carry out these actions of antisocial behaviour. She is able to regulate her behaviour: she did so when the first injunction of DJ Parker was in place, she was polite and courteous and attentive in Court for two days. I cannot criticise the Claimant for choosing to continue with the possession proceedings in those circumstances. Akerman-Livingston at [32] says that the relevant question is 'Has the local authority done all that can reasonably be expected of it to accommodate the consequences of the disabled person's disability?' I believe they have done all that can reasonably be expected of it. I am satisfied in reaching the decision to seek possession, and to continue with the possession proceedings, they did give due regard to the factors and have complied with the PSED."

85. Mr Clarke focussed his criticism of this part of the Judgment on Paragraph 98, where the Judge made her decision on the question of whether the Respondent had adequately considered the effect of eviction upon the Appellant. Mr Clarke submitted that the specific matters relied upon by the Judge in this respect were too generic, and were not evidence of the specific inquiry which the Respondent should have made into the effect of eviction on the Appellant, but failed to do so. In relation to those specific matters, the points made by Mr Clarke, in summary, were as follows:
    (1) Reference to the past dealings of the Respondent's employees with the Appellant was not the specific inquiry or assessment of the effect of eviction on the Appellant which the PSED required.
    (2) The reference to eviction not going well for the Appellant appeared to derive from a point which was made in the Multi-Agency Meeting (quoted earlier in this judgment), to the effect that alternative accommodation for the Appellant in the private sector would not work well for the Appellant. This was not the required consideration of the effect of eviction on the Appellant.
    (3) The reference to eviction being catastrophic for the Appellant was not part of any documented discussion, but appeared to come from a statement to this effect by Nicola Rogers in her second witness statement. That statement was a statement of opinion by a witness of fact, and thus inadmissible. In any event the statement did not form any part of any documented discussion at the time when the Respondent was making its decision to pursue the possession claim.
    (4) The reference to Dr Ahmad (the consultant psychiatrist who had assessed the Appellant) being very concerned at the prospect of the Appellant being evicted came from an email sent by Nicola Rogers to Emma Langran on 25th February 2021, reporting this concern of Dr Ahmad. Both this email and a subsequent email sent on the same date by Dr Ahmad himself, which confirmed this concern, were intended as no more than *"short functional communications by busy medical practitioners in the context of their professional involvement with"* the Appellant.
    (5) Dr Iles did not address the effect of eviction upon the Appellant, beyond a passing remark in paragraph 80 of the Report, to the effect that eviction would not be helpful to the Appellant. In this context the Judge was wrong to suggest that Dr Iles had had two opportunities to address the effect of eviction upon the Appellant. In fact, this specific question had never been put to Dr Iles, as a result of the Respondent blocking the attempt of the Appellant to put the Additional Questions to Dr Iles. Mr Clarke did not contend that a public sector landlord

would, in every case, be required to obtain expert advice on the likely consequences of eviction in order to ensure compliance with its PSED. On the facts of the present case however, so Mr Clarke submitted, the Respondent did require such expert advice.

86. There are, as it seems to me, two essential and related problems with the submissions of Mr Clarke in relation to the first limb of the first ground of appeal; that is to say with the argument that the Judge went wrong in her decision, and should have decided that the Respondent had failed to comply with its PSED by failing adequately to consider the effect of eviction on the Appellant in the light of her disability.

87. First, there is the question of what exercise the Respondent was required to undertake, in order to demonstrate compliance with its PSED. If it was the case that the Respondent was, as a matter of law and in order to demonstrate such compliance, required to carry out a single formal exercise of considering, with the required sharp focus, the effect of eviction upon the Appellant, bearing in mind her specific disability, then one can see that the Respondent's case that it did comply with its PSED would be in some difficulty. So far as I can see, there is no evidence that the Respondent did carry out a single formal exercise of this kind. Indeed, so far as the EA Assessment was concerned, the Judge accepted the bulk of the criticisms made by Mr Clarke, and found that Ms Langran had, in the EA Assessment, fallen short of complying with the PSED; see Paragraphs 90 and 91.

88. It is however clear from the authorities that a single formal exercise is not necessarily required in order to demonstrate compliance with the PSED; see in particular Turner J in *London and Quadrant*, at [42]. The position is not as rigid as this. As Mr Clarke accepted before the Judge (see Paragraph 91), compliance with the PSED does not have to be achieved by a formal document and can even be achieved without the employees of the public sector body understanding that they are complying with the PSED. I should also quote, in this context, footnote 3 from page 4 of Mr Clarke's skeleton argument for the hearing of the Appeal:

> *"The court accepted that this assessment* [the EA Assessment] *was deficient in various respects, although it was common ground that, in assessing compliance with the PSED, the court was not limited to this (or any) formal assessment, but rather had to consider R's actions overall (judgment para 90-91)"*

89. It follows from this that the Judge was entitled, as she decided in Paragraph 91, to look at the question of whether the Respondent had complied with the PSED on a wider basis. In looking at this question on a wider basis it does not seem to me that it can be said that the Judge misdirected herself as to the applicable law. The Judge plainly understood the need for the Respondent to demonstrate the required sharp focus. The Judge made a specific reference to sharp focus in Paragraph 94 and, as I have already noted, made specific reference to what Lord Neuberger had said in *Hotak*, at [78], on the need for sharp focus on the likely effect of a disability on the relevant person *"if and when homeless"*; see Paragraph 28.

90. Nor can it be said that the Judge did not have in mind the specific argument of the Appellant which comprises this part of the appeal; namely the argument that the Respondent failed to consider, with the required sharp focus, the effect of eviction upon the Appellant, bearing in mind the specific disability to which the Appellant was

subject.
The Judge made specific reference to this argument in Paragraph 98.

91. This leads on to the second problem confronting Mr Clarke in relation to this part of the Appeal. If, as seems to me to be correct, the Judge directed herself correctly as to the relevant law, and if, as also seems to me to be correct, the Judge correctly identified the particular question which she had to answer, the Appellant's argument necessarily has to be that the Judge returned the wrong answer to this question. The answer to this question depended however upon the evidence relevant to this question. At the trial the Judge read and heard all of this evidence, and heard the arguments of the parties on all of this evidence. The Judge's conclusion, on the basis of all this evidence, was that the Respondent had properly considered the likely effects of eviction on the Appellant in the light of her disability. Given that the Judge read and heard all of the relevant evidence, and the arguments on the same, over the two days of the trial, and given that I have not done the same, it is difficult to see a basis on which I can or should interfere with the Judge's conclusion on the evidence.

92. It seems to me that this is well demonstrated by working through the specific criticisms made by Mr Clarke of the Judge's reasoning in this respect.

93. In Paragraph 98 the Judge made reference to the past dealings of the Respondent's employees with the Appellant. Mr Clarke contended that this was not the specific inquiry or assessment of the effect of eviction which was required. This is true, so far as it goes, but it seems to me to miss the point the Judge was making. The point the Judge was making was, as she said, that the whole focus of the Respondent's employees in dealing with the Appellant was to seek to support her to manage her relationships, anger, emotional liability, drinking etc *"to enable her to keep her tenancy and avoid eviction, <u>because it is understood that settled accommodation is important for her management of her vulnerabilities arising from her disability</u>"* (underlining also added). This was one of several reasons why the Judge thought that the Respondent had the knowledge properly to consider and had properly considered the effect of eviction upon the Appellant, bearing in mind her disability. While this finding should not be considered in isolation, but falls to be considered in the context of all the other findings made as to the Respondent's knowledge of and dealings with the Appellant, I cannot see what was wrong with this finding. The role of this finding, as one element in support of the Judge's decision that the Respondent had complied with its PSED, can only be questioned if the law required the Respondent to demonstrate that it had carried out a single specific exercise of considering the effect of eviction upon the Appellant, bearing in mind her disability. It is however clear that this is not the law.

94. In Paragraph 98 the Judge made reference to the acknowledgments in documented discussions that eviction would not go well for the Appellant and would be catastrophic for her. The reference to eviction not going well for the Appellant appears to be a reference to the following point made in the Multi-Agency Meeting, which I have already quoted, from the note of the Multi-Agency Meeting, earlier in this judgment. I repeat what is recorded in the note, for ease of reference:

> *"If TH is evicted she would have to present to our Housing Advice team as homeless and then they would make decision whether or not we have duty to house but, on the basis that TH is to be evicted on breach of tenancy through ASB grounds, the likelihood is that she would be found intentionally homeless and*

would need to seek alternative accommodation herself more than likely through the private sector, which will not work well for TH."

95. It is important to note that this extract from the note of the Multi-Agency Meeting is immediately followed by a discussion of the Appellant's mental health situation. The Judge would therefore necessarily have had this well in mind, in her reference to the documented discussion of eviction not going well for the Appellant. This only serves to reiterate the importance of looking at documents in their entirety, as the Judge did, rather than treating the Judge as having only directed her attention to specific extracts from the documents before her at the trial.

96. The reference to eviction being *"catastrophic"* for the Appellant appears to come from paragraph 9 of the second witness statement of Nicola Rogers, who was heavily involved in providing mental health support to the Appellant and, amongst other involvement with the Appellant, attended the Multi-Agency Meeting. Ms Rogers said the following in paragraph 9 of her second witness statement:

"I do feel that it would be catastrophic for her to lose her home at Flat 4, 24 Liebenrood Road and become homeless."

97. I can see the point that what Ms Rogers said in her second witness statement was not part of any documented discussion at the time when the Respondent was making its decision to pursue the possession claim. This renders it unnecessary, in this context, to deal with Mr Clarke's additional point, in paragraph 44 of his skeleton argument, that the Judge had ruled, at the outset of the trial, that she would not consider any statements of opinion in evidence not admitted as expert evidence. As such, so the argument went, the Judge could not rely on what was said by Ms Rogers, as to the effect of eviction on the Appellant, as evidence that the Respondent had complied with its PSED. I am not entirely convinced that what Ms Rogers had to say in her second witness statement, as to the effect of eviction on the Appellant, did fall to be disregarded by the Judge pursuant to her ruling on statements of opinion. I am not familiar with the detail of the ruling, and I did not hear detailed argument on this point. The relevant evidence came from a mental health professional who clearly knew the Appellant well, and was giving evidence as to her own reaction to the possible eviction of the Appellant. As I have said however, it is not necessary to go into this additional point. I take Mr Clarke's first point that what Ms Rogers said in her second witness statement was not part of any documented discussion at the relevant time.

98. It seems to me however that Mr Clarke's first point is not a material one. It is quite clear from the note of the Multi-Agency Meeting that the Respondent had well in mind, and was considering the effect of eviction on the Appellant in the light of her disability. This was something which the Judge was plainly entitled to take into account in deciding whether the Respondent had complied with its PSED. If the Judge was mistaken in her reference to *"catastrophic"* not appearing in the documented discussions, I cannot see that this was a material error. Equally, the Appellant's criticism of the Judge's reliance upon the note of the Multi-Agency Meeting seems to me only to get off the ground if the Respondent was required to show that the exercise of considering the effect of eviction on the Appellant had to be carried out within the confines of the Multi-Agency Meeting. As I have already noted, this is not the law.

99. Turning to the emails of 25th February 2021, I do not accept that these emails can be dismissed as short functional communications by busy medical practitioners. By contrast, these two emails communicated to the Respondent, at the key time when possession proceedings were being considered, that two medical professionals who were familiar with the Appellant and her disability (Dr Ahmad and Ms Rogers) had serious concerns as to the effect of eviction upon the Appellant, in the light of her disability. Given the terms of these communications, it is very hard to see how the Judge was wrong to reject the argument that the Respondent had failed properly to consider the effect of eviction upon the Appellant, in the light of her disability.

100. Turning to Dr Iles, I can see there are some grounds for questioning the reasoning of the Judge in this particular instance. The Judge stated, in Paragraph 98, that Dr Iles had had two opportunities to address the question of what effect eviction would have on the Appellant, given her disability. With due respect to the Judge, I do not think that this is quite accurate. In the Report and in the Addendum Report, Dr Iles set out the questions he had been asked to consider. They did not include, at least in specific terms, the question of what effect eviction would have on the Appellant, given her disability. The Appellant sought to raise the Additional Questions with Dr Iles by the Expert Evidence Application, but the Expert Evidence Application was refused by District Judge Harrison.

101. This point must however be put into its proper context. As the Judge made clear, in the relevant part of Paragraph 98, she accepted that it was not necessary for Dr Iles to put in a further report addressing the question of the effect of eviction upon the Appellant, *"given the Claimant's long involvement with the Defendant"*. Mr Clarke submitted that the Respondent was, on the facts of this case, obliged to obtain such additional expert evidence. Mr Clarke also however fairly accepted that a public sector landlord was not, in every case, required to obtain expert evidence on the likely consequences of eviction in order to ensure compliance with its PSED. Mr Clarke was, as it seems to me, undoubtedly right in accepting that this was the general position. What however seems to me to follow from this acceptance is that it was very much a matter for the Judge to decide whether, on the facts of this case, additional expert advice should have been obtained by the Respondent on the specific question of the effect of eviction on the Appellant in the light of her disability. The Judge, for the reason which she gave, did not think that this was required. I cannot see a basis for my interfering with this finding of the Judge.

102. There are also some additional points which, it seems to me, must be borne in mind in this particular context.

103. First, the relevant question in this context is whether the Respondent required the benefit of expert medical advice on the specific question of the effect of eviction on the Appellant in the light of her disability, in making its decision to pursue the possession proceedings. In this context I am not sure that what Dr Iles had to say was directly relevant to the question of compliance with the Respondent's PSED. Dr Iles was essentially giving evidence after the event, on the basis that the event was the decision of the Respondent to pursue the possession proceedings. It strikes me as questionable whether evidence given by Dr Iles could have filled the gap if, contrary to the Judge's decision and in order to demonstrate compliance with its PSED, the Respondent had been required to obtain its own expert medical advice on the specific question of the

effect of eviction on the Appellant in the light of her disability. My point is that I am not convinced that evidence from Dr Iles, in relation to the effect of eviction on the Appellant in the light of her disability, was directly relevant to the question of whether the Respondent had, in this respect, complied with its PSED. At best, such evidence might have allowed the Respondent to demonstrate that, by the time of the trial, it had obtained the required expert advice, if it is assumed that expert advice in response to the Additional Questions was required by the Respondent in order to demonstrate compliance with its PSED. Ultimately, the question was whether the Respondent should have obtained its own expert medical advice on the effect of eviction on the Appellant in this light of her disability. As I have said the Judge, for the reason which she gave, did not think that this was required.

104. Second, and putting the point made in my previous paragraph to one side, it was the case, as the Judge recorded, that Dr Iles did consider, at the very end of the Report, that it would not be helpful for the Appellant's tenancy to be taken away from her without an alternative placement being provided. It seems to me, on the basis of the evidence which I have been taken to, that this was a matter which the Respondent already had well in mind and had considered; see, by way of example only, the note of the Multi-Agency Meeting.

105. The third and final point I would add in this context is that I do not accept that the Respondent is correctly characterised as having blocked the attempt of the Appellant to put the Additional Questions to Dr Iles. What in fact happened was that the Respondent resisted the Expert Evidence Application. The decision that permission for the Additional Questions to be put to Dr Iles would be refused was made by the court, not the Respondent. It is very unfortunate that there is no record of the reasons why District Judge Harrison refused permission for the Additional Questions to be put. The second recital to the order made by District Judge Harrison makes reference to the arrangements which needed to be put in place for the trial, given that the Appellant was a vulnerable witness. It is therefore clear that the District Judge had well in mind the Appellant's vulnerability. In these circumstances I suspect that the District Judge's reasons for refusing permission for the Additional Questions would have been illuminating. Unfortunately, they were not available on the hearing of the Appeal.

106. I mention this final point because I found it difficult to accept Mr Clarke's argument that the absence of the Additional Questions being put to Dr Iles constituted a problem for the Respondent rather than the Appellant, if it is assumed that the additional evidence of Dr Iles in answer to the Additional Questions was capable of being relevant to the question of whether the Respondent had complied with its PSED. For the reasons which I have already set out, I am doubtful that the Additional Questions were relevant to the question of compliance with the Respondent's PSED. If however this had been the position, it seems to me that there was considerable merit in the submission of Ms McKeown that it is for the court to decide the scope of the expert evidence required at a trial; see in particular CPR 35.1 and 35.4. Given the decision of the court that the Additional Questions were not required, it strikes me as somewhat perverse for that decision to be relied upon as a reason for saying that the Judge was wrong on the PSED Issue. In the event however I have not found it necessary to go further into this particular issue, given my doubts that the evidence given or not given by Dr Iles was capable of being directly relevant to the question of whether the Respondent had complied with its PSED.

107. Returning to the specific criticism of the Judge's reasoning in Paragraph 98 in this context, it seems to me that it was a matter for the Judge to decide whether the Respondent, in order to demonstrate compliance with its PSED, needed to obtain additional expert medical advice on the specific question of the effect of eviction on the Appellant in the light of her disability. The Judge decided that this was not required. It seems to me, as I have said, that this was a matter for the Judge to decide, on the basis of all the evidence at trial. I can see no grounds on the basis of which I should interfere with that decision.

108. The exercise of working through the specific criticisms made of the Judge's reasoning has the effect of obscuring a further important point. The specific criticisms focus on particular parts of Paragraph 98. Paragraph 98 is not however the sum, nor anywhere near the sum of the Judge's reasoning on the PSED Issue. While it is true that the Judge turned specifically at Paragraph 98 to the question of the effect of eviction on the Appellant in the light of her disability, the Judge's reasoning in Paragraph 98 drew on her previous reasoning and on her findings on the evidence, which were set out in very considerable detail in the earlier parts of the Judgment. I give just two examples of this, and I stress that they are only examples. First, in Paragraph 94 the Judge made specific reference to the Respondent's extensive efforts to provide support to the Appellant, with a sharp focus on the Appellant's diagnoses, including EUPD. Second, in Paragraph 92 the Judge recorded that, by the time the Respondent came to serve a notice seeking possession on the Appellant, *"the Claimant knew the Defendant very well"*. It is clear that the Judge did not treat findings such as these as being somehow sealed off from her reasoning in Paragraph 98. In my judgment the Judge was quite entitled to rely on findings of this kind when she turned to the specific question of whether the Respondent had, as the Appellant contended, failed properly to consider the effect of eviction on the Appellant, in the light of her disability.

109. The overriding point is that in judging the merits of this first limb of the first ground of appeal, it is necessary to consider the findings and reasoning of the Judge as a whole. In my judgment it is wrong to concentrate on parts of Paragraph 98.

110. Drawing together all of the above analysis, I cannot see any basis for interfering with the decision of the Judge that the Respondent did adequately consider, with the required sharp focus, the effect of eviction upon the Appellant in the light of her disability. It seems to me that this conclusion holds good whether one concentrates upon Paragraph 98 and the Appellant's specific criticisms of the reasoning in that Paragraph, or whether one adopts what is, in my view, the correct approach, and considers the reasoning in Paragraph 98 in the context of the Judgment as a whole.

111. I now turn to the second limb of the first ground of appeal, and to the Proportionality Issue. The Appellant's argument is that the Judge was wrong to find that eviction was proportionate, on the basis that the Judge herself failed to consider, with the required sharp focus, the effect of eviction on the Appellant in the light of her disability. The argument in this context is that the Judge should have found that the Respondent had failed to demonstrate that eviction was proportionate, within the meaning of Section 15(1)(b), with the consequence that the possession proceedings did constitute unlawful discrimination against the Appellant.

112. I can take this second limb of the first ground of appeal much more shortly. The Judge's consideration of the Proportionality Issue was largely concerned with the argument of the Appellant that there had been a failure to consider whether there was suitable alternative accommodation which could be made available to the Appellant, which in turn, so it was submitted, rendered the eviction disproportionate. The Judge's consideration of this argument covered much of the same ground as is relevant to the question of whether the Judge assessed the question of proportionality with the required sharp focus on the effect of eviction upon the Appellant in the light of her disability.

113. For present purposes however it seems to me that Paragraph 109 is key, where the Judge said this (underlining also added):

> *"109. As regards the balance between the disadvantage to the Defendant of being evicted against the benefits to the Claimant, their employees and contractors, and the neighbours if the antisocial behaviour is stopped by an eviction: I accept that eviction without alternative accommodation will be very bad for the Defendant's mental and physical health and particular vulnerabilities arising from her EUPD particularly. I have set out the history of allegations of antisocial behaviour and other complaints and behaviours very extensively – perhaps too extensively – for fear of not painting a fair picture of what the Claimant's staff and contractors, neighbours and others such as Forest Care staff have had to deal with from the Defendant over the years. In fact it does not paint a full picture because the sheer volume of calls, voicemails, texts and their abusive content to staff and contractors cannot be understood from my history, and nor, no doubt, can the extent of difficulties, disruption and abuse that has been experienced by the neighbours. The Defendant has made those over-55 neighbours, some elderly and vulnerable themselves, who have been assessed as suitable for sheltered housing, feel unsafe and insecure in their homes such that some of them have asked to leave it. They and other users of the Tunstall system have been put in danger by the Defendant's excessive use of, and damage to the Tunstall system. When it is damaged it cannot be used by some residents to call if they fall or have another emergency, it puts the fire warning and monitoring system at risk: these are real dangers."*

114. Leaving aside, for present purposes, the issue of whether the question of the availability of suitable alternative accommodation was sufficiently considered, it will be noted that the Judge had reached her own conclusion, in the underlined section of Paragraph 109 above, as to the effect of eviction upon the Appellant in the light of her disability. The Judge had concluded that eviction without alternative accommodation would *"be very bad for the Appellant's mental and physical health and particular vulnerabilities arising from her EUPD particularly"*. This was not of course a conclusion which the Judge reached in the abstract. The Judge had the benefit of all the same evidence which she had considered in the context of the PSED Issue. The Judge also had the benefit of the evidence from Dr Iles. While I have my doubts, as I have already explained, that this evidence was evidence upon which the Respondent could rely for the purposes of demonstrating compliance with its PSED, it was evidence upon which the Judge could rely for the purposes of her consideration of the Proportionality Issue. For the purposes of considering the Proportionality Issue, the Judge was not tied to a consideration of what the Respondent should have done, in order to achieve compliance with the PSED Issue, but was entitled to take into account all of the evidence before her.

115. The Judge did not have the evidence of Dr Iles specifically in answer to the Additional Questions, by reason of the court's earlier dismissal of the Expert Evidence Application. I have already mentioned, in the context of the PSED Issue, that I found it difficult to accept Mr Clarke's argument that the absence of the Additional Questions being put to Dr Iles constituted a problem for the Respondent rather than the Appellant, given the decision of the court on the Expert Evidence Application. Again however, I have not found it necessary to go further into this issue. I say this because the Judge decided, in Paragraph 98, that further evidence from Dr Iles was not necessary, given the Respondent's long involvement with the Appellant. This was a decision made in the context of the PSED Issue, but it was a decision which was made on the basis of all the evidence at the trial and it was, as it seems to me, a decision upon which the Judge could rely in the context of the Proportionality Issue. In considering the Proportionality Issue I cannot see that it was necessary for the Judge to have had the answers to the Additional Questions. The Judge had the benefit of all the evidence which she had received on the effect of eviction on the Appellant in the light of her disability and, with the benefit of all that evidence, the Judge reached the conclusion, which I have quoted above, in the underlined text in Paragraph 109. In my judgment, and in the context of the Proportionality Issue, the Judge did not require further expert evidence from Dr Iles in order adequately to consider the effect of eviction on the Appellant in the light of her disability.

116. The criticism of the Judge in this context is that she failed specifically to consider, with the required sharp focus, the effect of eviction upon the Appellant in the light of her disability. In my view it is clear from the Judgment that the Judge did consider this question, with the required sharp focus, and came to a clear conclusion, at Paragraph 109. Unless the Judge required further expert evidence from Dr Iles in order to answer this question, and I can see no basis for interfering with the Judge's decision that she did not require this further evidence, it seems to me that the Appellant's complaint falls away.

117. Drawing together all of my analysis of the first ground of appeal, my conclusion is that the first ground of appeal fails.

<u>The second ground of appeal - analysis</u>

118. As with the first ground of appeal, I take first the Appellant's argument that the Respondent failed to demonstrate that it had complied with its PSED. In the context of the second ground of appeal, the Appellant's argument is that the Respondent failed to consider all the options, in terms of suitable alternative accommodation and, in particular, failed to consider whether there was suitable alternative accommodation available for the Appellant in Reading. The PSED, so it was submitted, required the Respondent to demonstrate that there was no less drastic means of achieving its objective than eviction. By reason of the failure of the Respondent adequately to consider whether suitable alternative accommodation could be made available to the Appellant, so it was submitted, the Respondent had failed to demonstrate that there was no less drastic means of achieving its objective.

119. Ms McKeown contended, in her skeleton argument for the Appeal, that the Respondent's PSED was not a duty to achieve a particular result, but a duty to have regard to the need to achieve the goals identified in paragraphs (a) to (c) in Section

149(1). On this basis, so Ms McKeown submitted, the argument that the Respondent had failed to comply with its PSED, by failing to ensure that suitable alternative accommodation would be available to the Appellant on eviction, must fail.

120. I accept that the Respondent's PSED was not a duty to achieve a particular result. It is clear that the PSED is not a duty to achieve a particular result, but a duty to have due regard to the need to achieve the results identified in Section 149; see Turner J in *London and Quadrant*, at [42] (quoted in an earlier section of this judgment). It seems to me however that Mr Clarke's arguments in support of his case on the PSED Issue, at least as they were developed in oral submissions, did not constitute or involve an argument that the Respondent was under a duty to achieve a particular result. As I understood Mr Clarke's arguments on the PSED Issue, they were to the effect that the Respondent had failed to carry out the required investigation and consideration, both in relation the effect of eviction upon the Appellant in the light of her disability and in relation to the question of whether there was an alternative solution to eviction on the basis of finding suitable alternative accommodation for the Appellant which would resolve, or at least mitigate the problems caused by the Appellant's behaviour in the Flat. As a result, so I understood the Appellant's case, the Respondent failed to demonstrate compliance with its PSED and, further, the Judge's consideration of the Proportionality Issue was fatally flawed.

121. Returning directly to the first limb of the second ground of appeal, the starting point is that I accept the principle which underpins this argument of the Appellant. It is clear from *Stephenson* that, in the context of possession proceedings, the question of proportionality is not to be treated as a binary choice between eviction and doing nothing. All the options have to be considered. The burden is on the landlord to show that no less drastic action would be appropriate. While the analysis of Lewison LJ in *Stephenson* was concerned with the question of proportionality, in the context of whether there had been disability discrimination, I accept that the same analysis can be applied in relation to the question of whether a public sector landlord has complied with its PSED. I accept that there is a linkage between the nature and content of a PSED and the application of the proportionality test in Section 15(1)(b). In order to demonstrate compliance with the PSED, it must be demonstrated by the public sector landlord that all the options have been considered, in relation to the decision to commence possession proceedings.

122. In the present case the argument was put to the Judge that the Respondent had failed adequately to consider the question of suitable alternative accommodation. The Judge dealt specifically with this argument at Paragraphs 99-104. At Paragraph 99, the Judge identified this argument in the following terms:

> *"99. The Defendant submits that Claimant did not adequately consider alternative suitable accommodation in the EA Assessment or otherwise* [So far as that] *is concerned, I do not accept that submission."*

123. There appear to be some words missing from this Paragraph. I have suggested what may have been intended, but whether my suggestion is right or not, the identification of the argument is perfectly clear.

124. The Judge then proceeded to set out her reasons for rejecting this submission. While it is necessary to consider all of Paragraphs 100-104 for this purpose, the two key

Paragraphs, in terms of the Judge's reasoning on this specific argument are Paragraphs 100 and 101, where the Judge said this:

> *"100. Firstly, Flat 24 can be seen as an attempt to put in place alternative suitable accommodation, and the same problems carried from previous accommodation to this despite all the many hours of effort from the Claimant and the many services they sought for the Defendant to engage with.*
>
> *101. Secondly, at most times since 2020 onwards, save for short periods when she*
>
> *has thought otherwise, the Defendant has expressed a wish to move to Devon. The Claimant acknowledged that she was changing her mind about this regularly but when the Defendant said she had absolutely made up her mind and would like support to enable her to bid for housing, the Claimant put that support in place, though her usual support workers but also through their Housing Support Department. It looked for a while as though that would be successful and an offer would be made to her in Barnstable, but it fell through. Although the Claimant then issued possession proceedings, the Defendant continued to express a desire to move to Devon, very soon after those proceedings started and up to 4 November. I accept the Claimant's submission that there would be no purpose to searching for suitable alternative accommodation in Reading if the Defendant was set on moving to Devon to be closer to her family. For those reasons, that criticism is misplaced., in my judgment."*

125. Mr Clarke concentrated his submissions in relation to this part of the Appeal on the fact of the Offer. His point was that the Offer indicated a willingness on the part of the Appellant to stay in Reading, as opposed to a move to North Devon, and that the option of moving the Appellant to suitable alternative accommodation in Reading was not properly explored. The Judge, so Mr Clarke submitted, failed to take the Offer into account and, by concentrating upon the position in relation to a move to North Devon, failed to consider whether the Respondent had carried out the required exercise of considering a move to suitable alternative accommodation within Reading.

126. The problem with these submissions is that they do not, in my judgment fairly reflect the reasoning of the Judge. At Paragraph 100 the Judge picked up a point which she had already made at Paragraph 98; namely the history of the Appellant's accommodation. As the Judge pointed out, the Appellant had been evicted from her previous accommodation, and was then housed in temporary accommodation, prior to being moved to the Flat. As the Judge noted, at Paragraph 98, that previous accommodation had not gone well. The history of this previous accommodation, as found by the Judge, can be read in Paragraphs 29-33. As the Judge found, the Appellant had previously been in a private rented flat, from which the Appellant was evicted against a background of complaints about the Appellant's behaviour. The Appellant was then housed in temporary accommodation where, by the Appellant's own admission (see Paragraph 33) the same problems with the Appellant's behaviour occurred as were subsequently to occur in relation to the Flat. It seems to me that the Judge was quite entitled to take all this into account, in her consideration of what was required of the Respondent in this context, in order to demonstrate compliance with its PSED. As the Judge pointed out, the same problems of behaviour carried over from the Appellant's previous accommodation *"despite the many hours of effort from the*

Claimant and the many services they sought for the Defendant to engage with". Given the Respondent's extensive experience of trying to provide the Appellant with suitable accommodation, I take the Judge's essential point, in Paragraph 100, to have been that the Respondent was entitled, on the basis of this experience, to conclude that eviction was indeed the only option; all other options having effectively been exhausted.

127. It is instructive to contrast the facts of the present case with those in *Stephenson*, so far as those facts can be ascertained from the judgment of Lewison LJ and from the report of the case with which I have been provided. In *Stephenson* there does not appear to have been anything equivalent to the history of dealings between the parties which occurred in the present case. In *Stephenson* the appellant was granted an introductory tenancy of a flat by the local authority. Following complaints from neighbours, which were principally concerned with the noise emanating from the flat, the council sought possession of the flat. The appellant suffered from paranoid schizophrenia, which engaged the question of disability discrimination and thus the question of proportionality. So far as I can see from the report of *Stephenson* with which I have been provided, there was no equivalent in that case to the extensive history of dealings between the Respondent and the Appellant upon which the Judge relied in the present case. In *Stephenson* therefore, in contrast to the present case, there was no history of previous attempts by the council to address the problems created by the appellant's disability. All this seems to me to support the point that the Judge was entitled to take into account the history of the Respondent's dealings with the Appellant, including the history of the Appellant's accommodation in various properties, in deciding whether the Respondent had demonstrated compliance with its PSED.

128. Turning to the Judge's reasoning in Paragraph 101, I do not think that the Judge did fail to take the Offer into account. As the Judge pointed out, the Appellant continued to express a wish to move to North Devon *"up to 4 November"*. This date (4th November 2022) was the date of the Offer. The trial commenced the following Thursday, 10th November 2022. The reference to 4th November 2022 cannot have been a random reference, it must have been a reference to the date of the Offer, from which it can be inferred that the Judge had the Offer well in mind. This is in fact further corroborated by Paragraphs 85 and 86, where the Judge made findings in relation to the Appellant's wish to move to Devon, in the following terms:

> *"85. The Defendant has, generally speaking, continued to express her desire to move to Devon, save that by the time of a housing triage assessment completed by Mr Roberts-Doyle on 3 May 2022, the Defendant was saying that she would rather stay in Reading than move to Devon. However just a month or so later, on 10 June 2022 she had reverted to saying that she does want to move to North Devon, because "Reading is too much for her head now" and "She never wanted to be in Berkshire."*
>
> *86. It was noted in a November 2022 update to a Housing Triage assessment of 5 May 2022 that she is in two minds about Devon: "one minute she wants to go there and one minute she wants to stay in Reading" but says that "She has come to the decision she wants to be in Devon not Reading… on home choice for Barnstable council." I am told that up until a week or so before the trial she was expressing a desire to move to Devon."*

129. I refer to the last sentence of Paragraph 86. Again, the reference to *"a week or so before the trial"* cannot have been a random reference. It corresponds to the date of the Offer and, in my view, demonstrates that the Judge had the Offer well in mind.

130. It is not surprising that the Judge did not attach much importance to the Offer. The Judge had already made the findings I have quoted above, in Paragraphs 85 and 86, in relation to the Appellant's desire to move to Devon. As the Judge found, the Appellant had previously come to a decision that she wanted to be in Devon, and had expressed that desire up until a week or so before the trial. Returning to the Judge's reasoning in Paragraph 101, I cannot see that the Judge was wrong to take into account the Appellant's previously expressed desire to move to Devon, and the support offered by the Respondent in that respect, in her determination of whether the Respondent had complied with its PSED in relation to the question of suitable alternative accommodation. The relevant point was that the Appellant had previously expressed a desire to move to Devon. The Respondent had supported the Appellant in realising her desire to move to Devon. The project failed, because the Respondent was obliged to disclose to Sanctuary Housing the Appellant's previous conduct. Equally I cannot see that the Judge was wrong to accept the Respondent's submission that there would be no purpose to searching for suitable alternative accommodation in Reading, if the Appellant was set on moving to Devon. Given that the Judge was, in this part of the Judgment, considering the question of whether the Respondent had complied with its PSED in making its decision to pursue possession proceedings, it seems to me that the Judge's point was a reasonable one.

131. In this context, there are two further points be made about the Offer, which are relevant both to the PSED Issue and the Proportionality Issue.

132. First, the Offer was made very late, a few days before the trial commenced. If the Offer is taken, as Mr Clarke submitted, as indicating a willingness on the part of the Appellant to move within Reading, this expression of willingness came very late. In the context of the question of whether the Respondent had complied with its PSED, in terms of considering all the options for suitable alternative accommodation, I do not accept that the Offer, given its timing, should be treated as effecting the change in the landscape contended for by Mr Clarke.

133. Second, I have accepted that the Offer should be treated as an expression of willingness on the part of the Appellant, albeit a belated one, to move within Reading. For the reasons which I have given, it seems to me that the Judge adopted the same approach. I do however have considerable reservations about treating the Offer in this way. The Offer was an offer of settlement of the possession proceedings. It seems to me however that the terms of the Offer effectively required capitulation on the part of the Respondent. I refer to the terms of the Draft Order, which I have already set out. As I read the recitals to the Draft Order, they committed the Respondent to an agreement that the Appellant's eviction from the Flat without suitable alternative accommodation being available to her would not be a proportionate means of achieving a legitimate aim. Eviction would be a proportionate means of achieving a legitimate aim if suitable alternative accommodation within Reading was available to the Appellant upon her eviction. If therefore the Respondent had agreed to the terms of the Draft Order, it would have been committed to this position in any resumption of the trial pursuant to the terms of the Draft Order. In other words, at any resumed trial, the Respondent

would have been committed to a position whereby it could not have argued that eviction without suitable alternative accommodation being available to the Appellant was proportionate. The Respondent would thereby have surrendered its central case in this action.

134. Mr Clarke contended that this was not the effect of the relevant recitals to the Draft Order, and that it would have been open to the Respondent to resume its claim for possession, and its argument that it was not required to demonstrate the availability of suitable alternative accommodation, at any resumption of the trial. So far as this contention was based upon construction of the relevant recitals to the Draft Order, I do not agree. It seems to me, as a matter of construction of the relevant recitals, that they had the effect which I have just set out. Mr Clarke argued that the Respondent could, in this context, have relied upon *Paragon* to contend, at any resumed trial, that although eviction without suitable alternative accommodation would have been disproportionate at the date when the Offer was accepted, eviction without suitable alternative accommodation would have been proportionate at the date of the resumed trial. I do not accept this argument. I cannot see how *Paragon* could have been relied on for this purpose, given the terms of the recitals to the Draft Order. To my mind, there was a serious problem with the drafting of the recitals, in that they committed the Respondent to a position on proportionality from which, so far as I can see, there was no obvious escape route at any resumed trial, either as a matter of construction or by reliance upon the principle in *Paragon*.

135. As I have said, I have been prepared, in common with the Judge, to treat the Offer as an expression of willingness on the part of the Appellant to remain within Reading, with the consequence that the Offer did fall to be taken into account at the trial, as such an expression of willingness, in relation to the PSED Issue and the Proportionality Issue. That said, it is right that I should record my reservations in this respect, as I have set them out in my two previous paragraphs.

136. Returning specifically to the Judge's reasoning in Paragraph 101, my discussion of this reasoning might be taken to mean that the Judge confined her reasoning, on the question of whether the Respondent had adequately considered suitable alternative accommodation, to the point that the Appellant had previously expressed a desire to move to Devon, so that there was no purpose in the Respondent considering a move to suitable alternative accommodation within Reading. The Judge's reasoning was not however so confined. I say this for two reasons.

137. First, there was the point made by the Judge at Paragraph 100, concerning the Appellant's accommodation history, which I have already mentioned.

138. Second, this part of the Judge's reasoning did not end at Paragraph 101. The Judge went on to consider the question of whether the Respondent had demonstrated compliance with its PSED in broader terms. The ultimate conclusion of the Judge, at Paragraph 104, was in the following terms:

> *"I am satisfied in reaching the decision to seek possession and to continue with the possession proceedings, they did give due regard to the factors and have complied with the PSED."*

139. This is not a conclusion which I can or should ignore. One of the factors the Judge had been asked to consider, as a factor which (so it was submitted) the Respondent had failed to address, was whether the Respondent had sufficiently considered whether suitable alternative accommodation could be found for the Appellant; see Paragraph 99. The Judge's reference to *"the factors"* must therefore have included this particular factor. The Judge read and heard all the evidence at trial. On the basis of that evidence the Judge was satisfied that the Respondent had given due regard to all the factors and had complied with the PSED. I cannot see any grounds upon which I can or should interfere with this conclusion of the Judge.

140. In this context Mr Clarke contended that Mr Roberts-Doyle had accepted, in his oral evidence at the trial, that no inquiries had been made as to types of accommodation which might address, or at least mitigate some of the issues with the Appellant's conduct. For this purpose, I was shown a transcript of the oral evidence of Mr Roberts-Doyle at the trial. The Judge did in fact address this particular argument, in her discussion of the Proportionality Issue at Paragraph 108. In the material part of Paragraph 108, the Judge said this:

> *"However looking at the possibility of a move within Reading for the purposes of proportionality, Mr Clarke raised various possibilities: the Claimant could move the Defendant to a flat without a Tunstall system (that would solve only a part of the problem); the Claimant could move the Defendant to accommodation with sufficient support but without proximate neighbours (if such a thing exists in Reading). Mr Roberts-Doyle's evidence was that Flat 24 was an attempt to provide such accommodation and he could not, in the witness box, think of any other such supported accommodation, without* ***any*** *proximate neighbours, which exists in the borough. Of course such accommodation would also have to be available. Ms McKeown submits that it cannot be the case that the Claimant is required to maintain the Defendant in her current tenancy indefinitely to await housing in such accommodation which may not exist and I accept this as a risk to be weighed in the balance."*

141. While the Judge said this in the course of her discussion of the Proportionality Issue, it seems to me that it was equally available to be relied upon by the Judge in relation to the PSED Issue.

142. Mr Clarke's case on the evidence of Mr Roberts-Doyle was that it had been accepted by Mr Roberts-Doyle that no inquiries had been made by the Respondent as to the types of accommodation which might address or mitigate some of the issues with the Appellant's conduct. For this purpose, Mr Clarke referred me to extracts from the transcript of the oral evidence of Mr Clarke.

143. Referring an appeal court to extracts from the transcript of the oral evidence at the relevant first instance trial is, in my experience, rarely a productive exercise. One is inevitably seeing only a part of the oral evidence of the relevant witness, and the position is rarely as clear cut as the appellant seeks to suggest. If one reads around the relevant extract in the transcript, one often finds that what the relevant witness is said to have admitted or conceded is qualified or even contradicted by what the relevant witness said elsewhere. This is of course the essential problem with looking at extracts from a transcript of the oral evidence of a witness. The first instance judge will have had the advantage of hearing all the evidence of the relevant witness, and all the other

evidence at the relevant trial. The trial judge will also have had the advantage of seeing the relevant witness. The appeal court will not have had any of these advantages.

144. These problems were borne out in the present case. The position was nowhere near as simple as Mr Clarke suggested. The transcript shows that it was put to Mr Roberts-Doyle that the problems experienced with the Appellant could be mitigated or removed by moving the Appellant to a different type of property, such as a detached bungalow, so as not to be in close proximity to others. The relevant extract from the cross examination of Mr Roberts-Doyle, in which Mr Roberts-Doyle answered this question and a related series of questions is too lengthy to set out in full in this judgment. It is however quite clear from this part of the cross examination that Mr Roberts-Doyle, as the Judge recorded at Paragraph 108, (i) did consider that the provision of the Flat had been an attempt by the Respondent to provide the kind of supported accommodation which was required and (ii) could not think of any supported accommodation without proximate neighbours.

145. Again, a comparison with *Stephenson* is instructive. In *Stephenson* the problem was that the local authority had not explored the options, in terms of intermediate steps *"short of throwing Mr Stephenson out on the street"*. In the present case the position was different. As the Judge found, the Respondent had extensive experience of dealing with the Appellant and had tried, through the provision of the Flat, to put in place suitable alternative accommodation. This did not solve the problems *"despite all the many hours of effort from the Claimant and the many services they sought for the Defendant to engage with"* (Paragraph 100). It is very difficult to see what intermediate steps were left which the Respondent might have been required to explore in order to demonstrate compliance with its PSED. More importantly, the Judge was satisfied, applying the test in *Aster*, at [32], that the Respondent had done all that could reasonably be expected of it to accommodate the Appellant's disability; see Paragraph 104. This in turn led on to the Judge's conclusion, which I have already quoted from the end of Paragraph 104, that the Respondent had complied with its PSED.

146. It is worth adding, in this context, that the Judge made a specific finding, in Paragraph 98, to the following effect:

> *"The Claimant has treated this case as one where eviction should try to be avoided at all costs (that too is documented) because of the detrimental impact it will have on the Claimant's mental health."*

147. This finding was made in the context of the impact of eviction on the Appellant, in the light of her disability. The finding may therefore be said to be more relevant to the first ground of appeal. Nevertheless, it seems to me that the finding also has significance in relation to the second ground of appeal because it is not consistent with an argument that the Respondent failed to consider all the options for dealing with the problems created by the Appellant's behaviour, either in terms of finding some other suitable alternative accommodation or otherwise.

148. Ultimately, and drawing together all of the above analysis, the Judge was satisfied that the Respondent had done sufficient, in relation to the question of whether some other suitable alternative accommodation might be found for the Appellant, either in Devon or in Reading, to demonstrate compliance with its PSED. I cannot see any basis on which I can or should interfere with that decision of the Judge.

149. I now turn to the second limb of the second ground of appeal, and to the Proportionality Issue. The Appellant's argument is that the Judge was wrong to find that eviction was proportionate, on the basis that the Judge herself had to consider all the options in this context and, specifically, the question of whether there was suitable alternative accommodation available to the Appellant in Reading. The Judge was not able to carry out this exercise because, so it was submitted, the Respondent had adduced no, or no sufficient evidence which permitted consideration of this question. In particular, so it was submitted, the Judge failed to take into account the implications of the Offer, which required consideration of whether suitable alternative accommodation was available in Reading. In the absence of that question being investigated by the Respondent, the Respondent had failed to demonstrate that eviction without suitable alternative accommodation being available was proportionate, and the Judge should so have found.

150. The Judge dealt with the Proportionality Issue at Paragraphs 105-110, although Paragraph 105 was concerned with the Judge's finding that the breaches of the Tenancy arose in consequence of the Appellant's disability. That finding is not challenged in the Appeal.

151. In relation to the Appellant's submission that there was a failure to consider the options, in terms of suitable alternative accommodation in Reading, I have already set out the key part of the Judge's reasoning, at Paragraph 108. In this context it is necessary to set out the whole of Paragraph 108 (the bold print is not added):

> *"108.I have already considered and dealt with the Defendant's main submissions that there were other, less drastic means of solving the problem. It is of key relevance that the Defendant has accepted that eviction* ***with*** *suitable alternative accommodation arranged would be proportionate, and so her argument on the third and fourth stages is limited to a submission that disproportionality arises from the failure to arrange suitable alternative accommodation. I have already explained that I do not think criticism of the Claimant's failure to offer alternative accommodation, by way of management move or otherwise, is fair in circumstances where the Defendant has repeatedly stated that she does not want to stay in Reading and wants to move to Devon. The Claimant, of course, has no power to arrange suitable alternative accommodation in Devon although it has been assisting the Defendant in her search there. However looking at the possibility of a move within Reading for the purposes of proportionality, Mr Clarke raised various possibilities: the Claimant could move the Defendant to a flat without a Tunstall system (that would solve only a part of the problem); the Claimant could move the Defendant to accommodation with sufficient support but without proximate neighbours (if such a thing exists in Reading). Mr Roberts-Doyle's evidence was that Flat 24 was an attempt to provide such accommodation and he could not, in the witness box, think of any other such supported accommodation, without* ***any*** *proximate neighbours, which exists in the borough. Of course such accommodation would also have to be available. Ms McKeown submits that it cannot be the case that the Claimant is required to maintain the Defendant in her current tenancy indefinitely to await housing in such accommodation which may not exist and I accept this as a risk to be weighed in the balance."*

152. There are a number of points to be made on Paragraph 108.

153. First, the Judge reiterated her point that it was unfair to criticise the Respondent for a failure to offer alternative accommodation in circumstances where the Appellant had repeatedly stated that she wanted to move to Devon, and where the Respondent had sought to support the Appellant in implementing that wish. For the reasons which I have already set out in my analysis of the first limb of this second ground of appeal, I do not think that the Judge was wrong in making this point.

154. Second, the Judge did not overlook the Offer, again for the reasons which I have already set out in my analysis of the first limb of this second ground of appeal.

155. Third, the Judge did consider the possibility of a move within Reading, for the purposes of proportionality. As the Judge recorded, Mr Clarke contended that there were other possibilities which required to be considered. The Judge was clearly not persuaded that these were realistic possibilities, for the reasons which she gave in Paragraph 108. I cannot see that there was anything wrong with this part of the Judge's reasoning; see my analysis of Paragraph 108 in relation to the first limb of this second ground of appeal.

156. Fourth, and concentrating upon the final part of Paragraph 108, the Judge accepted the submission of Ms McKeown that the Respondent could not be required to maintain the Tenancy indefinitely, in order to await housing in suitable alternative accommodation which might not exist. Given the history of the Respondent's dealings with the Appellant, including in relation to the provision of accommodation, and given the inability of Mr Roberts-Doyle to identify any form of accommodation within Reading, alternative to what was provided by the Flat, which might be suitable for the Appellant, it seems to me that the Judge was entitled to accept the submission that the Respondent could not be expected to maintain the Tenancy indefinitely.

157. In summary, the position seems to me to be this. The second limb of the second ground of appeal is based upon the argument that there was insufficient evidence of consideration by the Respondent of the possibility of finding suitable alternative accommodation for the Appellant within Reading. As a result, so it is contended, the Judge was not equipped with the evidence which she required, in this context, properly to consider the Proportionality Issue, and thereby wrong in her consideration of the Proportionality Issue. In my judgment the argument in support of the second limb of the second ground of appeal has not been made good. For the reasons which I have set out, it seems to me that there was sufficient evidence in this context for the Judge properly to consider the Proportionality Issue. I cannot see that the Judge went wrong in her treatment of this evidence, which was of course pre-eminently a matter for the Judge.

158. Beyond this however, the Judge had to carry out a balancing exercise in relation to the Proportionality Issue. In Paragraph 110, the Judge said this:

> *"110.I am satisfied after considering all the evidence and carrying out a balancing exercise that eviction of the Defendant without alternative suitable accommodation is a proportionate means of achieving what is accepted to be a legitimate aim, and maintaining her tenancy until suitable alternative accommodation can be found in the Borough of Reading would*

be disproportionate and cause unacceptable risk to the neighbours and others, and to property, all of which rely on the Claimant to protect them from those risks."

159. While I do not say this by way of criticism of Mr Clarke, the concentration in the Appeal upon specific ways in which it is argued that the Judge went wrong in her consideration of the Proportionality Issue tended to obscure the point that the Judge had to carry out a balancing exercise. What weighed heavily in the scales for the Judge was the effect of the Appellant's behaviour on her neighbours and others and on property. Given the Judge's findings in relation to the Appellant's behaviour, I take the reference to property to include both the Flat and the Block, and the chattels and fixtures within that property, such as furniture and the Tunstall system. The Judge stressed the effect of the Appellant's behaviour at a number of points in the Judgment, pursuant to the findings which she made in respect of the Appellant's behaviour. I have set out earlier in this judgment what the Judge said in Paragraph 109. The findings made in that Paragraph are very serious and bear further repetition. As the Judge found:

> *"I have set out the history of allegations of antisocial behaviour and other complaints and behaviours very extensively – perhaps too extensively – for fear of not painting a fair picture of what the Claimant's staff and contractors, neighbours and others such as Forest Care staff have had to deal with from the Defendant over the years. In fact it does not paint a full picture because the sheer volume of calls, voicemails, texts and their abusive content to staff and contractors cannot be understood from my history, and nor, no doubt, can the extent of difficulties, disruption and abuse that has been experienced by the neighbours. The Defendant has made those over-55 neighbours, some elderly and vulnerable themselves, who have been assessed as suitable for sheltered housing, feel unsafe and insecure in their homes such that some of them have asked to leave it. They and other users of the Tunstall system have been put in danger by the Defendant's excessive use of, and damage to the Tunstall system. When it is damaged it cannot be used by some residents to call if they fall or have another emergency, it puts the fire warning and monitoring system at risk: these are real dangers."*

160. These very serious findings were an integral part of the balancing exercise which the Judge was required to carry out. I do not think that they can be separated out from the specific issue of whether the Judge adequately considered the questions of whether suitable alternative accommodation could be provided within Reading and whether there was a less drastic option than eviction. The risks and dangers of allowing the Appellant to remain in the Flat, which the Judge saw as very serious, seem to me to have been part and parcel of what fell to be taken into account in considering whether it was actually feasible to find some other suitable alternative accommodation for the Appellant. The Respondent clearly did not consider this to be a feasible course of action, either before or after the Offer was made. The Judge clearly took the same view. I cannot see that the Judge was wrong to take this view. To the contrary, it seems to me that the Judge was more or less compelled to this view, given her findings on the evidence, as those findings are set out in the Judgment.

161. In conclusion, in relation to the second limb of this second ground of appeal, I cannot see that the Judge went wrong in relation to the question of whether there was a less drastic option than eviction available. In the particular circumstances of this case, and

on the basis of her findings on the evidence, it seems to me that the Judge was right to find that it was proportionate for the Appellant to be evicted, and was right for the reasons which she gave.

162. Drawing together all of my analysis of the second ground of appeal, my conclusion is that the second ground of appeal fails.

Other points

163. In his skeleton argument for the hearing of the Appeal Mr Clarke advanced various additional points in support of his argument that the Respondent failed to comply with its PSED. In oral submissions, as I have already explained, Mr Clarke restricted his arguments to the two grounds of appeal which I have summarised earlier in this judgment. For the sake of completeness, I should make it clear that in my view Mr Clarke was correct to confine his case to the two grounds of appeal. I do not think that the additional points added anything to these grounds of appeal or had any merit as independent arguments in support of the Appeal.

The outcome of the Appeal

164. The outcome of the Appeal is that the Appeal fails. The Appeal therefore falls to be dismissed.

An additional point

165. I add one final point in relation to this most unfortunate case. No court would wish, if this could be avoided, to make an order for possession or to uphold an order for possession which will leave a 62 year old woman, with a disability, in a state of homelessness. As against that, the Judge made very serious findings as to the problems created by the Appellant's behaviour, in terms of the risks and dangers to persons and property. The Judge also accepted the evidence of Dr Iles that the Appellant was capable of regulating her own behaviour, and could be considered responsible for her own actions; see Paragraph 104.

166. In this context it is particularly unfortunate that the Appellant's behaviour does not appear to have improved since the making of the Possession Order. In Paragraph 111 the Judge expressed the hope that the Appellant would try to manage her behaviour within the period of time the Judge allowed to the Appellant to vacate the Flat. In the judgment which I delivered, on the hearing of the renewed application for permission to appeal, I also expressed the hope that the Appellant would try to manage her behaviour while the stay of execution remained in place. By the time of that hearing, I had received a second witness statement of Georgina Tully, Principal Solicitor in the Housing and Civil Litigation Team of the Respondent. In that second witness statement, which was dated 25th April 2023, Ms Tully gave evidence of reports received by the Respondent of continuing anti-social behaviour on the part of the Appellant, similar to the behaviour found by the Judge.

167. The evidence in the second witness statement of Ms Tully was not tested at the hearing of the permission application, and I was not in a position to make any findings on the content of that witness statement. Since then however matters have moved on. The Respondent has made an application to court for committal of the Appellant, on the basis that her continuing behaviour had put her in breach of the injunction which had been ordered by Deputy District Judge Nicholson. The injunction, as amended by the

Judge, remains in place and imposes controls on the Appellant's behaviour. The committal application came before District Judge Harrison on 23rd May 2023. The Appellant was present at that hearing and was represented by counsel. The substantive hearing of the committal application was adjourned to be relisted, but I note that there is a recital to the order made by District Judge Harrison which records the Appellant's admission of a number of instances of anti-social behaviour in February, March and April 2023, constituting breaches of the injunction. The purpose of the adjourned hearing is to consider sentencing for breaches of the injunction. I assume that the relevant breaches are those admitted in the recital to the order.

168. I have not thought it right, in my decision on the Appeal, to take into account this further anti-social behaviour of the Appellant, as admitted in the recital to the order of District Judge Harrison. The behaviour postdates the Judgment, which is what I have been concerned with in the Appeal. The fact that the behaviour has continued may however be said to reinforce the conclusion which the Judge reached; namely that in the present case, and however unpalatable this may be, there really is no option but the eviction of the Appellant from the Flat.