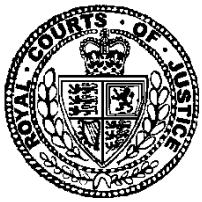

Neutral Citation Number: [2019] EWCA Civ 1334

Case No: A2/2019/0242

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HONOURABLE MRS JUSTICE CHEEMA-GRUBB DBE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2019

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE BEAN
and
THE RIGHT HONOURABLE LORD JUSTICE MOYLAN

- -

Between:

STEVEN FORWARD	**Appellant**
- and -	
ALDWYCK HOUSING GROUP LIMITED	**Respondent**

- -
- -

Mr Toby Vanhegan, Mr Nick Bano & Ms Hannah Gardiner (instructed by **Arkrights Solicitors**) for the **Appellant**
Mr Nicholas Grundy QC & Ms Millie Polimac (instructed by **Devonshires Solicitors LLP**) for the **Respondent**

Hearing dates: 16th July 2019

- -

Approved Judgment

Lord Justice Longmore:

Introduction

1. In the courts below the Aldwyck Housing Group Ltd (whom I will call "the landlord") admitted that the defendant Mr Steven Forward was physically disabled and that it had failed to comply with its public sector equality duty ("PSED") under section 149 of the Equality Act 2010 before seeking and obtaining a possession order on the grounds that Mr Forward had breached his tenancy agreement and had been guilty of conduct causing a nuisance or annoyance to persons residing nearby. The main question arising on this appeal is as to the consequences of that breach of duty and, in particular, the degree to which the court should assess whether it would have made any difference if the landlord had complied with its duty.

2. Mr Forward's physical disability was that he had severe back, hip and knee pain on the right side of his body. Mr Forward also asserted that he was mentally disabled because he suffered depression, anxiety and had a personality disorder but the district judge was not satisfied on the evidence that Mr Forward suffered from any mental disability. That issue therefore fell out of the picture.

3. The landlord is a social housing association and, since it exercises public functions, comes under the duty imposed by section 149 of the Equality Act in the exercise of those functions. In broad terms this duty is to have due regard to the need to eliminate discrimination, advance equality of opportunity for disabled persons and to foster good relations between disabled and non-disabled persons. This involves having due regard to the need to remove or minimise disadvantages suffered by disabled persons, to take steps to meet their needs and to encourage them to participate in public life. Such steps include steps to take account of disabled persons' disabilities.

4. Section 149 of the Equality Act provides:-

> "**149 Public sector equality duty**
>
> (1) A public authority must, in the exercise of its functions, have due regard to the need to –
>
> a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
>
> 2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

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

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

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

   c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

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

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

   a) tackle prejudice, and

   b) promote understanding.

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

7) The relevant protected characteristics are –

   disability;

   …"

Background facts

5. These are set out in detail in the judgments of Judge Wood at Watford County Court and Cheema-Grubb J on appeal from that decision. For present circumstances they can be summarised in the following way.

6. In 2013 the landlord granted an assured tenancy to Mr Forward of a flat at 34 Wilmington Close, Watford. Problems began in early 2017. On 12th February a visitor of Mr Forward arrived at the property late at night, banging on the door, using the buzzer, shouting and swearing, demanding to be let in and threatening violence. A week later on 19th February one of Mr Forward's visitors was assaulted with some sort of instrument in the flat by another visitor Mr Dejuan Davis. In response to that assault the police attended the flat in the early hours of 20th February and found five

visitors, class A drugs in the form of cocaine and drug-dealing paraphernalia. Mr Davis was found to be using the property to cut drugs in preparation for sale. The police arrested three of the visitors two of whom later pleaded guilty to a charge of possessing cocaine and the other to possessing cannabis. On 28th March 2017, two of Mr Forward's visitors, who were known drug users, pushed past one of Mr Forward's neighbours to force their way into the apartment block and then entered the property.

7. On 24th February the landlord (by its housing officer Ms Anne Ronan) wrote to Mr Forward with a formal warning in relation to the reported anti-social behaviour of his visitors. On 21st March Ms Ronan and Ms Sharon Savage (the landlord's area housing manager) met Mr Forward and a friend of his at the property. They asked Mr Forward if they could provide any support to help him keep people away from the property, but he did not take up that offer. They warned him that there might have to be court proceedings if there was no improvement in the situation.

8. On 7th April the landlord served on Mr Forward a notice of intention to seek possession. Between 26th April and 10th May 2017 Watford Borough Council arranged for a security officer to monitor access to the block; the situation improved but attempts by suspected drug users to gain access to the property continued. There was then a meeting on 11th May 2017 at Watford Council premises in relation to the implications for Mr Forward's tenancy of the notice seeking possession. This meeting was attended by Mr Forward and his daughter, Ms Savage and Ms Ronan and Mr Liam Fitzgerald, the Community Safety Co-ordinator for Watford Borough Council. Mr Fitzgerald said he would send Mr Forward the names of persons who should not be visiting him and it was made clear that if Mr Forward's association with them continued, the landlord would issue proceedings for possession. Those names and that formal warning were communicated to Mr Forward on or about 19th May 2017, but the landlord continued to receive complaints in relation to the property from the neighbours.

9. On 23rd May 2017 the police executed a warrant at the property and again found evidence of Class A drugs and drugs paraphernalia. Two days later the police obtained a closure order from Central Hertfordshire Magistrates Court which was later extended for a further 3 months. Since that date Mr Forward has had to fend for himself.

10. On 19th July the landlord issued a claim for possession relying on grounds 12 and 14 of schedule 2 of the Housing Act 1988, namely that Mr Forward was in breach of the obligations of the tenancy agreement (in particular, causing a nuisance and using the property for illegal purposes) and that he was guilty of conduct causing or likely to cause a nuisance. The claim form was served on 16th August; a defence was filed on 18th September 2017 and a trial took place before Judge Wood in January 2018. In March 2018 she found the breaches of the tenancy agreement and the allegations of nuisance established and an order for possession was made on 12th March 2018.

11. When the arrests were made on 20th February 2017 the police considered that what was happening in Mr Forward's flat was typical of what they called "cuckooing" where those operating a drugs line run by mobile telephone take over the address of a vulnerable person and use it to deal in drugs. In cross-examination Ms Savage said that she knew the local police believed that Mr Forward was being exploited but she

preferred the evidence of neighbours who thought that he was dealing in drugs himself.

12. This was of some importance because after the proceedings had begun but before trial, Ms Savage had conducted a PSED assessment on 21st September 2017 but she accepted in cross-examination that it had been inadequate because, although she was aware of Mr Forward's disability, she had not obtained any medical advice about it and because she had not done the assessment with an open mind; she had not considered any alternative to the possession proceedings which were already in train and had preferred the residents' views to those of the police in relation to Mr Forward's use of drugs. The result of this was that it was common ground before both Judge Wood and Cheema-Grubb J that there had been a breach by the landlord of its public sector equality duty (see High Court judgment para 29).

The judgments

13. Judge Wood did not accept that Mr Forward was subjected to cuckooing (or "cocooning" as she called it). At paras 86-87 of her judgment she rejected Mr Forward's evidence that people were coming to the property without his permission and she concluded that Mr Davis in particular was rightly to be described as Mr Forward's visitor. She also rejected his assertion of any mental impairment and made the important finding (para 156) that there was no causal link between Mr Forward's physical disability and the anti-social behaviour occurring at the premises. That was fatal to the defence of direct discrimination asserted pursuant to section 15 of the Equality Act since the landlord had not decided to claim possession because of his disability.

14. The defence of indirect discrimination pursuant to section 19 of the Equality Act also failed because, even if it could be said that the landlord's practice of seeking possession on anti-social behaviour grounds put Mr Forward at a particular disadvantage because of his disability, that practice was a proportionate means of achieving the legitimate aim of reducing the incidence of anti-social behaviour at the block for the benefit of other tenants and preventing the property from being used for the purpose of drug dealing. The eviction of Mr Forward did not exceed what was necessary to achieve that aim since there was no potential alternative of achieving that aim. The decision was also proportionate in striking a fair balance between the need to reduce anti-social behaviour and the disadvantages that Mr Forward would suffer by reason of the order for possession.

15. Neither of these matters was appealed to the High Court judge. Judge Wood considered the breach of section 149 but rejected that as a defence relying on Hertfordshire County Council v Davis [2017] EWHC 1488 which had, in fact, been reversed by this court shortly before she gave judgment. She added, however, that even if it had provided a defence, she would have rejected it for the same reasons as she had rejected the defence of indirect discrimination; the possession order was, in any event, a proportionate means of achieving a legitimate aim. It is this aspect of Judge Wood's judgment that was appealed to Cheema-Grubb J and is now appealed to this court by permission of McCombe LJ.

16. Cheema-Grubb J rejected an application by the landlord to adduce new evidence of subsequent PSED assessments and an application by Mr Forward to adduce new

evidence of mental incapacity. She said that Judge Wood had erred in two respects (a) by relying on the decision in Davis which, unknown to her, had been overturned by the Court of Appeal and (b) by relying on her findings as to proportionality in relation to the indirect discrimination defence in support of her decision that the possession order should be granted despite the PSED breach. That was because compliance with PSED involved more than a proportionality assessment, namely a rigorous consideration of the impact of the decision to seek possession against the objectives encapsulated in the PSED.

17. She said, however, that these errors were immaterial because the court could be satisfied that the landlord could and would legitimately make the same decision if now required to do a proper assessment and that Judge Wood would herself have so concluded if she had carried out a structured enquiry about the consequences of the breach of the section 149 duty. Cheema-Grubb J said (para 45):-

> "In my judgment therefore, whilst of course Judge Wood did not carry out a structured enquiry, believing that it was unnecessary, her judgment shows that she regarded the enforcement of a possession order as a proportionate means of achieving a legitimate aim. She had to consider the reasonableness of permitting the order, and enforcement if necessary in due course. If she had applied her mind to the broader considerations of s.149 Equality Act she would inevitably have come to the same answer. The failure to have due regard to the important matters set out in s.149 in the structured way required by the legislation was not a material error in this case. Looked at from the other end of these proceedings, it would be wholly unfair and disproportionate for me to allow this appeal because of the errors in Judge Wood's approach when the entitlement of the respondent to seek eviction and the reasonableness of making the order sought, have already been clearly established on the facts of this case. For these reasons I conclude that there is no merit in the appeal and I dismiss it."

Submissions

18. Mr Toby Vanhegan for Mr Forward submitted:-

1) once it was admitted that a person under the PSED had not complied with its duty, there was in principle no room for a court to exercise its discretion to grant relief;

2) there were only two categories of case in which a discretion to refuse relief had been exercised:

    a) cases in which there had been a subsequent compliance with the duty in that particular case;

    b) cases in which it was clear that future compliance would compensate for the prior non-compliance;

3) those categories of cases should not be extended and, in a case in which the decision-maker cannot say that he has remedied the breach by subsequent compliance or cannot authoritatively say that a future compliance would compensate for the earlier non-compliance, a decision reached without complying with the duty must always be quashed or, if (as in this case) such a decision results in a possession order, that possession order must always be set aside;

4) there was no material on which it could rightly be concluded that, if the duty had been complied with, a possession order would in any event had been sought and made; and

5) as a separate (second) ground of appeal, Cheema-Grubb J had relied on the absence of evidence of mental incapacity as justification for her conclusion that the same decision would have been reached; that reliance on an irrelevant matter, which had fallen out of the picture, vitiated her conclusion.

19. Mr Nicholas Grundy QC submitted:-

1) he should be allowed to withdraw his predecessor's concession that there had been a breach of the PSED;

2) the grant of relief in a case raising issues of public law (whether by way of claim or defence) was always discretionary;

3) the fact that discretion had in the past been exercised in two categories of case did not mean that the exercise of discretion was artificially confined to those categories;

4) there was ample material to show that, if the landlord had complied with its PSED, it would have sought and would have been granted possession; and

5) Cheema-Grubb J's recording of the absence of mental incapacity did not affect her decision.

20. We intimated during the course of the hearing that we would not permit Mr Grundy to withdraw his predecessor's concession which must stand. That was for two reasons:

1) the course of the hearings below might well have been different if the concession had not been made; there would have had to be an assessment of the different heads of duty under section 149 and of the impact of Ms Savage's acceptance that she had not complied with the duty; and

2) the ambit of the duty raised potentially broad-ranging questions on which it would not be appropriate for this court to embark as, in effect, a court of first instance from which there would be only a precarious right of appeal.

We therefore proceeded on the basis that there had been a breach of duty and that the court had to assess the consequences of that breach.

The Law

21. I would for my part decline to accept the proposition that, as a general rule, if there is a breach of the PSED, any decision taken after such breach must necessarily be quashed or set aside or even the proposition that there is only a narrow category of cases in which that consequence will not follow.

22. It may well be right that major governmental decisions affecting numerous people may be liable to be quashed if the government has not complied with the PSED. Thus in R (Hurley) v Secretary of State for Business [2012] HRLR 374, an application to quash regulations raising fees for university students when the department had not, in some respects, complied with the PSED, Elias LJ said (para 99):-

> "It will be a very rare case, I suspect, where a substantial breach of the PSEDs would not lead to the quashing of a relevant decision."

The Divisional Court in that case held that there had in fact been substantial compliance and, in the event, did not quash the regulations.

23. In Bracking v Secretary of State for Work and Pensions [2013] EWCA Civ 1345, [2014] Eq. L.R. 60, a decision by the Minister for Disabled People to close the Independent Living Fund which provided assistance to disabled persons for whom the consequence of closing the fund would have a very grave impact, was quashed for failure to comply with the PSED in reliance (inter alia) on the above dictum of Elias LJ. In delivering the first judgment, McCombe LJ said (para 60):-

> "It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all passing circumstances of whatever magnitude."

24. These decisions cannot be applied indiscriminately to cases in which a decision is made affecting an individual tenant of a social or local authority landlord as recognised by McCombe LJ himself in Powell v Dacorum Borough Council [2019] EWCA Civ 23; [2019] H.L.R. 341 (para 44):-

> "In my judgment, the previous decisions of the courts on the present subject of the application and working of the PSED, as on all subjects, have to be taken in their context. The impact of the PSED is universal in application to the functions of public authorities, but its application will differ from case to case, depending upon the function being exercised and the facts of the case. The cases to which we have been referred on this appeal have ranged across a wide field, from a Ministerial decision to a close a national fund supporting independent living by disabled persons (*Bracking*) through to individual decisions in housing cases such as the present. One must be careful not to read the judgments (including the judgment in *Bracking*) as though they were statutes. The decision of a Minister on a matter of national policy will engage very different considerations from that of a local authority official

> considering whether or not to take any particular step in ongoing proceedings seeking to recover possession of a unit of social housing."

In the context therefore of a typical possession action the court, while having regard to the importance of the PSED, will also have available to it the facts of the particular dispute and be able to assess the consequence of any breach of the duty more easily than in the context of a wide-ranging ministerial decision.

25. Mr Vanhegan submitted that, apart from the two categories of case he identified, the court should quash a decision made when the PSED is not complied with, otherwise local authorities will have no incentive to comply with the duty and no opportunity to learn from their breach of duty. For my part, I would resist the notion that the court should act as some sort of mentor or nanny to decision-makers. As Laws and Treacy LJJ said in R (West Berkshire District Council) v Secretary of State for Local Communities [2016] EWCA Civ 441; [2016] 1 WLR 3923, in which a change in ministerial policy for the provision of affordable housing had been made without initially complying with the PSED, (para 87):-

> "Nothing we say should be thought to diminish the importance of proper and timely compliance with the PSED. But we have strong reservations about the proposition that the court should necessarily exercise its discretion to quash a decision as a form of disciplinary measure. During the course of argument, Mr Forsdick accepted that if an assessment, subsequently carried out, satisfied the court, there would be no point in quashing the decision if the effect of doing that and requiring a fresh consideration would not have led to a different decision. We think this was a correct concession. The court's approach should not ordinarily be that of a disciplinarian, punishing for the sake of it, in these circumstances. The focus should be on the adequacy and good faith of the later assessment, although the court is entitled to look at the overall circumstances in which that assessment was carried out."

Rather than acting as some sort of mentor the court should, in deciding the consequence of a breach of PSED, look closely at the facts of the particular case and, if on the facts it is highly likely that the decision would not have been substantially different if the breach of duty had not occurred, there will (subject to any other relevant considerations) be no need to quash the decision. If, however, it is not highly likely, a quashing order may be made.

26. What then of Mr Vanhegan's two categories? It is fair to say that, to date, it does seem that the remedy of quashing or setting aside the decision has only been refused when there has been a subsequent compliance or a convincing undertaking that the duty will be complied with in the future in a manner that compensates for earlier non-compliance. Both West Berkshire and Powell v Dacorum BC are examples of the former category. Another example is London and Quadrant Housing Trust v Patrick [2018] EWHC 1263 in which the judge was satisfied that compliance with the section 149 duty at a later stage compensated for earlier non-compliance. Turner J said:-

> "55. Of course, where a breach of the PSED is established then the court must exercise the requisite degree of care when concluding that compliance would have made no material difference. Otherwise, there is a risk that the importance of fulfilling the duty may be impermissibly demoted. Nevertheless, where, as in this case, the Judge has very carefully analysed the factors leading to his conclusion on this issue he is entitled, where appropriate, to uphold the decision. Any contrary approach would, in my view, mark the triumph of form over substance and give rise to the risk of serious injustice to those whose interests the original decision, although procedurally flawed, was rightly intended to protect.
>
> 56. Furthermore, I observe that section 31 of the Senior Courts Act 1981 (as amended) now provides:
>
> > "(2A) The High Court –
> >
> > (a) must refuse to grant relief on an application for judicial review, and
> >
> > (b) may not make an award under subsection (4) on such an application,
> >
> > if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."
>
> 57. It may be thought anomalous that the effect of a non-material breach of the PSED should automatically frustrate private law claims brought by a public body but, equally automatically, be ignored entirely in the context of public law challenges.
>
> 58. I note that the decision in Forward is under appeal to the Court of Appeal. It is to be hoped that, whatever the outcome, such guidance as may be given will significantly reduce the risk that, in future, possession applications are subject to protracted delays and uncertainty which are highly prejudicial to all of those affected."

27. That case shows the concern of a least one first instance judge that there should be no rigid rule that non-compliance with the PSED should always result in quashing the relevant decision.

28. An example of a case in Mr Vanhegan's second category is the older case of Barnsley MPC v Powell [2011] EWCA Civ 834, [2012] PTSR 56 which considered the earlier provisions of the Disability Discrimination Act 1995 as amended by the Disability Discrimination Act 2005, which were in similar form to those now included in the Equality Act 2010. Mr Norton was a school caretaker who lived in premises with his wife and disabled daughter (Sam); he was required to live in the school grounds. His

employment came to an end and the Council sought possession. It was said that the Council had failed to comply with its duty to consider the daughter's disability when deciding to bring and continue possession proceedings. This court held that there had been a breach of the duty but the judge had been entitled to make a possession order; the Council would then come under a duty to re-house Mr Norton and his family and the court was satisfied that at that stage the Council would comply with the equivalent of the PSED. Counsel for the tenant submitted that, once a failure to comply was shown, the possession order should be set aside and the possession proceedings dismissed. Lloyd LJ (para 34) said he could see no proper basis for any such order since it was always open to the Council to remedy that breach by giving proper consideration to the question at any late stage "including now in the light of our decision". At a later part of the judgment, he said:-

> "36. If the council's failure to comply with its duties under section 49A(1)(d) of the 1995 Act had been challenged by an application for judicial review rather than by way of a defence to the possession claim, it would have been open to the Administrative Court to conclude that, despite a proven past breach, the council's decisions already taken should not be set aside, if the court considered that the council could now be relied on to exercise its relevant future functions properly, with (of course) the sanction – if it were not to do so – of further proceedings whether by way of judicial review or under (if relevant) Part VII of the 1996 Act itself.
>
> 37. By analogy, given that a breach of a public law duty is relied on by way of defence in the present case, it seems to me that it is open to the court in this situation to take the view that, if the decision would not have been set aside on an application for judicial review, it should not provide a basis for a defence to the proceedings for possession. In Wandsworth Borough Council v Winder [1985] AC 461, in which the availability of a public law defence in private law proceedings was established by the House of Lords, the decision at issue had been taken once and for all, namely to increase the level of the rent payable by council tenants, including the defendant. Here, by contrast, the Council's duty to Sam is a continuing duty, and the time when a possession order has been made is in practice the most significant stage at which the duty needs to be discharged properly. Before that, it is a question of looking to the future, with an imperative for the council of establishing that the house could be made available for a new caretaker. Once an order for possession has been made it is up to the council to deal with its functions of providing suitable accommodation for Sam and her family (being entitled to it, whether under Part VII or Part VI of the 1996 Act) and to do so in proper accordance with the applicable duties under the Housing Act 1996 as well as under (now) the Equality Act 2010."

29. Mr Vanhegan submitted that Barnsley was different from the present case because the landlord and the local housing authority were one and the same entity whereas here the landlord owes no housing duty to Mr Forward, who (he submitted) would be unlikely to succeed in any application to his local authority, since it would probably decide that he was intentionally homeless having been evicted for breach of his tenancy obligations. That difference is certainly a factual difference between the two cases but I do not read the judgment of Lloyd LJ as saying that the decision would inevitably have been different if he was dealing with the case of a private landlord. He was just not considering that scenario and indeed emphasised in the passage quoted above how imperative it was that the house should be available for a new caretaker.

30. Carnwath LJ did address the broader question saying:-

> "45. The judge was entitled to take the common sense view that, on the issue directly before him, namely the possession of the school house, there was only one possible answer, in view of the school's pressing need to replace its caretaker. The only other issue was what provision was to be made thereafter for the family. He understandably did not see it as part of his functions to police the performance of the authority's separate duties towards the vulnerable homeless under the housing legislation. He was satisfied on the evidence that "particularly having regard to Samantha's pregnancy this family will receive a high degree of priority".
>
> 46. In my view the issues in this case were and are straightforward. Once it was decided that there was no valid defence to possession, and the school's need for possession was compelling, there was no reason to delay a possession order. The judge was entitled to trust the authority to carry out their duties under the housing legislation. Lloyd LJ has referred to Lord Neuberger of Abbotsbury MR's advice to leave such questions "to the good sense and experience of judges sitting in the county court": see Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2011] PTSR 61. This in my view was such a case. Applying a practical approach the judge was entitled to find that consideration of Sam's disability would not have made any difference to the authority's decision to seek possession."

Maurice Kay LJ said that he "entirely agree[d] with the judgment of Lloyd LJ" but he, no more than Lloyd LJ, was considering the broader question.

31. Thus, although as a matter of fact relief has to date been refused only in the categories of case identified by Mr Vanhegan, I do not read the authorities as saying that, as a matter of law, it is only in those categories that there is a discretion to refuse relief. That would be contrary to the general rule of public law that the nature of the relief granted is a matter of discretion and, as Lloyd LJ pointed out, the fact that the point is taken by way of defence can make no difference to that general position.

32. It seems, to me, therefore, that it was open to the judge to make the possession order (and to Cheema-Grubb J to refuse to set aside) if on the facts, there was only one answer to the claim for possession. Just as in Barnsley v Norton the court could be satisfied that consideration of Sam's disability would not have made any difference to the local authority's decision to seek possession, so the district judge in this case could, if the facts of the case warranted it, conclude that compliance with its duty in respect of Mr Forward's disability would likewise have made no difference to the landlord's decision to seek possession.

33. The question therefore is whether this was an appropriate case so to conclude on the facts.

The factual question

34. To my mind the answer is yes. In the first place there was a finding that there was no viable option for the landlord other than to seek possession, see Judge Wood's judgment para 167. The argument in court naturally concentrated on Mr Forward's disability; but it was highly important for the landlord to bear in mind the position of the other tenants in the block whose lives were blighted by Mr Forward's breach of the terms of his tenancy. On any view their position was of great importance.

35. Secondly it is not for this court to substitute its view for that of the lower courts, unless there was some error of legal approach. In the absence of any such error, the decision of the courts below should be respected.

36. Thirdly I would endorse Turner J's reliance in Patrick on section 31(2A) of the Senior Courts Act 1981. That provides that the High Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. It would be very odd if a non-material breach could be disregarded on a public law challenge but was fatal to a private law claim in which public law was relied on as a matter of defence. As Lloyd LJ pointed out in Barnsley the allowance of the defence to private law claims must carry with it the public law consequences of relying on such a defence.

37. I would, therefore, reject the first four submissions made by Mr Vanhegan and turn to his second ground of appeal.

Second ground of appeal

38. This ground asserts that the decision of Cheema-Grubb J was vitiated by her references to Mr Forward's failure to show he suffered from mental disability. Thus, towards the beginning of her conclusion, she said (para 38) that the appeal "floundered" (no doubt she meant "foundered")

> "on the inescapable fact that the appellant did not provide any support for his assertion that he had mental health difficulties …"

But this statement has to be read in the context of the previous paragraph in which she adverted to the "apparently growing phenomenon" of cuckooing and to the fact that

anti-social behaviour may be the consequence of exploitation by criminals of a susceptible tenant. It is not surprising that the judge then said that considerations of that sort foundered in this case because of the absence of mental disability. Nor is it surprising that she went on to say that Mr Forward had not demonstrated that he was someone acting under a disability. By that she referred to mental disability. It was always accepted by everyone including Cheema-Grubb J that Mr Forward had a physical disability; if that were not the case, the section 149 PSED would not have applied at all.

39. It may be said that it was not strictly necessary for the judge to have considered cuckooing at all in the light of Judge Wood's finding in paras 86-87 that Mr Forward was not being visited without his permission. But Cheema-Grubb J no doubt thought it was helpful to reiterate that this was not a cuckooing case. Her remarks on the subject were only the introductory part to her "conclusion" the rest of which proceeded on entirely orthodox lines.

40. In these circumstances I do not see how it can be said that her reference to the absence of mental disability in any way affected her ultimate decision that the failure by Judge Wood (and indeed the landlord) to have regard to the section 149 question in a structured way was not a material error. Even if it did, this court is in reality concerned with the question whether Judge Wood reached the right decision. In my opinion she did.

Conclusion

41. I would therefore reject both grounds of appeal and uphold the decision of Cheema-Grubb J. The result is that, if my colleagues agree, this appeal will be dismissed.

Lord Justice Bean:

42. I agree.

Lord Justice Moylan:

43. I also agree.

ORDER

UPON hearing Mr Toby Vanhegan, Mr Nick Bano and Ms Hannah Gardiner for the Appellant and Mr Nicholas Grundy QC and Ms Millie Polimac for the Respondent

IT IS ORDERED that:

(1) The appeal is dismissed;

(2) The Appellant shall pay the Respondent's costs of the appeal to the Court of Appeal, such costs to be assessed by way of detailed assessment if not agreed. The Appellant's personal liability to pay such costs shall not exceed the amount (if any) which it is determined to be reasonable for the Appellant to pay pursuant to section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Civil Legal Aid (costs) Regulations 2013;

(3) There be detailed assessment of the Appellant's publicly funded costs;

(4) Permission to appeal is refused.