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‘Human rights’ defences in residential possession proceedings: a cautionary tale

Ian Loveland *

This paper charts the progress of a complex possession action in the English county court. The case raised a mix of inter-related questions under the Human Rights Act 1998, the Equality Act 2010 and general principles of public law in relation to assured shorthold tenancies. The purpose of the paper is to bring much more clearly and fully to the attention of academic lawyers and law students the way in which the mechanics of preparing, pleading and arguing such cases effectively shape ‘the law’ which the courts apply.

Keywords; Possession Proceedings; Human Rights Defences; Equality Act 2010

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I. INTRODUCTION

While it may surprise judges in the higher courts to learn that decisionmaking processes in local authorities and housing associations which lead to the initiation and continuation of possession proceedings are frequently – to put it kindly – lackadaisical, and more than occasionally – to put it less kindly – thoroughly incompetent, the observation will not startle lawyers who work at the sharp end of such litigation. A case which I was briefed to argue by Shelter is a salutary example of the genre, the essential elements of which perhaps merit wider dissemination than they would acquire simply by virtue of being argued (albeit at some considerable length and expense) in the Central London County Court.

The purpose of the paper is essentially twofold. The first, and more straightforward, is in a limited qualitative sense to provide a link or bridge between academic critiques of public law and human rights law in a doctrinal sense and the empirical experience of marshalling those arguments in preparing and arguing them in court. At the risk of some generalisation, it might be suggested both that many academic lawyers have little awareness of the ways in which what may seem in abstract terms clear doctrinal points can be compromised or

undermined by the practical mechanics of managing a case at its various stages from conception to final execution; and that many practitioners have a similarly limited awareness of how academic critiques might be invoked better to shape the way litigation is conducted.

The second, perhaps more significant, purpose is to alert academic lawyers to the quantitative significance of what we might term ‘invisible law’ within our legal system. Crudely put, the overwhelming majority of cases heard in our courts never get anywhere near the law reports. They are resolved at a lower court level, or settled without trial at all, in a fashion which means they are known often only to the players immediately involved or at most are publicised (in a very limited way) in very specialised professional fora. Moreover, they may frequently be resolved – for perfectly rational micro-level, case specific reasons - in ways which might seem quite unexpected in the light of the abstract doctrinal issues which they appear to raise. This appear therefore tries to make a further modest contribution to placing that ‘invisible law’ under a more searching academic spotlight.

II. THE CLAIMANT, THE DEFENDANT AND THE ISSUE

The Claimant – let us call it Happy Homes – is a fairly sizeable organisation. It is a charity and what is now referred to as a Registered Provider of social housing; (what in the olden days we would have called a Housing Association). Happy Homes owns some 40,000 properties. Most of these are let as general needs housing, but some 10% of its clients are disabled in some fashion and Happy Homes has a small number of developments which cater exclusively to disabled clients whose tenancies include provision for various kinds of support service. Many of these clients are referred to Happy Homes by local authority Social Service departments.

The defendant, James Robertson, was one such client referred to Happy Homes by a local authority Social Services department. He was a young man with severe autism, profound behavioural difficulties and an extremely unhappy personal history. The local authority had provided Happy Homes with an extensive referral form detailing Mr Robertson’s medical condition and recording that he had a limited capacity to empathise with other people and to appreciate the impact of his behaviour upon them. The referral form identified various people, among them several social workers and Mr Robertson’s mother, who could be contacted in the event that Mr Robertson encountered difficulties. Forewarned and one assumes forearmed, Happy Homes decided to offer Mr Robertson a tenancy in spring 2011 in a twelve flat block. The tenancy granted was what Happy Homes called a ‘Starter Tenancy’, which housing lawyers would recognise as an assured shorthold tenancy.¹ The tenancy agreement made it clear that the tenant was in effect on an initial period of probation, and that Happy Homes might use the Housing Act 1988 s.21 procedure to end the tenancy if the tenant’s behaviour was not acceptable.

Matters soon it seemed turned sour. Although Mr Robertson had a designated support worker at Happy Homes and an assigned social worker at the local authority, he proved very

¹ A form of tenancy which prima facie affords no security of tenure to the tenant.

reluctant to engage with either of them to formulate a detailed support plan. He missed appointments, did not answer his phone or respond to voicemails, and did not reply to letters. He also began to engage in what Happy Homes regarded as anti-social behaviour. This took the form primarily of playing loud music at all hours and occasionally shouting and screaming in the early hours of the morning. Happy Homes made some attempt to address this issue in collaboration with the council social worker, but these efforts were rather overtaken by events in the summer of 2012 when Mr Robertson was attacked and robbed in his home by people he had (erroneously) believed to be his friends. Several multi-agency reviews followed (attended by police officers, social workers and a Ms Smith and Ms Jones from Happy Homes).² The reviews recorded the trauma that Mr Robertson had suffered and underlined the importance of providing him with effective social work support over the next few months.

Immediately following the attack the anti-social behaviour – unsurprisingly one might think given Mr Robertson’s evident trauma – continued and indeed intensified. More surprisingly perhaps, Happy Homes’ Ms Jones considered that the best way to deal with the problem was to have Mr Robertson sign an ‘Acceptable Behaviour Contract’ (hereafter referred to as an ABC). The gist of this ‘contract’ was that if Mr Robertson continued with his anti-social behaviour then Happy Homes would begin legal proceedings to evict him. More surprisingly still, Mr Robertson’s social worker evidently thought this was an appropriate step and signed the ‘contract’ herself. This was in September 2013. Perhaps however the officers at Happy Homes and the social worker were right, as the incidence of anti-social behaviour suddenly declined.

III. THE INITIAL STAGES OF THE LITIGATION

And yet ten weeks later on 12.11.2012 Ms Jones of Happy Homes signed and issued a s.21 notice to Mr Robertson. The trigger for this seemed to have been that on 08.11.2012 two officers attended Mr Robertson’s block and heard loud music coming from his flat for about 10 minutes. The s.21 notice was sent to his flat. It seems that it was not copied to Mr Robertson’s social workers or to his mother. There was no indication that Ms Smith or Ms Jones had told anyone involved in Mr Robertson’s care about the notice. In accordance with Happy Homes’ *Starter Tenancy Policy* (of which more is said below), the s.21 notice was accompanied by information about a right to ‘appeal’ against the notice to a panel of Happy Homes officers. The appeal had to be made in writing within two weeks. Given Mr Robertson’s history of non-engagement the fact that no appeal was made is perhaps not surprising.

The rest of November and then December and January apparently passed without incident. Then it seems that on 07.02.2013 a neighbour of Mr Robertson made a complaint about Mr Robertson shouting in the early hours. Shortly thereafter on 21.02.2013 Ms Jones issued accelerated s.21 proceedings against Mr Robertson. Accelerated proceedings are of

² Ms Smith and Ms Jones would feature prominently in the litigation. Ms Smith was a support worker. Ms Jones was an anti-social behaviour officer, whose responsibilities apparently included deciding whether to issue s.21 or s.8 notices and issuing possession claims.

course conducted solely on the papers. Assuming that a valid notice has been served, the court must issue a possession order unless the Defendant has taken the initiative to raise what prima facie appears to be a valid defence. There is no requirement that the Claimant give reasons for issuing proceedings. In this case however Ms Jones had filed a witness statement which alluded to anti-social behaviour as the reason for the claim.

Ms Jones had informed Mr Robertson's council social worker that proceedings would be issued. The social worker – with the assistance of Mr Robertson's father – referred Mr Robertson to Shelter, which at the last minute filed a brief defence form which suggested that the action breached both the Equality Act and Art 8 HRA 1998. Unhappily, the defence form went astray in the county court and did not reach the court file. Consequently the court made an outright possession order in March 2013.

(i) The Set Aside and the Expert Report on the Defendant's Mental (Dis)ability

Despite being invited to do so by Shelter, Happy Homes refused to agree to the order being set aside. A formal application therefore had to be made. Happy Homes, having instructed a large firm of commercial solicitors and fairly senior counsel to argue its case, opposed the application, essentially on the eyebrow-raising basis that Mr Robertson should have got his act together with more alacrity. The application was granted in November 2013,³ and directions were made for a contested trial. Foremost among the directions was that a joint expert (we may call him Dr Kildare) be appointed to provide the court with information about Mr Robertson's mental state and its relevance to any anti-social behaviour which he might engage in.

The report was completed in January 2014. Dr Kildare's findings broadly reiterated the information referred to in the referral documents produced by the council. The report concluded unequivocally that Mr Robertson was a disabled person for Equality Act purposes, that his disability precluded him from appreciating the impact of his behaviour on other people, and that the anti-social behaviour he had engaged in arose as a consequence of his disability. He also suggested that – with rather more extensive and effective support than Mr Robertson had thus far received – Mr Robertson might well be able to modify his behaviour in a way that at least much reduced the disturbance he allegedly caused to his neighbours.

³ On the basis that the defence had been filed within time, had not come to the attention of the judge who made the possession order, and would had it done so have prompted him to list the matter for an oral hearing. From a tenant's perspective the most helpful authority (and the key one in this case) is *Manel v Menon* (2001) 33 HLR 24 and the following passage from the judgment of Holman J at 244:

‘The machinery under the rules for a summary order for possession upon the basis of the filed documents alone does, of course, underpin the concept of an assured shorthold tenancy whereby the landlord can be confident of regaining possession quickly and with minimum formality and expense when he requires and is entitled to it. But it is a robust machinery. It depends upon district judges rigorously considering the documents which have been filed. Some replies may be little more than a plea, however genuine, for mercy. But if, on the face of the reply, a matter has been raised which, if true, might arguably raise a defence; or if the documents filed by the claimant might arguably disclose a defect in his claim, then the district judge must necessarily be “not satisfied” within the meaning of rule C49.6A(16) and a hearing on notice must be fixed’.

(ii) The initial defence and a CMC

Notwithstanding the set aside order, Happy Homes did not immediately amend its particulars of claim. This led us to file what was essentially a pre-emptive defence to force Happy Homes to be candid in its pleadings. The defence we had in mind would draw on three discrete but interlinked sources.

Source 1: The Equality Act 2010

The Equality Act defence began with s.35, which provides that:

35 Management

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

S.35 applies to any 'person', and so can be invoked against government bodies, housing associations, companies or indeed private individual landlords. The meaning of 'discrimination' (for s.35 and with the Act generally) is laid out in s.15:

15 Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

'Disability' is in turn defined by s.6.

6 Disability

- (1) a person (P) has a disability if—
- (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

In short, the defence was that Happy Homes was seeking to evict Mr Robertson from his home because of anti-social behaviour which was a consequence of his disability and it was therefore for Happy Homes to show that each 'step' taken to achieve this objective was proportionate.⁴

⁴ The burden of proof provisions are in s.136:

136 Burden of proof

That the Act offers no definition of ‘proportionate’ might be thought a rather startling omission, given the many and varied versions of that term which had some legal currency prior to 2010. The crucial unanswered question in cases such as Mr Robertson’s is whether Equality Act proportionality is limited to evaluating the substantive defensibility of particular ‘steps’ (ie ‘proportionality as outcome’) or if it also embraces such issues as the matters taken into account at each step and the weight given to them (ie ‘proportionality as process’). The Equality and Human Rights Commission guidance on the Act seems to support the former view,⁵ but in the absence of clear authority on the point we were obviously inclined to plead the latter perspective.

Source 2: Proportionality per Art 8 of the Human Rights Act 1998

The Art 8 defence drew squarely on the Supreme Court’s judgment in *Manchester CC v Pinnock*,⁶ in which the Court finally accepted that Art 8 HRA 1998 created a statutory proportionality defence for defendants in possession proceedings relating their homes. While the court suggested in *Pinnock* that Art 8 proportionality defences would rarely even be seriously arguable and would very (very) rarely succeed, the prospects of success would seemingly be highest in cases involving ‘vulnerable’ defendants:

‘64 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’.

It would seem obvious that if Mr Robertson was a disabled person for Equality Act purposes he would also be ‘vulnerable’ in the *Pinnock* sense.

Pinnock raises rather than answers two important doctrinal questions. The first is whether proportionality in the limited substantive sense is a test of lawfulness which applies not just to the court at the end stage of the litigation process (ie in making its order), but also to the landlord at each stage of the decisionmaking process that leads (eventually) to trial. In Mr Robertson’s case those stages would have been the issue of the s.21 notice, the issue of the claim and the continued pursuit of the claim after the set aside. The second (which also arises in regard to Equality Act proportionality) is whether Art 8 ‘proportionality’ entails not

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

⁵ **Proportionate**

This refers to measures or actions that are appropriate and necessary. Whether something is proportionate in the circumstances will be a question of fact and involve weighing up the discriminatory impact of the action against the reasons for it, and asking if there is any other way of achieving the aim:

<http://www.equalityhumanrights.com/private-and-public-sector-guidance/guidance-all/glossary-terms>

⁶ *Manchester CC v Pinnock* [2010] UKSC 45; [2011] 2 AC 104. See generally I. Loveland, ‘A Tale of Two Trespassers: Reconsidering the Impact of the Human Rights Act on Rights of Residence in Rented Housing: Part One and Part Two’ (2009 *European Human Rights Law Review* 148 and 495).

just an intensified standard of *Wednesbury* substantive irrationality ('proportionality as outcome'), but also an intensified version of other public law principles, and most especially the relevant/irrelevant considerations doctrine ('proportionality as process') which could be applied to each stage of the decisionmaking process?⁷ As with our Equality Act defence, we considered that we should plead the more expansive notion of Art 8 proportionality.

⁷ The high water mark of this process driven notion of proportionality under the HRA is the Court of Appeal's judgment in *R (SB) v Governors of Denbigh High School* [2005] EWCA Civ 199; [2005] 1 WLR 1372 in which the Court held that a decision affecting a Convention Right would be disproportionate – irrespective of the outcome reached – if the decisionmaker did not structure her decisionmaking process in the way that would be required of a court; ie to ask sequentially: is a Convention Right affected? Are we doing so in pursuit of a legitimate aim? Is the interference prescribed by law? Is the interference necessary in a democratic society?

The Court of Appeal's extremely rigorous approach was rejected in the House of Lords ([2006] UKHL 15; [2007] 1 AC 100; especially paras 28-31) on the basis that it would impose wholly unrealistic controls on administrative decisionmakers. Lord Bingham's leading judgment contains however an important ambiguity on the essential question of whether the ratio of the decision is simply to reject the proposition that the HRA requires administrative decisionmakers to act as if they were 'courts', or whether (much more broadly) it also holds that proportionality as process adds nothing to existing principles of public law.

The following passage supports the first viewpoint:

'31.....The Court of Appeal's decision-making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it'.

Proponents of the second position would draw some comfort however from this part of the judgment:

'30 Secondly, it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach was exposed in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, para 138, and the new approach required under the 1998 Act was described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 25–28, in terms which have never to my knowledge been questioned.....'.

The key part of the analysis referred to in *Daly* reads as follows:

'27....The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. *First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights.'; (emphasis added).

There is clearly a very large gap between the quasi-judicial procedure (favoured by the Court of Appeal) and rejected by the House of Lords and the perception of proportionality as a purely outcome issue. Lord Steyn's view seems to fall in the middle of that gap. One need not impose a quasi-judicial role on administrators in order to require them to take care to identify relevant matters and then also take care to evaluate them diligently.

Source 3: Orthodox Public Law Principles

Prior to *Pinnock* being decided, the House of Lords had decided that one effect of Art 8 was to permit defendants in possession proceedings brought by local authorities to raise orthodox public law principles as a defence. Initially, in *LB Lambeth v Kay*⁸ the defence appeared to be limited to *Wednesbury* irrationality in a narrow, substantive sense.⁹ (This came to known in housing law circles as a ‘Gateway B’ defence; ie an unlawful use of a law which was per se not incompatible with Art 8. A ‘Gateway A’ defence in contrast was one which asserted that the rule of law in issue was per se incompatible with Art 8). In *Birmingham CC v Doherty*¹⁰ however, the House of Lords indicated that all of the orthodox grounds of review could be pleaded in a ‘Gateway B’ defence and that the intensity of review which should be applied was rather greater than under ‘ordinary’ public principles.¹¹ That conclusion was significant in two senses.

The first was that it takes one back to the more expansive (but often forgotten and/or overlooked) notion of ‘reasonableness’ offered by Lord Greene MR in *Wednesbury*. That notion is as much concerned with the *conduct* of the decisionmaking process as it is with the *outcome* of the process (emphases added):¹²

‘It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. *For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he*

⁸ [2006] UKHL 10; [2006] 2 AC 465.

⁹ There would be little point in pleading *Wednesbury* substantive irrationality if one is also pleading Art 8 proportionality. A substantively disproportionate decision is necessarily substantively irrational, although the converse proposition does not follow.

¹⁰ [2008] UKHL 57; [2009] 1 AC 367.

¹¹ The most expeditious way to convey the ratios of *Kay* and *Doherty* is perhaps to cite the following passage from the judgment of Patten LJ in *Croydon BC v Barber* [2010] EWCA Civ 51; [2010] HLR 26.

‘16 In [Kay v Lambeth LBC \[2006\] 2 A.C. 465](#) the majority view was that judges in the county court trying such cases should proceed on the assumption that domestic law strikes a fair balance and is compatible with the occupier’s convention rights. This led Lord Hope to limit possible challenges to a local authority’s otherwise established right to possession to two types of case: (a) those in which exceptionally it was arguable that the law giving the right to possession was incompatible with art.8 ; and (b) cases where the decision to exercise the legal right to obtain possession was one which no reasonable person would consider justifiable: see [110] at 517D.

17 These gateways were considered further by Lord Hope in the subsequent decision in [Doherty v Birmingham City Council \[2008\] UKHL 57](#) but the guidance set out in [Kay](#) remained intact and any further analysis is unnecessary for the purposes of this appeal. Gateway (b) is essentially a conventional public law test, although one which is broader than a strict formulation of the *Wednesbury* principle: see [Doherty](#) at [55]’.

¹² [1948] 1 KB 223 at 228.

is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation* gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

.....I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account *or neglected to take into account.*'

The second significant implication of *Doherty* and *Kay* was that they suggested that defendants could attack the lawfulness of claimants' decision at different stages of the claimant's pre-trial decisionmaking process, and that success at one stage would knock out a claim entirely. That assumption was borne out in subsequent case law.

The multi-stage point was confirmed by the Court of Appeal in *Taylor v Central Bedfordshire Council*:¹³

'40. An authority such as the council in the instant appeals may make a decision on the facts as known to it to send a letter seeking possession. Prima facie it has no obligation to find out what the true facts are and the burden is going to be on the occupier to demonstrate any grounds relied on as providing an Article 8 defence. If the occupier informs the public authority of relevant circumstances, the public authority will have to take a further decision as to whether to commence proceedings. If no letter is received and the facts are only divulged just prior to the hearing, the public authority in reality has to take a further decision as to whether to proceed. Indeed if the revelation is only during the hearing, the council in deciding to continue to press for an order takes yet a further decision. I do not see why if any one of these decisions could be shown to be 'unreasonable' whatever that means (and I will come back to that), it could not be attacked.'

The 'knock-out' principle was confirmed in *Eastlands Homes Partnership Limited v Sandra Whyte*.¹⁴ The claimant in *Whyte* had issued a s.21 notice because of rent arrears incurred by the defendant. It then offered the defendant an internal appeal, which was conducted in a fashion which the court regarded as procedurally unfair, before issuing a s.21 claim. By the time the matter came to trial, the arrears had increased very substantially, to the point where it could not credibly be argued that it would be substantively irrational for the claimant to seek and the court to make a possession order. The defendant's argument however was that the court could not even reach this question, as the procedural unfairness rendered the issue of the claim unlawful, and so there was no claim for the court to resolve. The claimant's rejoinder was that this failing was at most a matter for the court to weigh in

¹³ [2009] EWCA Civ 613; [2010] 1 WLR 446 per Waller LJ. See also *Croydon BC v Barber* [2010] EWCA Civ 51; [2010] HLR 26 per Patten LJ at para 18:

'In *Kay* Lord Hope spoke of the challenge under gateway (b) being to the decision of the local authority to recover possession. That process involves not only the service of a notice to quit as a necessary first step but also the commencement and conduct of the possession action thereafter. It seems to me that a local authority is bound to keep the position under review and to take into account any relevant facts which come to its notice at any stage in the proceedings'.

¹⁴ [2010] EWHC 695 (QB) (per HHJ Holman sitting as a Judge of the High Court).

the scales in deciding if it would be substantively irrational to make a possession order. The court accepted the defendant's submission (emphasis added):

'62 I respectfully adopt the reasoning of Waller and Patten LJ [in *Taylor and Barber* above] . Mr Whatley argued that the continuum cuts both ways. He suggested that the unlawful act (if there was one) was only potentially suspensory, and the circumstances had to be considered at the date of trial. He postulated as an example a situation where the arrears were £1000 at the service of notice, had been cleared at review stage (which would make the decision to proceed irrational) but had risen to £5000 by the hearing date.

63 I reject this submission. Gateway (b) requires the authority to keep the situation under regular review. This is for the protection of the tenant and Gateway (b) provides a defence to the claim. If the authority makes a decision which no reasonable person would consider justifiable, *the guillotine comes down, as it were. The decision in this case to issue proceedings is unlawful, and in my judgment is incapable of retrospective validation.*'

For tenants of housing associations, *Doherty* and *Kay* became significant judgments when the Court of Appeal in *R (Weaver) v London and Quadrant*¹⁵ held that a housing association which brought possession proceedings against a tenant was performing a public function per HRA 1998 s.6, and would in doing so be subject - like a local authority landlord – to orthodox administrative law principles. In the pre-*Weaver* era it was assumed that housing associations were not subject to public law principles.¹⁶ In adopting an expansive notion of 'public function', the Court of Appeal in *Weaver* de facto lent Art 8 an unexpected 'horizontal' reach. Given the respective sizes of the local authority and social landlord rented sectors,¹⁷ that was a quantitatively very significant conclusion.

IV. DRAFTING THE DEFENCE

At this stage of the proceedings, all of these potential grounds of defence seemed credible. The main purpose of our initial defence was simply to smoke out the detailed basis of a properly reasoned claim. We made our point in this way:

¹⁵ [2009] EWCA Civ 587; [2010] 1 WLR 363.

¹⁶ That view was reached (with evident reluctance) by Moses J in *R v Servite Houses and Wandsworth LBC, ex parte Goldsmith and Chatting* (2001] 33 HLR 35. The judgment was not appealed.

¹⁷ The latest official estimates of the housing stock (in England) offer the following breakdown: 23.2 million dwellings; of which 14.7 million (63%) were owner-occupied; 1.7 million (7.3 %) were let by local authorities; 2.33 million (10%) were let by social rented sector landlords; and 4.2 million (18%) were let by private landlords; Department for Communities and Local Government (2014) *Dwelling stock estimates 2103: England*; available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285001/Dwelling_Stock_Estimates_2013_England.pdf

DEFENCE

1. This claim was initially brought through the accelerated HA 1988 s.21 procedure. The order granted on the papers by HHJ Donald on 19.03.2013 was set aside by HHJ Wilson on 11.10.2013....
2. The Defendant pleads the following grounds of defence.
3. In respect of all grounds it is averred that in initiating and continuing these proceedings the Claimant is performing a public function per HRÁ 1998 s.6.

Ground 1. No reasons are pleaded for the Claimant's wish to regain possession

4. It is accepted that the 'reason' the Claimant seeks possession is because of allegations of anti-social behaviour by the Defendant and that an account of such reasons is provided in the witness statements of Ms Jones for the Claimant.
5. However if:
 - (a) the court is properly to exercise its jurisdiction to determine if it was disproportionate per Art 8 or per the Equality Act 2010 for the Claimant to have begun these proceedings; and/or
 - (b) if the court is properly to exercise its jurisdiction to determine if it would be proportionate per Art 8 to make a possession order; then
 - (c) those 'reasons' must be pleaded in a form which is sufficiently particularised for the Defendant to be able to respond to them in a similarly particularised fashion in his/her defence.

[Footnote to para 5(c): Cf. *Pinnock* at 53 (emphasis added): "In this connection, it is right to refer to a point raised by the Secretary of State. He submitted that a local authority's aim in wanting possession should be a "given", which does not have to be explained or justified in court, so that the court will only be concerned with the occupiers' personal circumstances. In our view, there is indeed force in the point, which finds support in Lord Bingham's comment in *Kay v Lambeth* [2006] 2 AC 465, 491, para 29, that to require the local authority routinely, from the outset, to plead and prove that the possession order sought is justified would, in the overwhelming majority of cases, be burdensome and futile. In other words, the fact that the authority is entitled to possession and should, in the absence of cogent evidence to the contrary, be assumed to be acting in accordance with its duties, will be a strong factor in support of the proportionality of making an order for possession. *But, in a particular case, the authority may have what it believes to be particularly strong or unusual reasons for wanting possession – for example, that the property is the only occupied part of a site intended for immediate development for community housing. The authority could rely on that factor, but would have to plead it and adduce evidence to support it.*]

6. The court must be able to examine the accuracy of the factual basis of the claim, which presupposes that the claimant must be able to challenge the accuracy and significance of that factual basis; which in turn presupposes there is an adequately particularised claim to permit a challenge.

[Footnote to para 6: Cf *Pinnock* at 73-74, in a passage specifically targeted at demoted tenancies but in our submission of general application (emphasis added):

[73] In our judgment, once it is accepted that it is open to a demoted tenant to seek judicial review of a landlord's decision to bring and continue possession proceedings, then it inevitably follows that, as a generality, it is open to a tenant to challenge that decision on the ground that it would be disproportionate and therefore contrary to article 8. Further, as we saw at paras 31 to 43 above, the *EurCtHR* jurisprudence requires the court considering such a challenge to have the power to make its own assessment of any relevant facts which are in dispute. We have already pointed out, at para 28 above, that Lord Scott and Lord Mance, in particular, reached this conclusion in *Doherty v Birmingham* [2009] 1 AC 367, paras, 68 and 138. The *EurCtHR* acknowledged this development in *Kay*

v UK (App no 37341/06), para 73. In these circumstances we are satisfied that, wherever possible, the traditional review powers of the court should be expanded so as to permit it to carry out that exercise.

[74] In summary. Where it is required in order to give effect to an occupier's article 8 Convention rights, *the court's powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering facts which have arisen since the issue of proceedings*, by hearing evidence and forming its own view.

7. The giving of reasons in a witness statement or in a letter accompanying a notice to quit or s.21 notice cannot satisfy this requirement.
8. This Claimant does not *plead* any reasons for seeking possession other than service of a valid s.21 notice. That is not a *reason*, it is a *mechanism*.
9. The claim as it is currently pleaded is therefore wholly inadequate as a basis for permitting the Claimant to recover possession on the basis of the Defendant's alleged anti-social behaviour and the court should either:
 - (a) Dismiss the claim; or
 - (b) Order the Claimant to file and serve a fully particularised statement of case to which the Defendant can respond in a fully particularised defence.....

Our expectation was that the court would choose option (b), and in a spirit of ensuring that the litigation was conducted promptly and efficiently we further pleaded (rather curtly) in the alternative that that the issue of s.21 notice and the claim were disproportionate per both the Equality Act 2010 and HRA 1998 Art 8 and unlawful in an orthodox public law sense and that it would be disproportionate per Art 8 for the court to make a possession order. In the event, the Claimant seemed to accept the correctness of our first point and it was agreed at a subsequent case management conference that an amended particulars of claim should be filed with an amended defence to follow.

V. THE AMENDED CLAIM

The amended particulars of claim, filed in February 2014, were settled by counsel, presumably in collaboration with the Claimant's solicitors. A brief perusal suggested that the Claimant's case had not been very carefully thought through, and a closer examination indicated that the Defendant's prospects of success vis a vis the claim as pleaded were very good indeed.

Taking its cue presumably from the initial defence, the amended claim listed some 33 alleged incidents of anti-social behaviour by the Defendant, the great majority of which preceded the ABC. The text of the claim did not aver that these were merely the worst incidents, or just illustrative of a much large number of such events. We thus proceeded on the basis that this was the case we would have to meet. The glaringly obvious weakness in the Claimant's pleaded case became apparent when one set these 33 alleged incidents alongside the assertions made in witness statements already filed by two of the Claimants' officers that the acceptable behaviour contract (hereafter ABC) had not had any positive effect on the Defendant's behaviour and this was why the s.21 notice and then subsequently the claim had been issued.

Event

Date

Acceptable behaviour contract	13.09.2012
	Then 2 alleged incidents until
Issue of s.21 notice	21.11.2012
	Then 1 alleged incident until
Issue of claim	14.02.2013

The dates and numbers offered us an inviting line of attack. In the 11 weeks between the ABC being signed and the s.21 notice being issued there were just 2 alleged incidents. In the 11 weeks before the ABC had been signed there had been 16 alleged incidents. In the 20 weeks between the ABC being signed and the claim being issued there were just 3 alleged incidents. In the 20 weeks before the ABC was signed there were 21 alleged incidents. Prima facie it would seem that the ABC had had a very positive effect. For the claimant's officers to assert in the witness statements they had already filed that the contract had no positive effect very strongly suggested that their conclusion was per se irrational or disproportionate and/or that they had not taken this matter into account before making either the s.21 or the issue of proceedings decisions.

In a similar vein, the last of the 33 pleaded allegations of anti-social behaviour in the amended claim was dated 31.08.2013. This was some *eight months* before the claim was amended. So on the Claimant's pleaded case, some eight months had passed without incident. To continue to pursue an anti-social behaviour argument in that context again seemed either irrational/disproportionate per se or to be based on a failure to take account of an obviously relevant consideration. This point was also germane to what the court should do if the case got to the point when the court itself should decide if making an order would be proportionate. A prolonged period of good behaviour on the Defendant's part would be a powerful indicator that making an order would not be proportionate.¹⁸

The Claimant's amended pleadings also seemed to do much of our job for us when it was averred that in June 2013 (ie long after the s.21 notice was served and long after the claim was issued) one of the Claimant's officers had carried out what was styled a 'proportionality review' of the case and concluded it was proportionate to continue with the claim. No pleading was made that such a review had been carried out before the s.21 notice was served or the claim issued. Neither Shelter nor the Defendant had ever been provided with a copy of the claimed proportionality review. But even if it did exist, and even if had been properly conducted (and we were sceptical as to the first point and extremely sceptical as to the second) the Claimant was seemingly conceding that no such review was carried out at stage 1 or stage 2. That implicit concession was, one might have thought, fatal to its case.

Nor was there any pleading to the effect that any of the claimant's officers had at any point given any thought to the fact that the defendant's anti-social behaviour had been a consequence of his disability, or even that he was disabled. Indeed, the pleadings themselves

¹⁸ There is perfectly clear authority on the point; see both the High Court and Court of Appeal judgments in *Southend-On-Sea DC v Armour* [2012] EWHC 3361 and [2014] EWCA Civ 231; [2014] HLR 23. See A. Ramshaw, "Southend-on-Sea v Armour: proportionality revisited" (2014) *Journal of Housing Law* 98.

appeared – notwithstanding Dr Kildare’s report - to deny and put us to strict proof of both points.

The final point in in our favour was that there was no pleading that any officer of the claimant had taken any steps to arrange for alternative accommodation to be provided if Mr Robertson were to be evicted. From a *Pinnock* ‘vulnerability’ perspective this seemed to us a helpful omission.

VI. CONSTRUCTING THE FINAL DEFENCE

Mr Morris accepted that he had on occasion behaved in anti-social way, especially by playing loud music. Given the nature of his disability, he was quite unable to give express instructions as to the 33 pleaded incidents in the amended particulars of claim. It was not clear to us at that point how well-evidenced the claimant’s case would be on these points. Consequently, while we made a general admission as to there having been some anti-social behaviour, we put the claimant to strict proof as to its frequency, its nature and its effect on neighbours.

There were several reasons for doing this. Firstly, we could not discount the possibility that the claimant would do such a poor job of marshalling evidence in support of the allegations *en masse* that the court could not confidently conclude that many of the pleaded incidents had actually occurred. In that event, the court might simply conclude that the level of anti-social behaviour per se was not sufficiently severe for it to have been proportionate for Happy Homes to have issued the s.21 notice or the claim. Secondly, we suspected that we would be able to show that at least a significant minority of the alleged incidents could not properly evidenced, which would add to an overall picture relating to the haphazard nature of the claimant’s decisionmaking.

In anticipation of the court accepting that many of the incidents had indeed occurred, our defence rested on the various inter-related grounds outlined above. Most of these attacked the integrity of the Claimant’s decisionmaking process. These grounds were rooted additionally and alternatively in orthodox public law principles, the proportionality requirements of Art 8 of the HRA 1998 and the proportionality provisions of the Equality Act 2010. These various sources had slightly different characteristic in terms of their utility as a source of defence.

The public law principles as to both outcome and process would impose only a fairly relaxed standard of review on the Claimant, and the burden of proof would rest on us, but there could be no doubt as to their applicability. The Art 8 requirements would impose a more stringent standard of review on the Claimant, the burden of proof would rest on us, and there was some doubt as to their applicability in terms of process. The Equality Act provisions would impose the same standard of review on the Claimant as Art 8, the burden of proof would rest on the Claimant, and there was no again some doubt as to their applicability in process terms. Crudely put, if we won on public law principles we would certainly also win on Equality Act grounds and probably win on Art 8. We could however lose both on the public law and Art 8 basis and still win on the Equality Act provisions.

Our first premise was that the overall process could be broken down (for public law, Art 8 and Equality Act purposes) into a series of discrete parts or stages, these being:

- (a) The decision to issue the s.21 notice on 12.11.2012; what we called ‘Stage 1’.
- (b) The decision to issue proceedings on 21.02.2013; what we called ‘Stage 2’.
- (c) The decision to amend the claim on 14.02.14; what we called ‘Stage 3’.

The second premise was that the Equality Act and Art 8 concepts of proportionality and orthodox public law principles were concerned with process as well as outcome issues.

The third premise was that the Equality and Art 8 concepts of proportionality imposed on the claimant a more stringent level of review than orthodox public law principles in both the process and outcome sense.

We decided to attack all three stages on all three bases, deploying both process and outcome arguments. The next step in the process would be to assess how well-supported our preferred narrative would be by the documentary record to be disclosed by the claimant.

VII. DISCLOSURE

The claimant’s disclosure seemed to be rather partial and grudging. In particular, there was no sign of the mysterious ‘proportionality review’ of June 2013 which was pleaded in the amended particulars of claim. Despite repeated requests from Shelter, the Claimant’s solicitors did not disclose it until a few days before the trial early in 2015. What was disclosed earlier however raised several helpful lines of argument from our perspective.

Firstly, there was no documentary record of any carefully considered overview having been taken either by Ms Jones (who signed the s.21 notice and the claim) alone or in conjunction with other officers of the various factors which were taken into account in issuing the s.21 notice or the claim.

Secondly, there was an e-mail from Ms Jones to a hitherto unmentioned officer – Ms Black – asking Ms Black to approve the issue of the claim. The email – sent at 10.29 am on 08.02.2013 – mentioned the alleged incident of 07.02.2013 and observed that Mr Robertson’s behaviour had not improved. Ms Black replied at 10.54 the same day authorising the claim. There was no documentary record of the matters she took into account in so doing. There was indeed no other documentary record at all of her ever having been involved with the matter, and there was no mention of her role in either Ms Jones or Ms Smith’s previously filed witness statements. We awaited Ms Black’s witness statement with great interest.

Thirdly the documents indicated that the complaints of anti-social behaviour came overwhelmingly from just one of Mr Robertson’s neighbours, a gentleman who apparently had quite severe psychiatric problems of his own. His complaints mostly took the form of long and often hysterical e-mails. A careful read of the e-mails revealed that he complained frequently about several other neighbours as well, about people coming and going from the pub over the road, and about Happy Homes staff. He also maintained that his life had been

made a misery by noise for several years before Mr Robertson even moved in. He was, one might have thought, *prima facie* not the most reliable witness. Yet there was no indication at all that any officer at Happy Homes had even considered this point: the neighbour complained, Happy Homes recorded his complaints and then pleaded them in the amended particulars of claim.

Fourthly, the disclosure included several ‘policy’ documents, upon which – according to the amended particulars of claim – the Claimant would rely. The first of these was a so-called ‘*Starter Tenancy Policy and Procedure*’ which outlined the way in which the Claimant would go about ending a starter tenancy. This document seemed an unlikely source of comfort for the Claimant. Although it was not dated, it appeared to have been drafted no later than 2009 as it made no reference to the Equality Act and ended its potted summary of the relevant case law with a reference to the High Court decision in *Weaver*.¹⁹ The policy seemed to be of general application to all of Happy Homes’ tenants. It made no reference at all to how mentally ill or disabled tenants should be treated. Its top page also announced it was to be reviewed in 2013. The policy document did however expressly canvass the possibility that proportionality review would apply to s.21 proceedings and that s.21 decisions could be challenged on judicial review grounds.

The second document was a ‘*Vulnerable customers policy*’. This 2011 document – due apparently for review in 2013 – did make reference to the Equality Act and disability. However it contained no information at all about how such matters might affect the way in which the ‘*Starter tenancy policy*’ should be applied to such ‘customers’. Most interestingly, the policy suggested that the Claimant had agreed ‘pre-eviction protocols’ with various local authorities with which it would comply before initiating possession proceedings.

None of the Claimant’s witness statements that had been filed to this point made any mention of either policy or of any pre-eviction protocol. We thought both policies were in themselves inadequate in their treatment of people like Mr Robertson, and we were also sceptical that either Ms Smith or Ms Jones – or the elusive Ms Black – were familiar with the policy in any event. This too would likely be a fruitful field for cross-examination.

VIII. THE DEFENDANT LACKS THE CAPACITY TO CONDUCT HIS OWN PROCEEDINGS

The progress towards trial was interrupted when – on further expert examination – it emerged that Mr Robertson lacked litigation capacity (i.e the mental capacity to defend the claim himself). The Rules of Court, therefore, required him to have a litigation friend to conduct the proceedings on his behalf through a solicitor. The Official Solicitor to the Senior Courts agreed to be Mr Robertson’s litigation friend as there was nobody else both suitable and willing to do so. This but obviously added further weight to our contentions as to Mr Robertson’s disability. It also opened the door for us to rely on an ECtHR decision called *Zehentner v Austria*²⁰. The applicant in *Zehentner* had failed to defend debt proceedings

¹⁹ Handed down on 24.06.2008; [2008] EWHC 1377; [2009] 1 All ER 17.

²⁰ (App. No.20082/02); 16 July 2009; (2011) 52 E.H.R.R. 22.

which had led to the sale of her home because at the time she lacked legal capacity as a result of mental illness. By the time she secured legal representation the relevant limitation period to reopen the matter had expired, and Austrian law made no provision to extend the period in such circumstances. The ECtHR found a breach of Art 8 ECHR on the basis that in this particular case Austrian law offered no effective protection to Mrs Zehnenter's interest in her home:

‘60 The Court recalls that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it. It is therefore not called upon to review the legislation at issue in the abstract, namely the relevant provisions of the Enforcement Act on the judicial sale of property, but will examine the specific circumstances of the applicant's case....

63 The Court notes the Supreme Court's and the Government's arguments that the said time limit served to protect the bona fide purchaser and the general interests of an efficient administration of justice and of preserving legal certainty. Nevertheless, persons who lack legal capacity are particularly vulnerable and states may thus have a positive obligation under art.8 to provide them with specific protection by the law. While generally there may be good reasons for having an absolute time limit for lodging an appeal against a judicial sale of real estate, specific justification would be required where a person lacking legal capacity is concerned....’.

The value of *Zehentner* from our perspective was that it enabled us to argue that insofar as domestic law contained some uncertainties as to how rigorously (in both an outcome and process sense) the Equality Act, Art 8 and orthodox public law principles protected Mr Robertson's interest in his home, it was appropriate in this particular case that such protection should lie at the most rigorous end of the spectrum of possibilities.

IX. A SPANNER IN OUR WORKS ?

Shortly before the trial, the Court of Appeal handed down its judgment in *Akerman-Livingston v Aster Communities Ltd.*²¹ This was a case in which the defendant pleaded both Art 8 and the Equality Act (but not orthodox public principles) as defences to a possession claim. The Court of Appeal considered that the proportionality defences from each source were in effect the same, albeit that the burden of proof fell on the claimant under the Equality Act. The point that caused us some disquiet was that the court could be taken to be saying that the content of the defence was limited only to outcome matters, and could not be applied to process issues.²² We thus included the case in our list of authorities and waited to see what the claimant (and the court) would make of it.

²¹ [2014] EWCA Civ 1981; [2014] 1 WLR 3980. See T. Buchanan and M. Sergides, “Article 8 and Disability Discrimination: Where Are We Now?” (2014) *Landlord and Tenant Review* 210.

²² Especially at paras 32-34. The Supreme Court subsequently reversed the Court of Appeal judgment, and held that Equality Act proportionality was a more rigorous creature than Art 8 proportionality [2015] UKSC 15; [2015] AC 1399.

X. THE WITNESS STATEMENTS AND SKELETON ARGUMENTS

The trial was set down for two days before a circuit judge in early 2015. Remarkably, the claimant did not file any statement from the mysterious Ms Black. Assuming the disclosed e-mail from Ms Jones to be accurate, it was Ms Black who made the decision to issue the claim. Yet she had either consciously decided to offer the court no evidence at all as to her role or it had not occurred to any of the claimant's lawyers that she ought to do so.

Relatedly, an updating witness statement from Ms Jones made no mention of Ms Black having been involved at any stage of the process. That witness statement also made no mention of Ms Jones' own purported 'proportionality review' in June 2103 and gave no indication that any such review (whatever it might be) had preceded the issue of the s.21 notice and the claim. The updating element of the statement was merely a rather vague assertion that the defendant had continued to act in an anti-social manner. The review was of course not exhibited to the witness statement, and as the trial date approached it had still not been disclosed.

Ms Smith also provided an updated statement. This did no more than repeat the claims of recent anti-social behaviour and assert that the defendant's flat was in a very messy state and two of his doors were broken.

There was no statement of any sort from any neighbour in relation to the allegations of noise nuisance. Nor, save for a vague allusion in one of Ms Smith's statements to neighbours being afraid of 'repercussions' from Mr Robertson if they made named complaints against him was there any explanation for the absence of such statements. Given that the complaining neighbour was repeatedly identified in the disclosed documents, that allusion did not seem particularly well-founded.

Mr Robertson did not give any evidence. It was clear that he would not be able to offer any credible response to most of the allegations of anti-social behaviour and that he would find the experience of – in effect being put on trial as to his past and future behaviour – extremely distressing.

We did file witness statements from two council social workers who had become involved in Mr Robertson's care. Their evidence was directed at our final ground of defence; namely that it would not be proportionate per Art 8 for the court to make a possession order. We hoped that this evidence would persuade the court that there were plausible grounds for believing that (assuming Happy Homes persuaded the court that Mr Robertson's past behaviour was unacceptable) his future behaviour would be much less problematic. The statements offered some support for that view, but they were not as unequivocal as we would have liked.

Our rather lengthy skeleton argument fleshed out our defence by drawing on the authorities noted above and integrating the legal argument with observations as to the paucity of evidence provided in the claimant's witness statements and disclosure as to the matters taken into account and the weight attached to them at each stage of the decisionmaking process. The legal argument rested on four propositions:

Proposition 1.

In possession proceedings brought against persons who suffer from severe mental health or disability impediments by Claimants who come within HRA 1998 s.6, domestic courts must take a very rigorous approach to such protections as may be afforded to such persons by domestic law in order for that domestic law to satisfy the requirements of Art 8 ECHR.

Proposition 2

That in possession proceedings brought against such a person by a public authority or a body exercising a public function per HRA 1998 s.6 which require the Claimant to take several discrete legal steps, an unlawful decision by the Claimant at an early stage of the process is not capable of retrospective validation.

Proposition 3

That failure by the Claimant to take into account a relevant consideration at any necessary step in the process renders the decision taken at that step unlawful in a conventional public law sense.

Proposition 4

That the statutory proportionality defence provided by the various provisions of the HRA 1998 and/or the Equality Act 2010 contains a more rigorous version of the conventional public law relevant considerations doctrine, under which the court must consider not just whether a relevant consideration was taken into account *at all* by the Claimant but also whether the Claimant attached *appropriate weight* to the consideration.

The related factual questions which we put squarely before the court were these:

Question 4. In making the decision to issue the s.21 notice, did the Claimant:

- (a) reach a conclusion that was substantively irrational or disproportionate; and/or*
- (b) fail to take any or any proper account of relevant considerations ?*

Question 5. In making the decision to issue the claim, did the Claimant:

- (a) reach a conclusion that was substantively irrational or disproportionate; and/or*
- (b) fail to take any or any proper account of relevant considerations ?*

Question 6. In making the decision to continue with the claim in its amended form, did the Claimant:

- (a) reach a conclusion that was substantively irrational or disproportionate; and/or*
- (b) fail to take any or any proper account of relevant considerations ?*

The Claimant's skeleton, in contrast to its amended claim, accepted that Mr Robertson was disabled and that at least some of his anti-social behaviour was attributable to his disability. The argument made no obvious attempt to use *Ackerman-Livingston* to knock out our process based argument under the Equality Act, nor to provide a detailed evidential rebuttal to our public law assertions as to the inadequacy of the claimant's decisionmaking processes at stages 1 and 2 and 3. The Claimant's case seemed to rest on little more than a general assertion that it had balanced Mr Robertson's interest against those of his neighbours and that all of its decisions were therefore lawful.

Just before the trial, the elusive proportionality review said to have been undertaken by Ms Jones in June 2013 was finally disclosed. This seemed on its face to be an absolutely pathetic document. The great bulk of its text was a verbatim repetition of the witness

statement filed by Ms Jones when the claim was issued, including the assertion that the ABC had had no positive effect on Mr Robertson's behaviour. This was followed by several un-numbered paragraphs which consisted of chunks of text taken from the *Vulnerable customers policy* and a vague comment that Happy Homes considered it proportionate to continue with the claim because of the impact of Mr Robertson's behaviour on other tenants.

XI. THE TRIAL

The die seemed to have been cast at the outset of the hearing when the judge observed to Happy Home's counsel that he would have expected in a case like this to see in the evidence contemporaneous carefully reasoned explanations by the claimant's officers as to why it was proportionate in an Equality Act sense for the various steps needed to secure Mr Robertson's eviction from his home to have been taken. The judge also indicated that he was not much interested in the pleaded allegations of anti-social behaviour save to the extent that they bore upon the various decisions made by the claimant. The obvious inference to draw from this was that the judge was in sympathy with our legal arguments, and our primary task would be to ensure that he answered our factual questions in our favour.

(i) Oral Evidence

Most of the first day was taken up with our cross-examination of Ms Smith and Ms Jones. Many of our questions to each officer were identical. Our first concern - given the claimant's acceptance in its skeleton of Mr Robertson's disability - was to establish the inadequacies of the claimant's policy documents. It soon became clear that Ms Smith had had very little involvement with the decisions made at our 3 chosen stages, and it proved to be Ms Jones' role that was much the more significant. The initial phase of the cross-examination went something like this:

IL Ms Smith, you are obviously familiar with Happy Homes 'Starter tenancy' policy.

MJ Yes.²⁸

IL There is no mention in either of your witness statements is there that you referred to this policy before you issued the s.21 notice and the claim?

MJ No.

IL Did you refer to the policy?

MJ No I didn't.

IL The policy does not consider the implications of the Equality Act does it?

MJ [Pause - leafs thru policy] I don't think so.

²⁸ We were expecting 'Yes'. Had the answer been no the next few questions would have been redundant, but we would have established Happy Homes' own incompetence in failing to make Ms Smith familiar with the policy.

- IL And it does not say anything about using the s.21 procedure against tenants who may have a mental disability does it.
- MJ [Pause – leafs thru policy] I don't think so.
- IL You are familiar with the observation made in the policy though that proportionality review might apply in some s.21 proceedings?
- MJ Yes.
- IL And that judicial review ideas might be relevant to s.21 proceedings.
- MJ Yes.
- IL And you are obviously familiar with Happy 'Vulnerable customers' policy.
- MJ Yes.
- IL There is no mention in either of your witness statements is there that you referred to this policy before you issued the s.21 notice and the claim?
- MJ No.
- IL Did you refer to the policy?
- MJ No I didn't.
- IL That policy does not say anything about using s.21 proceedings does it ?
- MJ [Pause]. No I don't think so.
- IL The policy refers to pre-eviction protocols. We heard from Ms Smith that Happy Homes has such a protocol with [the relevant] council. Did you refer to the protocols before you issued the s.21 notice or the claim. ?
- MJ No.
- IL Are you familiar with the contents of the protocols ?
- MJ No I'm not.

We then spent some time establishing that Ms Jones had not made any contemporaneous record of the matters she had weighed in the balance when deciding to issue the s21 notice or to issue the claim. On the latter point we also addressed the role of Ms Black, who Ms Jones agreed was the person who actually made the decision to issue the claim. Ms Jones had no explanation as to why she had made no mention of Ms Black in either of her witness statements or her 'proportionality review'. Ms Jones accepted – she had little choice – that there was no record in the disclosed material of what factors Ms Black had taken into account in the (at most) 25 minutes she apparently spent in making this decision. Ms Jones then made the bizarre assertion that there was such documentary evidence in notes of various discussion she and Ms Jones had had about the case, but these had not been disclosed because the conversations also dealt with other, confidential matters. This presumably surprised Happy Homes' counsel as much as it did me. Even if were true (and Happy Homes' solicitor made no offer to track the documents down), it identified an acute failure of disclosure on the Claimant's part.

Having established with Ms Jones that the 'reason' for the ABC was to prompt a change in Mr Robertson's behaviour, we then spent some considerable time on the

chronology of alleged incidents in the pleadings set alongside the timings of the ABC, the s.21 notice and the issue of the claim (as outlined above).

IL In the 10 or 11 weeks between the ABC being signed and the s.21 notice being issued there were 2 pleaded incidents weren't there.

MJ Yes.

IL And in the 10 or 11 weeks before the ABC being signed there were 16 incidents weren't there?

MJ Yes. There were some others that are not mentioned there.

IL There doesn't seem to be any record of you having taken the reduction of incidents into account before you issued the s.21 notice does there ?

MJ Not in the documents, no.

IL So it went from 16 incidents to 2 in the same period. And yet you say in your witness statement that the ABC had no positive effect on Mr Robertson's behaviour. That is a ludicrous conclusion isn't it?

MJ [Pause] No.

We then had much the same exchange concerning the number of alleged incidents between the signing of the ABC and the issue of the claim, and then between the last incident pleaded (August 2013) and the amendment of the claim (February 2014). Ms Jones persisted – to the judge's not-at-all concealed surprise - in her insistence that the ABC had no beneficial effect.

Subsequently, we asked Ms Jones why she had not carried out a proportionality review prior to issuing the s.21 notice and the claim, but had rather waited until four months after the claim was issued to do so. She was not able to answer the question and so we moved on to the substance of the proportionality review itself. Very oddly, when asked if the review was in large part a verbatim repetition of her earlier witness statement Ms Jones said: 'No, it's not'. We then spent some excruciating minutes reading out the text of each document to establish that they were in fact pretty much identical. Ms Jones was unable to explain why the review made no mention of Ms Black, why it made no reference to the reduction in the alleged incidents of anti-social behaviour, why it made no reference to Mr Robertson's mental state, and why it made no mention of where Mr Robertson might end up living if he were to be evicted.

We had thought Ms Jones was in a bit of a hole on the basis of her written statements. She was – unfortunately for the Claimant's case – unable to stop digging during cross examination. And when the cross-examination ended, the judge had a couple of questions:

HHJ Are you able to tell me that when you made the s.21 decision and you issued the claim you took Mr Robertson's disability into account?

MJ We would have done yes.

HHJ No, I am not asking you if you would have done. I am asking you if you did. Can you tell me that you did take it into account?

MJ [Pause, head down, very quietly] No.

The evidence offered by the council social workers did not detain the court for long. Both witnesses were quite resolute in asserting that they thought Mr Robertson could live in the flat without causing difficulties for his neighbours.

The oral submissions were made the next morning. Rather to our surprise, the Claimant's counsel accepted that our dual substance and process-based attack on each stages 1, 2 and 3 was correct as a matter of law from an Equality Act and public law perspective, and from an Art 8 that perspective as well. He did as good a job as was possible in making a silk purse out of the sow's ear of written and oral evidence that his client offered up, but as the judge rose to take time to consider if he could write his judgement in sufficient time to deliver it that day, it was hard to avoid the conclusion that Ms Jones' final 'No' had settled the outcome.

XII. THE JUDGMENT

The judge began by saying that he was concerned not to keep Mr Robertson on tenterhooks and confirmed he was dismissing the claim. He accepted that both on public law and Equality Act grounds the issue of the s.21 notice and the claim had been unlawful. Both decisions were irrational (public law) and disproportionate (Equality Act) on substantive grounds because of the Claimant's officers' absurd conclusion at each stage that the ABC had not had a very positive effect on Mr Robertson's behaviour. They were also unlawful at public law and under the Equality Act because at neither stage had the Claimant given any proper consideration to the defendant's disability and its effect on his behaviour. The judge also accepted that the *Eastlands Homes* 'guillotine' analysis applied to both the public law and Equality Act strands of the defence. Even if the belated proportionality review had addressed the issue properly (which the judge for good measure decided it had not), that could not retrospectively validate the earlier unlawful decisions at stage 1 and 2.

XIII. CONCLUSION(S)

Given that the dismissal of the claim had the usual costs consequences (that Happy Homes would pay all of Mr Robertson's costs, to be assessed if not agreed), we will likely never know just how much money Happy Homes spent on its solicitors and counsel at the various stages of the litigation. The sum was presumably rather large. The case turned out to be very time-consuming, with multiple pleadings and multiple hearings. Shelter's costs bill for the entire matter was close to £10,000, as were counsel's fees. These fees were billed at commercial rates, which now exceed legal aid rates at a ratio of about 3.5 to 1. For Shelter the case was very good news, as the award of commercial costs enables it to cross-subsidise the work it does on a publicly (under)funded or pro bono basis.

The high costs were in part an inevitable consequence of Mr Robertson's disability, which made the process of taking instructions quite longwinded and complicated. But it was also in part because the Claimant made what turned out to be an ill-conceived decision to try

to bounce Mr Robertson out of his home through the accelerated s.21 procedure rather than bring a claim based squarely on the anti-social behaviour provisions of the Housing Act 1988 which would have required it to convince the court that it was reasonable that Mr Robertson be evicted. Had Happy Homes embarked on that ostensibly more demanding path, it might well have done a much better job of getting its case in order.

It may be that Happy Homes and its lawyers were lulled into a false sense of security by the oft-repeated maxim that it will only be in an ‘exceptional’ case that an Art 8 or Equality Act or public law defence will succeed in possession proceedings. But this should give us pause to think about what we mean by ‘exceptional’ in this context. The nub of Mr Robertson’s defence was that the entirety of Happy Homes’ decisionmaking in his case was an absolute shambles when measured against basic standards of administrative competence. That should, one assume, make the case ‘exceptional’ because such incompetence is not a regular feature of a local authority or social landlord’s decisionmaking process. There is no way of knowing if that is an empirically sound presumption. My own experience as an academic doing qualitative research on administrative behaviour and as counsel strongly suggests it is not. But from a defendant’s perspective the implication is surely this: that it is proper to assume competence is the norm and that therefore (gross) incompetence is indeed exceptional.

For claimant landlords such as Happy Homes, one might think quite basic steps are all that is needed to minimise the likelihood that Art 8 and public law defences in cases such as Mr Robertson’s will not even be arguable still less successful

- Pay a competent lawyer to draft a policy dealing with the circumstances in which the organisation will issue pre-proceeding notices and subsequently issue claims
- Have the policy reviewed on a regular basis to take account of major legislative or case law events
- Ensure that the policy includes a checklist of matters that officers should consider before issuing notices or claims
- Ensure that such matters are divided into those pointing towards and those pointing against issuing the notice or claim
- Ensure that the checklist identifies alternative courses of action that have been considered and rejected
- Require that such a checklist be completed and filed before any notice or claim is issued
- Require that the checklist be subject to critical appraisal by another officer with relevant experience before any notice is issued
- Ensure that all offices making such decisions receive regular (documented) training on the requirements of the policy

Such measures might be thought ‘expensive’. But so – even in a narrow sense – is losing a contested trial. So why were such measures not in place in Happy Homes? The (perhaps rather cynical) fear that one might entertain is that local authority and social landlords (consciously or unthinkingly) tolerate administrative incompetence on the basis that most possession claims are not effectively challenged, so it costs them less to maintain a shambolic decisionmaking process and lose (albeit expensively) the very occasional properly

defended case than it would cost to design and effectively implement a decisionmaking system that minimised the prospect of poorly founded cases ever being brought.

The headline costs figure tells only part of the story of course. Happy Homes' officers put in many wasted hours of their time in preparing the case and attending court. For Ms Jones and Ms Smith giving their oral evidence was presumably both a time-consuming and unpleasant experience. These matters were presumably not 'costed' in any thoughtful way by the Claimant.

And for Mr Robertson, the costs were wholly unquantifiable financially but not for that reason insignificant. The s.21 notice was issued in November 2012. The claim was eventually dismissed in February 2015. He spent the best part of 2 ½ years living with the knowledge that his landlord was (implacably) determined to have him evicted from his home. The implications this would have for his mental health are both obvious and negative.

This was a claim which – if it should have been brought at all – should have been brought in a much carefully and cautiously reasoned way. The judgment will not feature in the law reports or in textbooks. It is just another example of our vast body of 'invisible law'. The issues that it raises are however important. As such, it merits dissemination to a broader audience than the people involved in its conduct and disposal.