



Neutral Citation Number: [2021] EWCA Civ 1890

Case No: CA-2020-000077

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR JUSTICE JOHNSON
[2020] EWHC 311 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2021

Before :

LORD JUSTICE GREEN
LORD JUSTICE NUGEE
and
LORD JUSTICE SNOWDEN

Between :

METROPOLITAN HOUSING TRUST LIMITED

**Claimant/
Respondent**

- and -

TM
(A protected party, by his litigation friend DM)

**Defendant/
Appellant**

Karon Monaghan QC and Nick Bano (instructed by Duncan Lewis Solicitors) for the
Appellant
Andrew Lane and Liam Varnam (instructed by the Respondent's in-house legal team) for
the Respondent

Hearing date : 4 November 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by e-mail and release to BAILII. The date and time for hand-down is deemed to be at 10:30am on 20 December 2021

Lord Justice Nugee:

Introduction

1. This second appeal arises from a claim for possession of rented residential premises and concerns the impact on such a claim of the public sector equality duty (“**the PSED**”), set out in s. 149 of the Equality Act 2010 (“**EA 2010**”).
2. The respondent, Metropolitan Housing Trust Limited (“**Metropolitan**”), is a registered provider of social housing and the freehold owner of the unit of supported housing accommodation which the appellant, TM, has occupied since February 2014 (“**the Property**”). TM does not have capacity to conduct litigation, and therefore the proceedings, both in this Court and in the Courts below, have been conducted on his behalf by his father and litigation friend, DM.
3. Metropolitan brought a claim against TM for possession of the Property in the County Court. The claim was heard by Mr Recorder Hodge Malek QC (“**the Recorder**”), sitting in the County Court at Cambridge, over three days from 9 to 11 September 2019. He gave a detailed oral judgment on 12 September 2019 upholding Metropolitan’s claim for possession and by his Order dated 13 September 2019 granted possession of the Property, but stayed enforcement pending a further hearing, his intention being that TM should not be evicted without suitable alternative accommodation.
4. The Recorder refused TM permission to appeal but TM was granted permission by Eady J. The appeal was heard by Johnson J (“**the Judge**”). He gave judgment on 30 January 2020 at [2020] EWHC 311 (QB) dismissing the appeal, which was given effect to by his Order dated 31 January 2020.
5. Permission for a second appeal was given by Asplin LJ on 9 March 2021.

The PSED

6. It is convenient to set out the text of s. 149 EA 2010 at the outset. It provides, so far as material, as follows:

“149 Public sector equality duty

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

- (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
 - (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
 - (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
 - (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.
- (5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
 - (a) tackle prejudice, and
 - (b) promote understanding.
- (6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.
- (7) The relevant protected characteristics are—

...

disability;

...”

Background

7. TM is an adult who is diagnosed with schizoaffective disorder and treatment-resistant paranoid schizophrenia. TM has occupied the Property under a supported living arrangement since February 2014. Although he occupied under an agreement termed a License Agreement, Metropolitan accepted that it created an assured tenancy under the Housing Act 1988 (“**HA 1988**”). The Property is one of 17 housing units forming a development which provides mental health supported accommodation for individuals with moderate to severe mental difficulties (“**the Development**”).
8. Care services were initially provided by Metropolitan itself. In 2017 however the local

authority re-tendered the care contract and awarded it to Sanctuary Supported Living (“Sanctuary”).

9. On 15 May 2018 TM assaulted an employee of Sanctuary working at the Development by hitting him on the side of the face and jaw. This incident was admitted in the Defence. The Recorder described it as a very serious assault: the employee was off work for 6 weeks and had a continuing ache in his jaw at trial (judgment at [B48]-[B49]¹). It occurred wholly out of the blue and led to Sanctuary withdrawing support ([B27(4)]).
10. That came shortly after another incident on 5 May 2018 when TM exposed himself to a female resident of the Development. This was not admitted in the Defence but was recorded on CCTV and not disputed at trial, albeit the Recorder found that it was very brief and not of a sexual nature, and said that he could exclude the possibility for current purposes of a repetition [B45].
11. On the basis of those two incidents on 1 June 2018 Metropolitan served a notice on TM as required by s. 8 HA 1988 as a prelude to taking proceedings for possession, and on 12 September 2018 issued a claim in the County Court for possession of the Property, relying on Ground 14 in sch 2 HA 1988 (“**Ground 14**”). Ground 14 is one of the discretionary grounds in Part II of sch 2, which means that the Court may, if satisfied that the ground is established, make an order for possession if it considers it reasonable to do so: s. 7(4) HA 1988. Ground 14, so far as relevant, is in the following terms:

“The tenant or a person residing in or visiting the dwelling-house—

- (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing; visiting or otherwise engaging in a lawful activity in the locality,
- (aa) has been guilty of conduct causing or likely to cause a nuisance or annoyance to the landlord of the dwelling-house, or a person employed (whether or not by the landlord) in connection with the exercise of the landlord's housing management functions, and that is directly or indirectly related to or affects those functions...

Metropolitan’s particulars of claim relied on the two specific incidents referred to above (assault on 15 May 2018 and exposure on 5 May 2018).

12. At trial Metropolitan sought to rely on a number of other incidents involving TM dating back to 2013 and continuing up to August 2019 (11 in all, including the two pleaded ones). There was a dispute whether the Recorder could take account of these incidents (not pleaded in the Particulars of Claim although there was reference to some of them in the Reply), but in his judgment he held that since the duty of the Court in considering reasonableness was to take into account all relevant circumstances (*Cumming v Danson* [1942] 2 AER 653), he did need to deal with the question whether the other incidents could be admitted or relied upon in assessing the risk of harm to TM himself and to

¹ The paragraphs of the Recorder’s judgment run from [1] to [47] and then again from [1] to [84]. In this judgment I use [A1] to [A47] to refer to the first set of paragraphs, and [B1] to [B84] to refer to the second set.

others in continuing to reside at the Development, and that they could provide the context as to whether the two pleaded incidents were one-off or formed a more disturbing pattern whereby the risk of harm was serious [A11]-[A12]. He made the point (at [A25]) that in every incident he had looked at:

“there is absolutely no blame at all on [TM]. These are the consequences of his illness for which he requires help from everyone concerned.”

13. In the event in addition to the two pleaded incidents, he found three prior incidents, and one subsequent incident, to have taken place, and to be relevant to his assessment of risk. They were as follows:
 - (1) In December 2014 TM was abusive to, and kicked out at, a gasman or heating engineer who was attending to carry out some work. There was no physical injury but the gasman was fearful for his own safety [B37].
 - (2) In May 2016 TM assaulted a member of staff at the Development, throwing a punch towards his chest, jabbing him in the stomach and throwing another punch at his face. The member of staff managed to avoid the punches, but the Recorder described this as a really serious matter, and disturbing; the member of staff was lucky not to be physically harmed and was very scared [B39].
 - (3) In 2017 TM hit his father. His father described it as a restrained blow, but the Recorder said he did not regard it as minor as he had hit his own father, and although understandable, illustrated the risk he was considering [B43].
 - (4) In the summer of 2018 (the date is unclear but between June and August) TM slapped another resident. The Recorder said that it was an incident of violence and he considered it relevant [B51].

I should note that we were told by Ms Karon Monaghan QC, who appeared with Mr Nick Bano for TM, that there had been no further incidents since 2018.

14. After the incident in May 2016 Metropolitan served a notice seeking possession, but subsequently decided not to issue proceedings. Instead it was agreed that Metropolitan would work with the local NHS trust to find alternative accommodation. Two sites were subsequently proposed but TM’s parents did not consider them suitable. The Recorder said that he did not criticise them for that: both of them in good faith felt that those properties were not suitable for the reasons they gave [B58].
15. That forms the background to Metropolitan’s decision to bring and pursue proceedings.

The Recorder’s judgment

16. The Recorder gave a full and careful judgment. After dealing with the question whether he could take account of the other incidents relied on by Metropolitan, he then set out the grounds relied on, on behalf of TM, for resisting an order for possession [A26]. One of these was that Metropolitan had failed to comply with the PSED (the others being that Metropolitan had unlawfully discriminated against TM, and acted in breach of its public law obligations, and that it was not reasonable or proportionate to make an order evicting him).

17. At [A27]-[A40] he then dealt with various aspects of the law, including that relating to the PSED. He noted that a breach of the PSED was a defence to the claim for possession (*London & Quadrant v Patrick* [2019] EWHC 1263 (QB), approved in *Forward v Aldwyck Housing Group Ltd* [2019] EWCA Civ 1334 (“*Forward*”), and cited extensively from the judgment of McCombe LJ in *Bracking v Secretary of State for Work & Pensions* [2013] EWCA 1345 (“*Bracking*”) at [26] and [69] on the nature of the PSED [A36].
18. At [A41]-[B5] he gave his assessment of each of the factual witnesses for both parties, starting with Mr Jeremy Print, an Anti-Social Behaviour Officer employed by Metropolitan. His evidence is of central importance to the appeal and I will have to come back to consider it in more detail. At [B6]-[B16] the Recorder then considered the expert material, including the evidence of Dr Koch, TM’s psychiatrist, who provided a psychiatric report. The Recorder accepted her assessment that TM was unfit to participate in the proceedings [B8]. He also quoted from her conclusion as follows:

“Should he be evicted from his current placement without careful planning involving his family and clinical team, and provision of suitable alternative accommodation and care, I would have great concerns for his well-being and consider that the action and neglect of our collective duty to protect him as a vulnerable person.”

The Recorder said that he agreed with that assessment: any eviction would require careful planning and it was not going to be a question of simply putting TM out on the street [B9]. After reviewing the evidence he gave his conclusion on this aspect of the case as follows [B16]:

“The conclusion I take at the end of the day is that [the Development] is not the right place for him and he does pose a significant risk, not just to himself but to others.”

19. He then made findings of fact about TM himself, noting that the case felt “a bit like Hamlet without the Prince” as he was neither present nor had any instructions been obtained from him. He gave another conclusion in this section of the judgment as follows [B27]:

“What is clear to me, however, is that in the medium and long-term [TM’s] future is not at [the Development], and that it is in the interest of him as well as others that he leaves the development. That it is in everyone’s best interests that [TM] leaves [the Development] in an orderly fashion, is evident from the following matters...”

That was followed by a list of the particular matters that led him to this conclusion, including that there was a real risk of altercation between TM and other residents, in which TM could easily end up being hurt [B27(2)]; and that the incidents of attacks on staff were the most disturbing [B27(4)]. Sanctuary’s staff had a right to work in a safe environment and there was “a real and significantly high risk of future violence which could cause physical harm to staff and other residents and visitors.”

20. He then made detailed findings of fact insofar as not already covered by what he had said, dealing with the background, and each of the incidents relied on (not just the two

pleaded ones but the others) [B28]-[B59]. At [B60] he found that Ground 14 had been established: there had been a serious assault and an exposure had occurred in a public place. That would prima facie justify an order especially in view of his findings of the significantly high risk of harm and recurrence.

21. He then considered the defences, dealing with discrimination and public law defences [B61]-[B75], and then the PSED [B76]-[B78]. I will come back to what he said about the latter in more detail below but in summary he rejected each of the defences. He then finally considered whether it was reasonable to make an order. He concluded that it was, as follows:

“85. As I have already set out when giving my assessment of [TM] at the beginning of this judgment and his position, it is my judgment that it is in everyone’s best interests that [TM] leaves [the Development] and that is done in an orderly fashion, so I will not repeat the factors I set out at the beginning of this judgment.

86. Weighing all the factors I conclude that it is reasonable to make the order, but any order as regards enforcement should be stayed for a period of time which I would like to hear counsel on...

87. The matter when it comes back should be reserved either to Her Honour Judge Karen Walden-Smith or myself if she is not available. I will inform her that it is not my intention that [TM] should be evicted without suitable alternative accommodation...”

22. His Order dated 13 September 2019 ordered TM to give possession of the Property within 28 days but stayed enforcement of the order pending a further hearing to be heard in December 2019 before HHJ Walden-Smith or himself, with the parties having permission to file further evidence addressing TM’s welfare and the efforts that had been made to find suitable alternative accommodation. That hearing has been stayed pending appeal.
23. I have referred to the Recorder’s judgment at some length because a number of things emerge from it. First, this is a careful, thorough and sympathetic consideration of the position not only from the point of view of Metropolitan, but also from the point of view of TM’s own best interests. Second, the Recorder dealt with a large number of issues, and it is right to record that, save in respect of the PSED, no criticism is made of either his factual findings or his consideration of the law. Third, the Recorder was very clear that a possession order would not mean that TM would be evicted without somewhere suitable for him to go to.
24. I now turn to look in detail as to the evidence about Metropolitan’s consideration of the PSED, and how the Recorder dealt with the criticisms made of it.

Metropolitan’s consideration of the PSED

25. It was not disputed that the PSED applied to Metropolitan. The relevant decision-maker at Metropolitan was Mr Print. The Recorder described him as highly experienced and professional; said that he cared about TM; found that he was very conscious it was going to be a big step to evict a tenant; and said that he was aware of the need to balance

the interests of all, not just of TM but of staff at Sanctuary and other residents [A41]. He found him to be an open and totally frank witness [A42].

26. The steps Mr Print took were as follows:

- (1) In the light of the incidents on 5 and 15 May 2018, he asked for a meeting with Sanctuary and the Community Mental Health Team (“CMHT”). The meeting took place on 24 May 2018. The meeting was attended by, among others, Ms Philippa Gordon-Smith, the Local Services Manager for Sanctuary. There was a discussion, in the course of which Mr Print raised the question of TM’s capacity to understand what he had done in the two incidents.
- (2) The meeting ended with Mr Print’s request to the CMHT representatives to consult with Dr Koch to determine TM’s capacity. There was some e-mail correspondence between Mr Print and Dr Koch but no definitive answer was given. The Recorder found that Mr Print had tried unsuccessfully to get advice from Dr Koch on capacity [A42].
- (3) On 1 June 2018 Mr Print decided to issue the notice seeking possession in order to safeguard the staff and residents.
- (4) An Equalities Act Report was prepared by Ms Gordon-Smith dated 13 June 2018. Among other things it said that TM had a history of being inappropriate and even aggressive in his manner towards staff and other residents and that interventions had not had any effect. The conclusion of the report, given in answer to the question “Why, in your opinion, is starting legal action against the perpetrator both reasonable and proportionate?”, was as follows:

“The assault of 15th May was the third incident in 4 years where someone has been physically harmed by [TM]. No amount of attempts to aid him in getting insight to what the effects are of his actions have proved successful. Indeed it is alleged that he stated to his CPN [Community Psychiatric Nurse] that “he couldn’t promise that he wouldn’t do it again as [the staff member] had it long time coming”. This indicates that [TM] was aware of his actions and he understood that what he has done was inappropriate and wrong. [TM’s] remaining on site presents a high risk to other residents, staff and any contractors attending.”
- (5) One of the criticisms advanced before the Recorder was that it was inaccurate to say that there had been three incidents where someone had been physically harmed. He accepted that: in December 2014 the gasman, although he might have been in fear of violence, had not been struck; and in May 2016, although there were blows to the stomach of the member of staff concerned, they did not cause physical harm. But the Recorder found that Ms Gordon-Smith (who also gave evidence before him, and whom he found to be a truthful and honest witness who was doing her best to do what was right in what was a very difficult situation for all concerned) would have made the same assessment; and said that her assessment of the risk to staff and others was one that in his view was correct [A43], [B76].

- (6) Mr Print got the Equalities Act Report and reviewed it. He decided to proceed with proceedings for possession and they were issued on 12 September 2018. A second criticism advanced before the Recorder was that the PSED is non-delegable and Mr Print was not entitled to rely on Ms Gordon-Smith's assessment. The Recorder rejected that. He accepted that the duty was non-delegable (*R (Brown) v Secretary of State for Work and Pensions* [2008] EWCA Civ 3158 (Admin) ("**Brown**") at [94] per Aikens LJ). But Mr Print was not on the ground; the support was being provided by Sanctuary; and he was entitled to rely on input from Sanctuary in complying with his own duty to make the assessment [B78].
27. Although Mr Print did not have any report from Dr Koch when he carried out the assessment required by the PSED and decided to proceed with the claim, Dr Koch did subsequently provide a report, dated 18 October 2018. She had last reviewed TM at the Property on 4 October. She concluded that he continued to experience significant symptoms of schizophrenia that affected his understanding of and capacity to make decisions about legal matters; that he was not fit to instruct a solicitor as he was unable to weigh information provided to him about the court process, and had no interest in representing his interests in court; and that his taking part in the proceedings would have a negative impact on his mental state and behaviour. We were not told when Metropolitan was given a copy, but we were told that they had it by the time of the first hearing on 29 October 2018.
28. A third criticism was that the duty was a continuing one and Mr Print should therefore have re-assessed the position once he had received Dr Koch's report. Since this lies at the heart of the present appeal, I should set out what the Recorder said about it. It appears in two places. First, when reviewing the evidence given by Mr Print, he said this [A42]:

"Since the decision to evict, we have Dr Koch's assessment that [TM] lacks capacity. Mr Print stated that if he had to make the decision today, he did not feel he would have pursued possession proceedings; he would have tried an alternative way of dealing with the situation if that was at all possible. However, he did consider that it remains a proportionate response to the two pleaded incidents and in their context to go through this proceeding. I do not think any criticism can be fairly made of Mr Print of the decision he made or the approach he took."

Then, when considering the defence of breach of the PSED, he said this [B77]:

"I accept that the duty in respect of the PSED is a continuing duty and that is clear from [*Brown*] at [168]. Metropolitan should have reassessed the situation as and when they got new information in the course of the proceedings. Dr Koch's report on capacity should have led to a reassessment. Not doing so was a breach, However, that assessment was in effect done when Mr Print gave evidence, albeit it is not satisfactory to do it in this way. It was put to him that he would have made a different decision in May 2018, but that does not mean that it was not a correct decision and one that he was entitled to make at that time. Now we have Dr Koch's report in the course of these proceedings, the evidence of Mr Print is that in his view it is reasonable and proportionate to pursue eviction and I agree."

The Recorder therefore rejected the defence of breach of the PSED, and as already referred to, went on to make the possession order.

The Judge's judgment

29. TM appealed to the High Court on two grounds. One concerned the application of the proportionality test under s. 15 EA 2010. This was rejected by the Judge in his judgment, who found that the Recorder had faithfully applied the correct legal approach [56]; that it was not a case of the Recorder failing to consider intermediate alternatives, but that the nature of the problems were such that there was no other available intermediate alternatives [58]; and that, in circumstances where the Recorder had not ordered immediate possession but made an order that would only be enforced once more appropriate accommodation were available, the proportionality balance fell in Metropolitan's favour [59]. There has been no further appeal on the question of proportionality.
30. The other ground was that the Recorder had failed to follow *Forward* in that he had found a breach of the PSED and yet had refused to grant a remedy in respect of it.
31. The Judge dismissed this ground as well. His reasons were as follows:
 - (1) At the time of issuing proceedings, Metropolitan had complied with the PSED and the decision to issue could not therefore be impugned [65].
 - (2) Once Dr Koch assessed that TM did not have legal capacity, Metropolitan was in breach of the PSED in failing to review the impact assessment in the light of her report [67].
 - (3) On a fair reading of the Recorder's judgment he found that Metropolitan did carry out the necessary assessment – and thereby comply with the PSED and remedy its earlier failure – in the course of Mr Print giving evidence [69].
 - (4) There was therefore no continuing breach by the time the Recorder gave judgment and no reason to refuse to grant a possession order [70].
 - (5) Further, on a fair reading of the Recorder's judgment it could safely be concluded that it was highly likely that Metropolitan would have reached the same decision if it had properly reconsidered the Equalities Act Report in the light of Dr Koch's assessment that TM lacked capacity [71].
 - (6) As to Mr Print's evidence accepting that he would have made a different decision in May 2018 had he known of Dr Koch's decision, the Judge said this [72]:

“However, the fact is that he did not know of the decision at that point, and there was no breach of the PSED at that point. The relevant point in time is October 2018 by which time possession proceedings had already been initiated. Mr Print was not asked what his position would have been in October 2018. However, nothing of significance changed between October 2018 and the point when he gave evidence. At the point when he gave evidence he considered that it was reasonable and proportionate to pursue eviction. It follows that it is highly likely that

even if Dr Koch’s report would have given him cause to reflect on whether the proceedings should be maintained, and to assess whether there are any other practical alternatives, he would ultimately have concluded that they should be maintained, notwithstanding proper compliance with the PSED in the light of Dr Koch’s report.”

- (7) It followed that *Forward* did not mandate the refusal of a possession order; it supported the Recorder’s decision that a possession order was appropriate notwithstanding Metropolitan’s breach of its PSED [73].
32. The Judge did not find it necessary or appropriate to resolve an issue raised in a respondent’s notice, namely that even if it could not be shown that Metropolitan would probably have reached the same decision if it complied with its PSED, relief should be refused as a matter of discretion [74].

Grounds of Appeal

33. TM now appeals to this Court with the permission of Asplin LJ. There are two Grounds of Appeal:
- (1) The Judge was wrong to find that, following Metropolitan’s breach of the PSED, Metropolitan had corrected this breach, and thereby complied with the PSED, when Mr Print gave evidence.
- (2) The Judge was wrong to uphold an order for possession in circumstances where Metropolitan had breached the PSED and Metropolitan’s own evidence was that it would have reached a different decision if the breach had not occurred. In doing so, the Judge erred in law as to the correct application of the “highly likely test” set out in s. 31(2A) of the Senior Courts Act 1981 (“**SCA 1981**”).

Ground 1 – was the breach of the PSED remedied by Mr Print in evidence?

34. This ground raises two questions which were argued by Ms Monaghan. The first is whether it is in principle possible for a breach of the PSED to be corrected or remedied by a later belated compliance. The second is whether on the facts the Recorder was right to find (and the Judge to uphold the finding) that the breach had in fact been remedied by Mr Print in the course of giving evidence.
35. We received extensive submissions on the first question, on which there is a fair amount of authority. But I prefer to start with the second question. Mr Andrew Lane, who appeared with Mr Liam Varnam for Metropolitan, accepted that the Recorder and Judge had both found that there was a breach of the PSED, albeit he said that it was important to note that that was not a breach in issuing the proceedings (where the Recorder found that Mr Print had duly considered the PSED on the material then available), but was a breach in continuing the proceedings without re-considering the PSED in the light of Dr Koch’s report. He made a number of other points: that there was no current challenge to the notice seeking possession, or to the decision to issue proceedings, or to the Recorder’s finding that Ground 14 was satisfied, or his rejection of the discrimination and public law defences, or his conclusion that it was otherwise reasonable and proportionate to make the order which he did. Moreover it was common ground (as recorded by the Judge in his judgment at [43], and as confirmed to us by

Ms Monaghan) that the Property was not suitable for TM and if more suitable accommodation were found for him, it would be appropriate for him to move.

36. All of that is true, but the fact remains that there is no dispute that there was a breach of the PSED in not re-assessing whether to continue with the proceedings on receipt of Dr Koch's report, and that breach continued at least up until trial. The question is whether it was remedied by what Mr Print said in the witness box. We do not have a transcript of his evidence, so we are entirely reliant on the Recorder's judgment for an account of what he said. I have set that out above (paragraph 28). It is immediately apparent that among other things Mr Print said that if he had to make the decision today, he did not feel he would have pursued possession proceedings but would have tried an alternative way of dealing with the situation if that was at all possible. It is difficult on the face of it to understand how in the light of this it can be maintained that the admitted breach of the PSED was remedied by him in the witness box.
37. It is well established that the PSED is a duty to carry out a proper process, not to procure any particular outcome, and that it must be exercised "in substance, with rigour and with an open mind" (*Brown* at [92], *Bracking* at [26(5)(iii)]). Here it appears that when Mr Print was asked what he would have done were he going through the process "today" he said that he would not have pursued the proceedings. Mr Lane in terms accepted that he could not go behind that. It does not seem to me to justify a conclusion that in effect he went through the assessment in the witness box and thereby remedied the breach; on the contrary it strongly suggests that if Mr Print had gone through the process as and when he should done, that is after receipt of Dr Koch's report in October 2018, the outcome would have been different in that the proceedings would have been stopped, or at least put on hold, and might never have come to trial.
38. It is of course the case that Mr Print is also recorded as saying that he considered that it remained a proportionate response to go through with the proceedings. It is difficult to know quite what to make of this or how to reconcile it with his first answer. It is possible that all he meant was that it remained a possible and proportionate response (although not what he himself would have done). Or perhaps, as Mr Lane suggested, he meant that although if he were deciding now whether to initiate proceedings he would not do so, given the stage that the proceedings had reached, he thought they should now be continued. But in truth this is speculation, and shows up the unsatisfactory nature (as the Recorder himself referred to) of the exercise. The PSED requires the assessment to be carried out with an open mind (see above), and it is good practice for a decision maker to keep records demonstrating consideration of the duty, as proper record-keeping encourages those carrying out the relevant function to undertake their disability equality duties conscientiously (*Brown* at [96], *Bracking* at [26(5)(vi)]). And even though the reasonableness and proportionality of continuing to seek possession may be an appropriate way of characterising the ultimate decision to be made, that is not the same as saying that all that is needed is a proportionality assessment; what is needed is the open-minded conscientious inquiry referred to in the authorities (*Luton Community Housing Ltd v Durdana* [2020] EWCA Civ 445 at [27] per Patten LJ).
39. Expecting a witness "in effect" to carry out an assessment in the witness box, with all the pressures that that brings, is self-evidently about as far removed from that as one could imagine. As has been said more than once, there is an obvious danger of confirmation bias whenever a decision-maker carries out an assessment in relation to a

decision that has already been made, rather than in advance; and this is perhaps particularly so in the case of litigation, when costs have already been incurred and the incentive to pursue the proceedings to a successful conclusion can be very high. Where, as here, the evidence is ambiguous at best, that makes it very difficult to hold that an admitted breach has been duly remedied (even assuming that this is in principle possible); and on the facts of the present case I have come to the conclusion that the finding that Metropolitan's breach of the PSED was remedied in the witness box cannot stand.

40. I would therefore accept that Ground 1 of the appeal is well-founded.

Is it possible in principle to remedy a breach?

41. That makes it strictly unnecessary to decide the question whether it is possible in principle to remedy a breach. The point was argued however and I should express my views, but I will do so more briefly than I would have done had the resolution of the appeal turned on it.

42. Ms Monaghan's submission was that it was established that the PSED was to be complied with *before* a relevant decision was made, and that if the decision-maker purports to comply with the PSED late, that does not "cure" the breach; at most it goes to what remedy is appropriate.

43. I do not think the position is as starkly absolute as Ms Monaghan suggested. I accept that there are clear statements that the PSED requires an assessment to be made before a decision is made: *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293 ("*Elias*") at [274] per Arden LJ ("advance consideration ... before making any policy decision"), *R (C (a minor)) v Secretary of State for Justice* [2008] EWCA Civ 882 ("*C*") at [49] per Buxton LJ ("not as a rearguard action following a concluded decision but as an essential preliminary to any such decision"), *Bracking* at [26(4)]. But these were all cases concerned with one-off decisions: a decision limiting eligibility for compensation for wartime internment to those who were, or whose parents or grandparents were, born in the UK (*Elias*); a decision to introduce an amendment to rules for secure training centres (*C*); a decision to close the independent living fund (*Bracking*). None of them were dealing with a case where proceedings had been brought and were ongoing, which to my mind raises rather different questions.

44. Ms Monaghan sought to derive some support from the fact that in *Hotak v Southwark LBC* [2015] UKSC 30 at [73] Lord Neuberger PSC referred with approval to various passages explaining what the PSED involved, including that given by McCombe LJ in *Bracking* at [25]. But Lord Neuberger says in terms that there had been no challenge to those statements in the appeals before the court, "and in my view, at least as at present advised, rightly so". That shows that he had neither heard argument on the point nor was purporting to decide anything finally; moreover there was no question in those cases of a breach having been purportedly remedied. I do not think it takes matters any further.

45. On the other hand there is a group of cases which do concern the position where possession proceedings are ongoing, and which provide support for the proposition that even if there has been a breach of the PSED at the outset of the proceedings, it may be possible to carry out the assessment belatedly: *Barnsley MBC v Norton* [2011] EWCA

Civ 834 (“*Norton*”), *Powell v Dacorum* [2019] EWCA Civ 23 (“*Powell*”), *Forward and Taylor v Slough BC* [2020] EWHC 3520 (Ch) (“*Taylor*”). To these can be added other cases where a PSED assessment has been carried out belatedly: *R (West Berkshire DC) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441 (“*West Berkshire*”), *R (Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108 (Admin) (“*Rowley*”).

46. I do not propose to embark on a detailed analysis of these cases, but confine myself to the following comments on the possession cases. In *Norton* Lloyd LJ said in terms at [34] that even though the claimant council was in breach of its duty before the proceedings were started “it would be open to it to remedy that breach by giving proper consideration to the question at any later stage, including now in the light of our decision”. In *Powell* McCombe LJ at [51] said that *Norton* was not inconsistent with anything in his own summary of the principles in *Bracking*, and at [44]:

“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 *Forward* Longmore LJ cited both that passage and what Lloyd LJ had said in *Norton* without expressing any doubts about them (at [24], [28]). It was suggested by Ms Monaghan in her written submissions that we should hold *Norton* to have been decided *per incuriam*. I do not think we should, *Norton* having been referred to at least twice by this Court (in *Powell* and *Forward*) without disapproval.

47. All these cases were the subject of a detailed and careful consideration by Zacaroli J in *Taylor*. He concluded at [41] that they established the proposition that in possession proceedings brought by a local authority a breach of the PSED at an early stage (for example the decision to commence the proceedings) can be remedied by compliance with the PSED at a late stage. Ms Monaghan invited us to hold that this was wrong. But I think Zacaroli J was right both in his analysis and in his conclusion. I would also endorse what he says at [42]:

“That is not to say that the fact that the PSED was not complied with at the earlier stage is irrelevant to the question of later compliance. It is always necessary to find that the public authority has complied in substance, with rigour and with an open mind with the PSED. Where a public authority has commenced proceedings without complying with the PSED, it is important to guard against the risk that its subsequent purported compliance when deciding to continue the proceedings was tainted by the incentive not to depart from a decision already made. That, however, is relevant to the question of fact – whether it has complied with the PSED in the particular circumstances – and is not a bar to it curing the breach as a matter of law.”

In practice I suspect it would normally be unlikely that evidence given in cross-examination would meet this test for reasons I have already touched on (paragraph 39 above). But I do not think one should be too dogmatic about it – if it became apparent at trial that there was some minor point that had been overlooked it might be possible

for the decision-maker to confirm that, having taken it fully into account, it made no difference.

48. Ms Monaghan suggested that it was wrong to say that where there had been a breach of duty later compliance could “remedy” or “cure” the breach, and that what was really going on in such cases was that there was still a breach but the Court declined to grant a remedy. To some extent I think this is a semantic point. When judges refer to a breach as being “cured” or “remedied” by later compliance, I do not think they mean that somehow the initial breach is retrospectively wiped away as if it never happened. What they mean is that although there was indeed a breach, the later compliance may mean that it is not a breach that has any continuing significance. I do not think there is anything particular about the PSED, or indeed public law duties as a whole, in this. It is to my mind a familiar way of referring to belated compliance with duties across the law.
49. Take a simple case in private law such as a contractual obligation to do something, for example to build a wall. If the contracting party fails to build the wall as required, he is in breach of contract. If he then builds the wall, albeit 6 months late, it seems entirely natural to refer to this as remedying his breach. That does not mean he was never in breach of contract; it means that the breach has now, albeit belatedly, been put right. If the other party suffered loss and damage as a result of the wall being built late, the fact that the breach has been “remedied” does not take away his right to damages for that breach. But if he has not suffered any loss, then the late compliance is one of those breaches of contract that may have no consequences at all.
50. In the same way, it seems to me, when judges say that a breach of the PSED at an early stage of the proceedings can be “remedied” by compliance with the PSED at a later stage of the proceedings, they do not mean that in such a case there never was a breach. But it may indeed mean that the breach, once remedied in this way, has no continuing consequences. I do not think it matters very much whether one refers to that, as Fordham J did in *Rowley* at [59], as a case where the relevant body is “not in present or continuing breach”; or, as Longmore LJ did in *Forward* at [26], as a case where subsequent compliance at a later stage has “compensated for earlier non-compliance”; or whether one says that in such a case the Court may refuse relief either under s. 31(2A) SCA 1981 or as a matter of discretion. The significant point is that although breach of the PSED can be relied on as a defence to a claim for possession, if it has been complied with, albeit belatedly, the Court is not obliged to refuse the claim for possession, any more than it is obliged in judicial review proceedings to quash a decision where there has been belated compliance: *Forward* at [31], [36]. The Court does not act as some sort of mentor or nanny to decision-makers (*ibid* at [25]) and its approach should not be that of a disciplinarian, punishing for the sake of it (*West Berkshire* at [87]).
51. In those circumstances I am not persuaded that there is anything wrong in referring to late compliance with the PSED as remedying or curing the breach.

Ground 2 – s. 31(2A) SCA 1981

52. I can deal with Ground 2 very shortly. The Recorder said nothing about s. 31(2A) 1981. The Judge however said that on a fair reading of the Recorder’s judgment it could safely be concluded that it was highly likely that Metropolitan would have reached the same decision if it had properly reconsidered the Equalities Act Report in the light of

Dr Koch's report that TM lacked capacity.

53. The difficulty I have with that should be apparent from what I have already said in relation to Ground 1. I do not see how it can be reconciled with Mr Print's evidence that if he were making the decision today he would *not* have reached the same decision. As Ms Monaghan submitted, it flies in the face of the only record of the evidence that we have.
54. I would therefore uphold Ground 2 as well.
55. In her written submissions Ms Monaghan also advanced an argument that s. 31(2A) should be confined to trivial procedural failings, relying on a suggestion by Blake J in *R (Logan) v Havering LBC* [2015] EWHC 3193 (Admin) at [55] that that might well have been the intention. She did not however press the argument in oral submissions. In the light of the conclusion I have already come to, the point does not arise, but I think she was well advised not to: see *R (Goring-on-Thames Parish Council) v South Oxfordshire DC* [2018] EWCA Civ 860 at [47] where this Court described the proposition that s. 31(2A) applies only to conduct of a procedural or technical kind as a surprising concept, it having regularly been applied to substantive decision-making both at first instance and in this Court, and expressed the view, albeit without full argument, that it was on the face of it mistaken.

Disposal

56. For the reasons I have given (and the reasons given below by Green LJ which I agree with) I would allow the appeal.
57. Mr Lane submitted that even if we allowed the appeal, the possession order could stand, on the basis that Metropolitan would undertake a further PSED assessment before applying to enforce the order. I do not think that can be right. If Mr Print's evidence was not sufficient to cure the breach, as in my view it was not, then the proceedings, although started properly, were continued in breach of the PSED. It is established by *Forward* that that does not necessarily require the possession order to be quashed as relief is always discretionary, but I do not see how in this case the possession order obtained in breach of the PSED could properly stand unless we thought the breach was so insignificant as not to justify any remedy. That is not my view.
58. Ms Monaghan submitted that if we allowed the appeal, we should not only set aside the order for possession but dismiss the claim. In our draft judgments we invited submissions from the parties on the question whether if we did so, it would be open to Metropolitan if (having carried out a conscientious, rigorous and open-minded assessment in proper compliance with the PSED), it thought it appropriate to do so, to bring a second claim for possession based on the same incidents, or whether any such claim would be liable to fail on other grounds, such as cause of action estoppel or abuse of process. We received helpful submissions from both parties agreeing that a second action would not be an abuse, the issue being covered by the decision of this Court in *Barber v Croydon LBC* [2010] HLR 26 where a very similar point was raised: see at [47] per Patten LJ.
59. In those circumstances I accept Ms Monaghan's submission. There was a breach of the PSED which had not been remedied prior to trial, and for the reasons I have given was

not in my view remedied at trial. That amounted to a defence. Metropolitan's claim having failed at trial, it follows that the action should be dismissed.

Lord Justice Snowden

60. I agree with the judgments of Nugee LJ and Green LJ.

Lord Justice Green

61. I agree with the judgment of Nugee LJ for the reasons that he has given and would add only the following three points.

62. First, an issue arose as to whether a breach of the PSED could be belatedly remedied. Nugee LJ has dealt with this at paragraphs [41]–[51] of his judgment under the heading “*It is it possible to cure a breach?*”. He has concluded that it is possible. He did not accept the appellant's argument that a proper PSED evaluation always had to pre-date the relevant decision (paragraphs [42]–[47]). I agree with this conclusion. However, it is important to be clear as to the limits of what can be achieved by belated compliance.

63. If the PSED is breached then because it is a continuing duty there remains an obligation upon the decision maker to adhere to the statutory duty in s. 149 to bring the breach to an end. When this happens it might, as a matter of semantics, be said that the breach has been “*remedied*”. However, as Nugee LJ points out (paragraph [48]), simply because it is possible to remedy a breach in this manner does not mean that the initial breach is “*wiped away as if it never happened*”. This is important. On first principles if a Court finds a breach by a person exercising a public law duty the Court has a discretion as to the remedy to be granted. In fashioning relief the Court will take into account all the surrounding circumstances, which will necessarily include past unlawful effects, and then choose between a range of options including quashing the underlying decision, making an order requiring something to be done, remitting the decision to be taken again, granting a declaration only, or even providing no relief if the breach was, in substance, immaterial.

64. For this reason I reject any suggestion made by the respondent that a belated act of compliance expunges any harmful effects of the earlier failure. I do not read any of the judgments referred to as supporting any such conclusion. An individual might, by reason of the prior failure, suffer the loss of a benefit or an entitlement. This loss does not evaporate simply because of a belated act of compliance. In the present case, the report of Dr Koch, dated 18 October 2018, identified that the claimant lacked capacity to participate in legal proceedings, in particular in the possession proceedings brought against him. This conclusion was not in dispute in the proceedings. As such, he could not give evidence about the incidents said to justify the possession order, nor could he give instructions to his litigation friend or his legal advisors. Yet, the respondent pressed forward to a trial, occurring over 12 months later, seeking possession in circumstances where the claimant did not have alternative suitable accommodation immediately available to him. He therefore suffered direct prejudice from the failure properly to perform the PSED which would (or should) have revealed his incapacity and the prejudice he faced in being subjected to possession proceedings. A delayed performance of the PSED cannot neutralise the prejudice suffered by the claimant from not being able fully to participate in the trial and in preparatory steps leading up to it; a prejudice exposing him to an increased risk of eviction.

65. The second point concerns the judge's conclusion that a witness box evaluation suffices to comply with the PSED. Again, I agree with the analysis of Nugee LJ. The judge recognised in his judgment that this was not a satisfactory state of affairs. He nonetheless concluded that it was lawful. With respect I would disagree. Any person carrying out a PSED evaluation at trial will be subject to an innate risk of confirmation bias. A witness that gives an honest yet inculpatory answer to a question risks losing the public authority the case, and exposing the employer to a risk of costs. It also places the witness and employer at a reputational peril. Further, the evaluation required to be performed under s. 149 EA 2010 is a rounded evaluation encompassing a range of considerations which must be taken into account. It is a duty to be performed in a dispassionate and objective manner upon the basis of relevant evidence collected in advance. A hostile cross-examination is not an environment suited to the due performance of this assessment. In the present case the judge at first instance recorded in his judgment that in light of Dr Koch's expert opinion on capacity, Mr Print stated that he would not have commenced proceedings had he taken the decision that day. Yet the judge recorded that Mr Print had said that continuation of the possession proceedings would *also* have been a lawful and proportionate response. The judgment recorded the following:

“Mr Print stated that if he had to make the decision today [i.e. the day of his evidence in the trial], he did not feel he would have pursued possession proceedings; he would have tried an alternative way of dealing with the situation if that was at all possible. However, he did consider that it remains a proportionate response to the two pleaded incidents and in their context to go through this proceeding.”

66. Absent considerable forensic gymnastics these two positions are inconsistent. No reasons were given by Mr Print for this inconsistency and, with respect, neither of the judges below have critically examined the implications of this conundrum. The first instance judge accepted and treated as dispositive the conclusionary exculpatory statement by Mr Print that notwithstanding that had the decision been taken on the date he gave evidence he would not have pursued possession, nonetheless pursuing possession was proportionate. In my judgment, neither judge was entitled to treat this as adequate evidence of performance of the PSED. It is unnecessary to express a concluded view whether the performance of a PSED in the witness box would *always* be non-compliant with the statutory duty. It is possible, one supposes, for there to arise a situation in which an earlier PSED was performed but was incomplete in some relatively modest manner and the lacuna was adequately filled later in the witness box. That, however, is a far cry from the present situation.
67. Thirdly, and finally, this was a case which cried out for administrative review. Here the claimant is legally aided, and the respondent is in receipt of public funds performing a public law service and duty. This appeal amounts to a third level of judicial intervention. The costs incurred are significant, both to the public purse and in terms of court resources. I fail to understand why, when Dr Koch's report was received in October 2018, there was no internal rereview of the decision to continue with the possession proceedings. Internal administrative review of decisions which are challenged is increasingly common within public authorities. An independent, objective, review by a fresh pair of eyes can bring a dispute to a swift solution avoiding hard-fought litigation. The failure to have such a system in place has led in this case to

the squandering of scarce resources far better deployed elsewhere. In similar vein, see the comments of the Court of Appeal in *RS v Brent LBC* [2020] EWCA Civ 1711 at paragraph [48].