Neutral Citation Number: [2020] EWHC 3520 (Ch)

Case No: CH-2019-000178

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)

7 Rolls Building
Fetter Lane,
London EC4A 1NL

Date: 21ST December 2020

Before:

MR JUSTICE ZACAROLI

- -

Between:

Ms Kerry Jane Taylor	**Appellant**
- and -	
Slough Borough Council	**Respondent**

- -
- -

Mr Toby Vanhegan (instructed by **Barrett and Thomson Solicitors**) for the **Appellant**
Ms Ruchi Parekh (instructed by **Sharpe Pritchard LLP Solicitors**) for the **Respondent**

Hearing date: 9 December 2020

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APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10.30 a.m. on Monday 21st December 2020.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

1. This is an appeal against the order of HHJ Melissa Clarke dated 18 June 2019 requiring the Appellant, Ms Kerry-Jane Taylor ("Ms Taylor") to give possession of 57 Monkfield Way, Slough (the "Property").

2. The only issue on this appeal is whether the Judge was wrong to find that there had been no breach by the Respondent, Slough Borough Council (the "Council"), of the public sector equality duty ("PSED") imposed by s.149 of the Equality Act 2010, and wrong not to have dismissed the claim for breach of the PSED.

3. By an order dated 27 April 2020, Mann J gave permission on this single ground. The possession order was stayed pending the determination of this appeal by the order of Nugee J dated 10 July 2019.

Background

4. Ms Taylor was granted an introductory tenancy of the Property on 12 January 2009. It became a secure tenancy after 12 January 2010.

5. In November 2011 Ms Taylor was diagnosed with bipolar disorder. The Council was aware of that from January 2012, following her interview with one of its housing officers.

6. On the basis of allegations of antisocial behaviour connected to drug use and supply at and from the Property, Reading Magistrates' Court made a Closure Order for three months on 2 January 2018. A Closure Order prohibits access to the premises for a specified period.

7. On the same day, the Council served Ms Taylor with a notice seeking possession relying on the absolute ground for possession contained in s.84A of the Housing Act 1985 ("s.84A"), based on Ms Taylor's antisocial behaviour.

8. On 21 March 2018, the Council's housing officer with responsibility for the area, Ms Lauren Hamilton, carried out an Equality Act assessment in respect of Ms Taylor. It is common ground that the assessment was done on the wrong premise. Ms Hamilton (albeit unbeknown to her personally) assessed Ms Taylor on the basis that she had no disability, whereas the Council accepts not only that Ms Taylor has a disability (bipolar disorder) but that it had been made aware of it in 2012.

9. On 23 March 2018, the Council commenced possession proceedings against Ms Taylor under s.84A. On 29 March 2018 Reading Magistrates' Court extended the Closure Order for a further three months. Ms Taylor returned to the Property on 2 July 2018. On 5 July 2018, in proceedings brought by the Claimant, Ms Taylor gave undertakings to the Court not to engage in antisocial behaviour.

10. During the period of the Closure Order, the antisocial behaviour at and from the Property ceased, but complaints from neighbours of such behaviour recommenced upon Ms Taylor's return to the Property.

11. On 24 July 2018 the Council served notice on Ms Taylor seeking possession on the basis of ground 1 of Schedule 2 to the Housing Act 1985 (arrears of rent). Possession proceedings on that basis were issued on 12 September 2018 and a possession order was made at Slough County Court on 5 November 2018, in the absence of Ms Taylor. That was, however, set aside by agreement in March 2019.

12. Both possession actions were ordered to be heard together. The trial took place on 24 May 2019.

The Judgment of HHJ Melissa Clarke

13. In a clear and careful extempore judgment, having set out the timeline of events, the Judge referred to the evidence of the expert psychiatrist, Dr Akenzua. His report set out a history of drug (heroin and crack cocaine) and alcohol misuse by Ms Taylor stretching back many years. He noted that Ms Tylor had been diagnosed as dependent on alcohol and that, at the time of his assessment of her, Ms Taylor was on methadone and denied intravenous drug use. He referred to previous participation in rehabilitation programmes and noted that it had been very difficult to motivate Ms Taylor to change her lifestyle.

14. Dr Akenzua's diagnosis was that Ms Taylor has a personality disorder, specifically that she fulfils the diagnostic criteria for "Emotionally Unstable Personality Disorder, borderline type ICD-10" (as opposed to the earlier diagnosis of bipolar disorder) which he concluded constituted a disability within the Equality Act 2010. At paragraph 71 of his report he said:

> "Ms Taylor certainly has a mental disorder, Emotionally Unstable Personality Disorder that is very severe and has almost eliminated her ability to live an independent and functional life. All accounts relating to Ms Taylor describe her social circumstances and lifestyle as extremely chaotic. She has had quite a traumatic and unfortunate sequence of life events. Her history strongly suggests her chronic use of alcohol and illegal drugs may actually be a method of coping with the psychological, emotional and physical trauma she has experienced."

15. At paragraph 77, Dr Akenzua concluded that:

> "Living independently will not provide the level of support and structure needed to address her use of illegal drugs. To benefit from treatment, she will need to be in highly-supported accommodation in the community and engage with a mental health team with resources to engage and manage patients with complex needs."

16. At paragraphs 85-89, Dr Akenzua said that he would be very concerned if she were made homeless as she had all the risk factors for exploitation in the community. He concluded that it was his carefully considered expert opinion that supported accommodation was the first step in breaking the vicious cycle of increased drug use and further deterioration of mental health and consequent exploitation.

17. Having addressed defences that are not relevant to this appeal, including that the absolute ground for possession under s.84A was not made out and that the notice seeking possession was invalid, the Judge turned to deal with the defence based on the PSED, at [40] to [52] of her judgment.

18. She noted that although it was accepted that Ms Hamilton had been unaware of the diagnosis of bipolar disorder at the time she produced her assessment in March 2018, once she (and Ms Jo Frost, Ms Hamilton's manager) became aware of the diagnosis in June 2018, from that time they treated Ms Taylor as having a protected characteristic and gave due regard to the PSED in making decisions since then.

19. She referred to the fact that, once aware of the diagnosis, Ms Hamilton had made enquiries of two agencies providing mental health support, Common Point of Entry and Turning Point, relating to the questions she would ask if carrying out an Equality Act assessment. From this she concluded that Ms Hamilton had intended to carry out a further formal Equality Act assessment, although she in fact did not do so. She set out her findings at [44] of the Judgment as follows:

> "Therefore, looking at all the evidence before me, although Ms Hamilton is not here to give me her evidence about it, I am satisfied on the balance of probabilities that:
>
> a. Ms Hamilton was aware of her public sector equality duty in carrying out the initial impact assessment. That is apparent from the documentation.
>
> b. Mrs Hamilton appears to have carried out the initial Equality Act assessment based on her knowledge at the time, but in fact that knowledge was wrong, as would have been apparent from further investigations of the information held by the claimant.
>
> c. It became apparent to Mrs Hamilton by June 2018 that her knowledge of the defendant's mental health was wrong, and that she potentially did have diagnoses the effect of which amounted to a disability.
>
> d. Mrs Hamilton took her public sector equality duty seriously, and was aware of the fact that it is a continuing duty, by seeking to make enquiries to carry out a further assessment in light of the new knowledge that she then had.

> e. Mrs Hamilton did exercise the public sector equality duty in substance and with rigour by asking specific questions and seeking information from the various agencies that the defendant had engaged with, namely Turning Point and the Common Entry, as to what specific implications an eviction would have on this defendant given her particular vulnerabilities."

20. The Judge noted that, in addition to the enquiries made of Turning Point and Common Point of Entry, the Council had taken various other steps: working closely with the police, including supporting a referral to Browns intensive support services; taking steps to investigate (in light of the expert's report) what could be done to enable Ms Taylor to obtain a highly-supported living environment from another provider (the Council not having that type of housing to offer); and visiting Ms Taylor with the police to discuss her housing needs.

21. At [51] the Judge said that she was satisfied on the basis of all the evidence before her that the Council had taken very seriously Ms Taylor's vulnerabilities, had treated her as disabled and exercised with rigour, in substance and with an open mind the duty to have regard to her disability. This was evidenced, for example, by Ms Hamilton having gone back and relooked at all of the issues the moment it became apparent there was a potential diagnosis. At [52] the Judge concluded that she was satisfied that the Council had complied with the PSED.

22. The Judge said that as part of her consideration of the PSED she had also considered the evidence that related to the separate but overlapping issue of discrimination. She dealt with this in the remaining part of her judgment, in which she concluded that the possession proceedings were a proportionate means of achieving a legitimate aim justifying direct and indirect discrimination. In doing so she took into account the following: the Council had taken other courses of action, short of possession proceedings, but those had been unsuccessful; it had also taken steps to signpost services that could assist Ms Taylor, but these had also been unsuccessful; the wide picture of anti-social behaviour going back many years, which had stopped temporarily during the Closure Order, but recommenced thereafter; the expert's conclusion that independent living was not going to be sufficient to enable Ms Taylor to refrain from antisocial behaviour and that she needed highly-targeted, supported living and psychological therapy; and the needs and rights of neighbours and visitors to those neighbours. In summary, she concluded that the Council had done everything it could do.

The Law

23. Section 149 of the Equality Act 2010 provides, so far as directly relevant to this appeal:

> "**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) …
>
> (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."

24. The general principles underlying the PSED were set out by McCombe LJ in *Bracking v Secretary of State* [2013] EWCA Civ 1345, at [26] (cited with approval by the Supreme Court in *Hotak v Southwark LBC* [2016] AC 811, at [73]):

> (1) As stated by Arden LJ in *R. (Elias) v Secretary of State for Defence* [2006] 1 W.L.R. 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
>
> (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the

decision maker seeking to meet the statutory requirements: *R. (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (Admin) (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R. (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26]–[27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a 'rearguard action', following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23]–[24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R. (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:

i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be 'exercised in substance, with rigour, and with an open mind'. It is not a question of 'ticking boxes'; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) '[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.' (per Davis J (as he then was) in R. *(Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R. (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74]–[75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R. (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R. (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At [77]–[78]

> "[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.
>
> [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89]–[90]

> "[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to

> be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in Brown (at [85]):
>
> > '… the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
>
> [90] I respectfully agree ..."

25. In *Powell v Dacorum BC* [2019] HLR 21, McCombe LJ warned against application of these principles without proper regard to their context. *Bracking* itself concerned a challenge to a decision by the Minster for Disabled People to close a fund known as the Independent Living Fund. At [44] of *Powell*, McCombe LJ said:

> "The impact of the PSED is universal in application to the functions of public authorities, but its application will differ from case to case, depending upon the function being exercised and the facts of the case. The cases to which we have been referred on this appeal have ranged across a wide field, from a Ministerial decision to close a national fund supporting independent living by disabled persons (*Bracking*) through to individual decisions in housing cases such as the present. One must be careful not to read the judgments (including the judgment in *Bracking*) as though they were statutes. The decision of a Minister on a matter of national policy will engage very different considerations from that of a local authority official considering whether or not to take any particular step in ongoing proceedings seeking to recover possession of a unit of social housing."

26. In the context of possession cases, in *London & Quadrant Housing Trust v Patrick* [2020] 1 P & CR 5, Turner J identified the factors likely to be of most relevance, at least in many instances, as follows (without the original footnote references):

> **"Application of the PSED**
>
> (i) When a public sector landlord is contemplating taking or enforcing possession proceedings in circumstances in which a disabled person is liable to be affected by such decision, it is subject to the PSED.

Nature and scope of the PSED

(ii) The PSED is not a duty to achieve a result but a duty to have due regard to the need to achieve the results identified in s.149. Thus when considering what is due regard, the public sector landlord must weigh the factors relevant to promoting the objects of the section against any material countervailing factors. In housing cases, such countervailing factors may include, for example, the impact which the disabled person's behaviour, in so far as is material to the decision in question, is having upon others (e.g. through drug dealing or other anti-social behaviour). The PSED is "designed to secure the brighter illumination of a person's disability so that, to the extent that it bears upon his rights under other laws it attracts a full appraisal".

Making inquires

(iii) The public sector landlord is not required in every case to take active steps to inquire into whether the person subject to its decision is disabled and, if so, is disabled in a way relevant to the decision. Where, however, some feature or features of the information available to the decision maker raises a real possibility that this might be the case then a duty to make further enquiry arises.

The importance of substance over form

(iv) The PSED must be exercised in substance, with rigour and with an open mind and should not be reduced to no more than a "tick-box" exercise.

Continuing nature of the duty

(v) The PSED is a continuing one and is thus not discharged once and for all at any particular stage of the decision making process. Thus the requirement to fulfil the PSED does not elapse even after a possession order (whether on mandatory or discretionary grounds) is granted and before it has been enforced. However, the PSED consequences of enforcing an order ought already to have been adequately considered by the decision maker before the order is sought and, in most cases, in the absence of any material change in circumstances (which circumstances may include the decision maker's state of knowledge of the disability), the continuing nature of the duty will not mandate further explicit reconsideration.

The timing of formal consideration of the PSED

(vi) Generally, the public sector landlord must assess the risk and extent of any adverse impact and the ways in which such

risk may be eliminated before seeking and enforcing possession and not merely as a "rear-guard action" following a concluded decision. However, cases will arise in which the landlord initially neither knew nor ought reasonably to have known of any relevant disability. The duty to "have due regard" will then only take on any substance when the disability becomes or ought to have become apparent. In such cases, the lateness of the knowledge may impact on the discharge of the PSED. For example, cases may arise in which countervailing interests justify a less formal PSED assessment than would otherwise have been appropriate. Thus a tenant whose anti-social conduct has already been adversely affecting his neighbours for a considerable time but whose disability is raised at the eleventh hour may well find that the discharge of the PSED does not necessarily mandate a postponement of the date or enforcement of a possession order. Of course, the obligation to have "due regard" still arises but the result of the discharge of that obligation may well be less favourable to the person affected where, through delay, the landlord's options have been limited and the rights and reasonable expectations of others have assumed a more pressing character. Each case will, of course, depend on its own facts.

Recording the discharge of the duty

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

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

(viii) The court must be satisfied that the public sector landlord has carried out a sufficiently rigorous consideration of the PSED but, once thus satisfied, is not entitled to substitute its own views of the relative weight to be afforded to the various competing factors informing its decision. It is not the court's function to review the substantive merits of the result of the relevant balancing act. The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have

> given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors."

The arguments on the appeal in outline

27. Mr Vanhegan, who appeared for Ms Taylor, divided the single ground of appeal into three sub-issues: (1) whether there was a breach of the PSED; (2) if so, whether the Council subsequently complied with the PSED and whether that subsequent compliance cured the original breach; and (3) whether, if there had been no cure of the original breach, the Judge should have granted a possession order.

28. By a Respondent's Notice, the Council sought to uphold the Judge's decision on the basis that it was open to her to conclude that the initial breach of the PSED was cured by subsequent compliance with the PSED and on the basis that it was highly likely that it would have reached the same decision had it fully complied with the PSED.

Breach of the PSED

29. Section 149(1) imposes the PSED on a public authority such as the Council "in the exercise of its functions". Mr Vanhegan submitted that the relevant function in this case was the Council's exercise of its housing function. In reliance in particular on s.149(1)(b), as explained by s.149(3)(b) and s.149(4), he submitted that, in essence, the Council had failed to have due regard to the need to take steps to meet the needs of disabled persons that are different from the needs of persons who are not disabled and to take account of disabled persons' disabilities.

30. The duty arises in respect of all aspects of the Council's exercise of its housing function, including the decision to commence possession proceedings and any decision to continue with those proceedings. It is a continuing duty, which must be complied with at all stages of the Council's consideration of Ms Taylor's housing needs including, for example, at such point in time in the future when a decision needs to be taken whether to enforce the possession order.

31. The single conclusion by the Judge on this issue was that the Council had complied with the PSED. It was common ground, however, that at the time that the possession proceedings were initially commenced, on 23 March 2018, the Equality Act assessment then carried out was flawed because it failed to acknowledge Ms Taylor's disability. It necessarily follows, that in carrying out its functions in respect of housing by deciding to commence the proceedings the Council was in breach of the PSED, since it had not taken into account the needs of Ms Taylor resulting from her disability.

32. Strictly speaking, therefore, although the Judge did not rationalise it in this way, the Judge's conclusion that the Council had complied with the PSED must be seen as an acceptance that, notwithstanding the *initial* breach of the PSED, the Council's subsequent conduct from the time that it did appreciate Ms Taylor's disability meant that the initial breach was cured such that overall the Council had complied with the PSED duty. As I have noted above, the Council, by its Respondent's Notice, contends that the Judge's decision can be supported on this basis.

Cure of the initial breach of the PSED

33. Mr Vanhegan submitted, first, that as a matter of law it is not possible to cure a breach of the PSED by subsequent conduct and, second, that the Council's subsequent conduct in this case did not as a matter of fact cure the initial breach.

34. He relied on the first, second and fourth of the points set out in [26] of *Bracking* (above), stressing the importance of the duty being complied with prospectively and not as a "rearguard" action. In *Kaur and Shah v Ealing LBC* [2008] EWHC 2602 (Admin), a judicial review challenge was made to a policy adopted by Ealing Borough Council to commission borough-wide services from community and voluntary organisations rather than fund individual organisations under sponsorship agreements. At [23] Moses LJ referred to the jurisprudence which reinforced the importance of considering the impact of any proposed policy before it was adopted and, at [24] said:

> "What is important is that a racial equality impact assessment should be an integral part of the formation of a proposed policy, not justification for its adoption."

35. Mr Vanhegan also relied on *Aldwyck Housing Group Ltd v Forward* [2020] 1 WLR 584. In that case, the argument advanced (as it happens, by Mr Vanhegan) was that once it was established that there had been a breach of the PSED, the only circumstances in which relief could be granted were if there had been subsequent compliance or where future compliance would compensate for the prior non-compliance. The Court of Appeal rejected that submission. At [31], Longmore LJ concluded that, "although as a matter of fact relief has to date been refused only in the categories of case identified by Mr Vanhegan, I do not read the authorities as saying that, as a matter of law, it is only in those categories that there is a discretion to refuse relief".

36. I do not accept the argument that a breach of the PSED cannot be cured, at least in the circumstances of this case, by subsequent compliance with the duty. The cases in which the importance of prospective compliance has been stressed were in the context of policies being set by public officials. As McCombe LJ noted in *Powell* (above), these raise different considerations to cases involving decisions to commence or pursue individual possession actions.

37. In the latter context, the possibility of a breach of the PSED being cured by subsequent compliance has been specifically approved by the Court of Appeal on at least three occasions.

38. First, in *Barnsley Metropolitan Borough Council v Norton* [2011] EWCA Civ 384, a case concerning possession proceedings against a school caretaker following termination of his employment. The council had failed to take into account the caretaker's daughter's disability before commencing possession proceedings or at any stage during the proceedings. The Court of Appeal nevertheless found that the judge had been entitled to make a possession order. At [34], Lloyd LJ said this:

> "Mr Read submitted that the possession order should be set aside and the possession proceedings dismissed. I can see no proper basis for such an order. Even though, on the basis on which I proceed, the 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."

39. Second, in *Powell v Dacorum Borough Council* [2019] HLR 21. In that case, the defendant had submitted to a possession order which was initially suspended. The Court of Appeal determined that the council, in requesting a warrant for possession, had not breached the PSED. It went on to conclude, however, that even if it had been, it had remedied that breach by its subsequent assessment of the defendant in light of later obtained psychiatric evidence. At [50], McCombe LJ referred to the decision in *Barnsley* (above) as having established that "in proceedings of this type, it is open to a social housing landlord to remedy any defect in compliance with the PSED at a later stage in the proceedings." He then said that there was nothing in his own judgment in *Bracking* which was inconsistent with that, noting that "the decision to seek possession of a social housing unit in respect of which a court has already made a possession order is different in character from the decision under consideration in *Bracking*".

40. Third, in *Forward* (above), Longmore LJ cited *Barnsley* – in particular the comment by Lloyd LJ that it was open to a council to remedy a breach of the PSED by giving proper consideration at any later stage in possession proceedings – without any adverse comment. I do not accept that the fact that the Court of Appeal in that case upheld the decision to grant possession on the grounds that it was appropriate to grant relief where the court could be satisfied that it was highly likely that the council's decision would not have been different had the breach of the PSED not occurred was any kind of rejection of the proposition of Lloyd LJ in *Barnsley*. Since the council in the *Forward* case had not sought to cure its breach of the PSED, the solution adopted in *Barnsley* and (as an alternative conclusion) in *Powell* was simply not in issue.

41. These authorities establish, in my judgment, 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 (for example in deciding to continue the proceedings). Accordingly, I reject the contention that the Judge was wrong as a matter of law to conclude that there had overall been compliance by the Council with the PSED notwithstanding the original Equality Act assessment had been undertaken without complying with the PSED.

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.

43. Mr Vanhegan submitted that the Judge fell into error in concluding that a breach of the PSED could be cured because it was a continuing duty. I do not accept that the Judge's conclusion was based on that reasoning. In any event, for the reasons I have given, the contention that a breach is capable of subsequent cure is supported by the authorities referred to above.

44. As to Mr Vanhegan's second contention, that the Judge was wrong to conclude that there had been subsequent compliance, as Ms Parekh submitted on behalf of the Council, an appellant faces a high threshold in seeking to overturn a trial judge's primary findings of fact: see the notes in the White Book at 52.21.5. In particular an appeal court will only interfere where the findings of fact were unsupported by the evidence or ones which no reasonable judge could have reached.

45. Mr Vanhegan's principal contention was that the Council's subsequent communications with Turning Point, Common Point of Entry and the Police do not demonstrate compliance. He submitted that there is no evidence that the Council sat down and re-assessed the question whether they should continue the proceedings taking into account Ms Taylor's disability.

46. As I have noted, the Judge found that although Ms Hamilton appears to have intended to carry out a subsequent formal Equality Act assessment, she did not do so. The Judge was correct to conclude, however, that while the Council's failure to make a record of its subsequent consideration of the PSED in a further assessment meant that there was missing an "important evidential element", it was not itself a breach of the PSED: see *Bracking* (above) at [26(2)]. The Judge, at [41], had due regard to the lack of documentary evidence, noting that the court should reach a determination on the basis of all of the evidence, not merely the documentary evidence.

47. Similarly, I do not accept that it is necessary for the Council to have adduced evidence of a particular moment when it "sat down" and made a decision to pursue the proceedings with due regard to the PSED. The Judge's task was to

consider on the basis of all the evidence whether the Council's decision (which it clearly made, as it pursued the possession proceedings) to continue with the proceedings once it appreciated Ms Taylor's disability was taken with due regard (as a matter of substance, rigour and with an open mind) to the PSED.

48. I have set out above the Judge's findings as to the steps taken by the Council in order to comply with the PSED from June 2018, when Ms Hamilton became aware of the PSED. The enquiries made of Turning Point and Common Point of Entry were made (as the emails in evidence demonstrate) in the specific context of the continuing possession proceedings. The Judge's conclusion was reached having heard evidence from (in particular) Ms Frost (Ms Hamilton being unable to attend trial due to maternity leave), as well as having reviewed the documents in detail.

49. In my judgment, Mr Vanhegan's submissions do not come close to establishing that the Judge's finding of fact that, on the totality of the evidence, the Council had complied with the PSED in making its decisions since June 2018 was unsupported by the evidence or was one which no reasonable judge could have reached. I was not in fact referred to any of the underlying witness evidence which the Judge read or heard in order to persuade me that the Judge's conclusion was unsupported by the evidence.

50. As Ms Parekh pointed out, the specific aspect of the PSED upon which Mr Vanhegan relied relates to the need to take steps to meet the needs of Ms Taylor in the light of her disability. The evidence relied on by the Judge, particularly at [27] to [29] and [45] to [47], demonstrate that the Council did just that.

51. Accordingly I reject the challenge to the Judge's finding of fact.

Conclusion

52. In light of my conclusions above it is unnecessary to consider the alternative argument raised by the Respondent's Notice (and not considered by the Judge) that even if there was a breach of the PSED it was open to the court to grant relief to the Council because it was highly likely that it would have made the same decision had it fully complied with the PSED.

53. For the above reasons I dismiss this appeal.