Case No: A2/2013/3161

Neutral Citation Number: [2014] EWCA Civ 1081

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
The Hon. Justice Cranston
IYE00912

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2014

Before :

LADY JUSTICE ARDEN
LADY JUSTICE BLACK
and
LORD JUSTICE BRIGGS

- -

Between :

Jonathan Akerman-Livingstone	**Appellant**
- and -	
Aster Communities Ltd (formerly Flourish Homes Limited)	**Respondent**

- -
- -

Mr Jan Luba QC and **Mr Russell James** (instructed by **Shelter Legal Services, Bristol**) for the **Appellant**
Mr Nicholas Grundy and **Miss Sara Beecham** (instructed by **Clarke Willmott LLP**) for the **Respondent**

Hearing date: Thursday 12th June 2014

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Judgment

Lady Justice Arden :

APPELLANT SEEKS TO RESIST POSSESSION PROCEEDINGS BY HIS SOCIAL LANDLORD ON GROUNDS OF HIS DISABILITY

1. Mr Jonathan Akerman-Livingstone has severe prolonged duress stress disorder ("PDSD"). In 2010, he was homeless. He went to his local housing authority ("LHA"), Mendip District Council ("MDC"). They agreed that they owed him the duty to secure that housing was available for him imposed by Parliament (section 193(2), Housing Act 1996 ("HA 1996")). I will call this "the main housing duty" (the expression adopted in section 200 (1)(b) of the HA 1996)., and it lasts until one of the events which Parliament has specified in section 193(5) to (7AA) occurs. These events include refusal to accept suitable accommodation offered by the LHA. So MDC ensured that Mr Akerman-Livingstone got temporary accommodation with what later became Aster Communities Ltd ("Aster"), which is a housing association. Mr Akerman-Livingstone became the tenant of Flat 1, Pilgrim's Tap in Glastonbury ("the property"), which was their property.

2. Then MDC wanted Mr Akerman-Livingstone to choose another property as his permanent accommodation. Mr Akerman-Livingstone had to choose between different properties. He is a very sick man. He could not cope with what was involved. Eventually there came a time when MDC said that they had discharged their duty. At that point their main housing duty came to an end. MDC then required Aster to take proceedings to evict Mr Akerman-Livingstone from the property so that it could be made available to another homeless person to whom MDC owed the main housing duty. When Aster did this, Mr Akerman-Livingstone said that the bringing of the proceedings amounted to discrimination against him by reason of his disability in breach of section 15 of the Equality Act 2010 ("EA 2010"). If this defence succeeded the court could not make a possession order.

3. Section 15 of the EA 2010 provides:

> "15 Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

4. The question on this appeal was whether there had to be a trial. Mr Akerman-Livingstone wanted there to be a full trial. Aster opposed that. On 7 June 2013, the judge, HHJ Denyer, sitting in the Bristol County Court, agreed with Aster. He held that, in the light of Aster's aims in getting back possession of the property to comply

with MDC's direction, Mr Akerman-Livingstone did not have a seriously arguable case that Aster had breached the EA 2010. So there was no need for a trial and Aster should have an immediate possession order. By order dated 14 October 2013, Cranston J dismissed Mr Akerman-Livingstone's appeal against this order. Mr Akerman-Livingstone now appeals to us against the order of Cranston J.

WHAT MR AKERMAN-LIVINGSTONE HAS TO SHOW TO SUCCEED ON HIS DEFENCE OF DISABILITY DISCRIMINATION

5. The conduct of the case below makes the question to be decided on this appeal look like a procedural question: should there be a full trial or can the court deal with the case summarily? But the question also involves deciding what Mr Akerman-Livingstone would have to show at trial in order to succeed in his defence. A particular difficulty for Mr Akerman-Livingstone is that, even if the institution of these proceedings is capable of amounting to an act of discrimination on the grounds of Mr Akerman-Livingstone's disability, it will not in fact be unlawful discrimination, even assuming that Mr Akerman-Livingstone is able to prove his disability to the full, if Aster can show that the proceedings are "a proportionate means of achieving a legitimate aim" within section 15(1)(b) of the EA 2010. This much is common ground.

6. Moreover, under section 136 of the EA 2010, the burden of proof is shared. Section 136 in material part provides:

> "136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision…"

7. Mr Akerman-Livingstone has therefore to do no more than show that there are facts from which, in the absence of some other explanation, the court could conclude that Aster had discriminated against him. Aster bears the burden of showing that the pursuit of the proceedings is "a proportionate means of achieving a legitimate aim".

COURTS BELOW RELY ON ANALOGY WITH ARTICLE 8 CASES

8. In the courts below, the judges drew on an analogy with Article 8(2) of the European Convention on Human Rights ("the Convention"). Article 8(1) guarantees the right to respect for a person's home, but this right is qualified by Article 8(2), which requires (so far as relevant) that any interference with this right by a public authority must be necessary for certain purposes, including national security, economic well-being and the protection of other people's rights.

9. The European Court of Human Rights ("the Strasbourg court") has read into Article 8(2) a further requirement that the proposed interference with the right conferred by Article 8(1) is a proportionate means of achieving a legitimate aim. Where a tenant relies on Article 8, it will be for him to show that the making of an outright possession order is disproportionate. The burden is not shared as it would be under section 136 of the EA 2010.

10. The effect of two recent decisions of the Supreme Court is that, where a tenant relies on Article 8(1) as a defence to possession proceedings brought by a LHA or a social landlord such as Aster, he must show a seriously arguable case and that the threshold for raising an arguable case on proportionality is a high one, which would only succeed in a small proportion of cases. The two cases are *Manchester City Council v Pinnock* [2011] 2 AC 104 and *Hounslow LBC v Powell* [2011] 2 AC 186. *Powell* is the name of the lead appeal in a group of cases in which judgment was given at the same time.

11. In *Pinnock*, Lord Neuberger gave the judgment of the court. He held that where a court was asked to make a possession order in favour of a social landlord against a person occupying accommodation under a "demoted" secure tenancy (a secure tenancy which the court has decided should have reduced rights of security of tenure because of anti-social behaviour) who raised a defence under Article 8, it had to determine whether it would be proportionate to make the order. The Supreme Court further held that the proportionality of making a possession order was supported by what Lord Hope, in *Powell* at [36], called the "twin aims" of making a possession order. These were: (1) vindicating the housing authority's ownership of the property and (2) enabling it to fulfil its public duties on the allocation and management of its housing stock. Where a social landlord was entitled to possession under domestic law, there would be a strong case for saying that the making of a possession order was proportionate. It held that there was no need for the housing authority to explain and justify its reasons for seeking a possession order (in the majority of cases).

12. Lord Neuberger held that the court should initially address the Article 8 defence summarily. If the court was satisfied that, even if the facts relied on were made out, the Article 8 defence would not affect the order to be made, there was no need for the case to go to trial. The defendant would be likely to succeed normally only in a very small proportion of cases. The court would only be concerned to investigate the tenant's personal circumstances and not with the reasons why the landlord sought possession.

13. The Strasbourg court ruled that an application to challenge in *Pinnock* was inadmissible (App no 31673/11).

14. *Powell* raised the question whether that principle applied to the homelessness and introductory tenancy schemes. In these cases, the Supreme Court gave further consideration to how the court in possession proceedings should approach the proportionality exercise. On this point, the Supreme Court held that the court only needed to consider an Article 8 point if it was raised by the defendant and crossed the high threshold of being seriously arguable. The question for a court was whether making an order for the occupier's eviction is a proportionate means of achieving a legitimate aim. In deciding this issue, the court needed to be concerned only with any factual dispute and the tenant's personal circumstances.

15. The practice where an Article 8 defence is raised in possession proceedings may be summarised as follows: where a tenant of a social landlord asserts that the possession order would constitute interference with his right to respect for a home in violation of Article 8, the court will make a summary assessment of that defence on the basis of the facts put before the court and will only proceed to hear the defence if it passes the high threshold of being seriously arguable.

16. In *Thurrock BC v West* [2013] HLR 5, this court has provided a detailed analysis of the recent domestic case law on Article 8 in social housing possession cases. But as Mr Akerman-Livingstone's Article 8 defence is not in issue on this appeal, it is not necessary to set that analysis out.

QUESTION TO BE DECIDED AND MY CONCLUSION ON IT

17. The question, therefore, is whether this court in possession proceedings should approach a defence based on disability discrimination in the same way as it would approach one based on Article 8 of the Convention, and if so whether the judge correctly applied this approach.

18. In my judgment, the judge was correct to hold that he should consider whether Mr Akerman-Livingstone's defence was seriously arguable, as he would have done if the defence had been based on Article 8, and he was correct to conclude that it was not seriously arguable for the following reasons:

    i) There are differences between the two defences but in each of them the court is concerned with the proportionality exercise.

    ii) The countervailing interest of the social landlord in obtaining possession will outweigh that of the defendant who relies on disability discrimination in most, but not all, cases.

    iii) Contrary to the submissions of Mr Akerman-Livingstone, Civil Procedure Rule ("CPR") 55.8 enables the court to dispose of the matter without a full trial.

    iv) No distinction can be drawn between a possession claim brought by a LHA and one brought by a housing association which is a social landlord.

    v) On the facts of this case, the circumstances of Mr Akerman-Livingstone's case, if proved in all respects, would not outweigh the strength of the countervailing interest of Aster, and so the trial judge was right to dismiss it summarily.

19. I shall amplify each of those reasons, explaining counsels' submissions on them.

    i) ***Same proportionality exercise***

20. Mr Jan Luba QC appears with Mr Russell James for Mr Akerman-Livingstone. Mr Luba submits that the Supreme Court in *Pinnock* and *Powell* formulated an "eye of the needle" test. The Supreme Court stressed that an Article 8 defence would only exceptionally succeed. Only two things can be raised, a relevant factual dispute (1) (by implication) whether the property is the defendant's home and (2) the defendant's

own personal circumstances. On the procedural side the local authority has no obligation to justify its reasons for seeking possession in each case.

21. Mr Luba submits that discrimination is easy to assert but difficult to prove. On a disability discrimination defence, four issues arise by virtue of section 15 of the EA 2010: Did the defendant have a disability? Did the claimant know about the defendant's disability? Did he treat the defendant unfavourably because of something arising in consequence of his disability? Can he show that his actions were proportionate? Because, submits Mr Luba, discrimination is difficult to prove, section 136 of the EA 2010 reverses the burden of proof, in particular on the fourth question. He submits that the court should be cautious about the approach of the judge since discrimination applies in many contexts beyond housing. To make it difficult to proceed with a discrimination case beyond a summary determination conflicts with the policy expressed by the highest courts that discrimination cases should go forward. For example, in *Anyanwu v South Bank Student Union* [2001] AC 14, [24], Lord Steyn held that summary disposal was inappropriate:

> "Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

22. Indeed in *London Borough of Lewisham v Malcolm* [2008] 1 AC 1399, Baroness Hale observed that she would expect the disability discrimination defence to be made out quite often.

23. Mr Luba submits that in any event the proportionality exercise under the EA 2010 is different from that under Article 8. He has two points here. First, the question of causation only arises in relation to disability discrimination. Second, on his submission, there is no "given" (i.e. presumption that the social landlord is performing its statutory duty) in discrimination cases. The burden is on the defendant in discrimination cases throughout, not simply in relation to proportionality. They are not able to rely on the high threshold in *Pinnock.*

24. Third, on Mr Luba's submission, in discrimination cases the courts adopt a structured approach to proportionality: thus in *R(o/a Elias) v Secretary of State for Defence* [2006] IRLR 3213, Mummery LJ held that a thee-part test applied, namely :

> "First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

25. In *Powell*, the Supreme Court rejected the structured approach: see paragraph [41] per Lord Hope, who held that a structured approach is not appropriate in Article 8 possession cases. Mr Luba submits that the EA 2010 applies with equal force in housing situations as others.

26. Mr Nicholas Grundy appears with Ms Sara Beecham for Aster. Mr Grundy submits that Aster can rely on the twin aims of protecting ownership rights and enabling MDC

to comply with its statutory functions. He accepts that sometimes the defence to the EA 2010 will have to be treated differently from that to Article 8 because it is based on different facts.

27. In my judgment, the approach to proportionality under Article 8 in *Pinnock* and *Powell* is in fact the same approach as section 15 of the EA 2010 requires. The proportionality exercise is generally divided into three (or even four) steps but it does not require every step in the exercise to be carried out: the steps are cumulative and if the court finds that any one step is not met there is no need to go to the other steps. That is what in my judgment happened in *Pinnock* and *Powell*: the court went straight to the balancing exercise because the weight to be attached to the twin aims was almost overwhelming: it would outweigh any consideration based on Article 8 save in exceptional circumstances. The twin aims are equally valid in EA 2010 cases.

28. Section 136 of the EA 2010 does not prevent this conclusion. Nor does it produce any different result from that under Article 8. Section 136 requires the applicant to show certain threshold matters, but this is no different from a tenant who relies on Article 8 having to show that the property is his home. These matters do not include the question of justification (see section 15(1)(b)), which is a proportionality exercise. Moreover, there is nothing in sections 15 or 136 of the EA 2010 to prevent the court from attaching weight to the fact that the housing authority has formed a view about how it should carry out its statutory duties and applying a less intense scrutiny to its decisions than it would apply in other contexts. Mr Luba submits that in *Pinnock* the Supreme Court laid down a "given" that, when seeking possession, a social landlord would not need to adduce evidence that it was performing its functions in relation to the allocation and management of its housing stock. He further submits that that "given" would not apply in a disability discrimination case. However, to say that there is no “given” in discrimination cases is simply to pre-empt the issue on this appeal.

29. Furthermore, there is no rational basis for saying that the weight to be given to the social landlord’s interest is somehow diminished where the tenant is relying on disability discrimination than where the tenant relies on Article 8. In both types of cases, the social landlord is pursuing proceedings in order to recover property that might be used to provide accommodation for other homeless people. Such properties are likely to be in short supply.

30. In this case, unusually, there is evidence confirming that possession is sought in performance of MDC’s housing functions. In her second witness statement, dated 14 June 2012, Holly Hebditch, a customer service adviser of Aster, states that, the defendant having been found by MDC to have become homeless intentionally, the claimant required outright possession in order “to ensure the temporary accommodation in which the [appellant] currently resides in is utilised for individuals who need it most.” In addition, Hester Rees, a senior housing options and development officer in the housing options team of MDC, stated in her witness statement of 19 January 2012 that MDC “has a number of households owed a full homelessness duty under section 193(2) who are currently living in bed and breakfast type accommodation who require the type of accommodation that Pilgrims Tap affords.”

31. The judge came to the same conclusion as I have done on the question whether the proportionality exercise was the same in both Article 8 and disability discrimination cases.

32. Mr Luba makes three further points. First, his "target point": he submits that the target of a disability discrimination defence is different. It focuses on what the other party has done and contends that that is unlawful. In Article 8 cases, on the other hand, the interference would be the court's order. In my view, this is not a substantial difference since the court's order would be the result of the other party's pursuit of its decision to obtain possession.

33. Mr Luba's second point is what he calls the "timing point". In disability discrimination, the defendant relies on what has already happened whereas in Article 8 cases, the tenant relies on what is about to happen. Different factors are thus relevant. In my view that is a difference of fact and not one which necessarily prevents the *Pinnock* approach from applying.

34. Mr Luba's third point is what he calls his "sequence point". In the defence under the EA 2010, each step towards the recovery of possession was alleged to have been discriminatory. Article 8 is looking forward by contrast. Furthermore, the court does not get to proportionality under Article 8 unless it first decides that the interference is in accordance with the law. That means that interference does not infringe the EA 2010. In my judgment, there is no substance in this point either.

ii) ***Social landlord's countervailing interest generally outweighs that of the tenant***

35. The countervailing interest of the social landlord is a very strong one. The social landlord has to decide how to allocate its finite stock of housing. It will be aware of a tenant's disability. It will be able to weigh up his need as against that of others who need accommodation. Sadly many homeless people suffer from a disability and the court is not in a position in a case such as this to say that the housing authority or other social landlord has wrongly preferred one applicant for housing over another more deserving applicant.

36. Furthermore, even though the tenant loses his property, if, like Mr Akerman-Livingstone, he is still a person with "priority need" (for example, because he is vulnerable when homeless), he will be entitled to the more limited housing duties owed by the LHA. Under section 190(2) of the HA 1996, the LHA must still secure accommodation for him for a period sufficient to give him a reasonable opportunity to obtain his own accommodation, and provide him with advice and assistance in any attempts which he may make to obtain accommodation.

37. In those circumstances, I consider that for a tenant to succeed on his disability discrimination case he will have to show some considerable hardship which he cannot fairly be asked to bear, for example that he has complex housing needs which simply cannot be met by the provision of accommodation in some other way. However, in *Pinnock* at [64] Lord Neuberger recognised that, in the case of disability, the LHAs may have to take more steps to help the tenant in question to obtain new accommodation. Lord Neuberger held:

> "64 Sixthly, the suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue "in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty", and that "the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases" seem to us well made."

38. Lord Neuberger's remarks are addressed, at least in part, to the possibility of finding alternative accommodation. This seems to me a more likely outcome than the court dismissing the possession proceedings. However, the possibility exists that in rare cases, the discrimination defence may succeed.

iii) CPR 55.8 permits summary disposal of possession proceedings

39. CPR 55.8 enables the court to deal with possession proceedings summarily or to give directions for trial where the claim is genuinely disputed on what appear to be substantial grounds.

40. Mr Luba submits that CPR 55.8 applies and that the court cannot deal with the EA 2010 defence summarily.

41. Mr Grundy submits that CPR 24 (which deals with summary judgment) applies to possession proceedings unless the tenant is either a mortgagor or a tenant protected under the Rent Act 1977 or the Housing Act 1988 and holding over after the end of the term (see CPR 24.3(2)). In so far as Eady J suggested otherwise in *Holmes v Westminster CC* [2011] EWHC 2857 (QB), he was wrong so to do.

42. I reject Mr Luba's submission, but for different reasons from those put forward by Mr Grundy. The court can deal with a possession claim summarily without invoking CPR 24. This is because CPR 55.8 (1) provides that in all possession claims by landlords there will be a first hearing at which the court gives directions for the conduct of the proceedings. At this hearing the judge can decide whether there should be a trial. As Briggs LJ pointed out during the argument on this appeal, the court can therefore perform the same role at this hearing as it would do if it was hearing an application for summary judgment under CPR 24. There is no need to have recourse to CPR 24 in possession proceedings.

43. Moreover, Mr Akerman-Livingstone does not need expert medical evidence about his disability at the hearing at which the question whether the court should give summary judgment is decided. For the purposes of that hearing, the court would assume in his favour that he would be able to produce the necessary evidence.

iv) No distinction between LHA and social landlord which is a housing association

44. Mr Luba submits that this case is not analogous to *Powell* in any event because Aster is not undertaking statutory functions and the tenant will not acquire the security of tenure that he would have done if his landlord had been the housing authority. Aster simply agreed to meet MDC's requirements.

45. Mr Grundy submits that the countervailing interest of a social landlord which is a housing association is greater because it is not performing statutory functions.

46. It is not necessary to go that far. In my view, the outcome of the disability discrimination claim should not depend on whether the landlord is a housing association acting on the instructions of the LHA or the LHA itself. Where, as here, the claimant for possession has an obligation to a housing authority to make its properties available for rent to those persons for whom the housing authority is obliged to find accommodation, it is entitled to rely on the twin aims just as the housing authority itself could have done.

v) *Circumstances of Mr Akerman-Livingstone's case do not outweigh Aster's countervailing interest*

47. By way of background, I need to provide a summary of the duties of an LHA to homeless persons.

48. The duties of housing authorities to homeless persons are set out in Part VII of the HA 1996. The main housing duty applies where the housing authority is satisfied an applicant is homeless and in priority need and did not become homeless intentionally (HA 1996, section 193(1)). In these circumstances, the housing authority is under a duty to secure that accommodation is available for the applicant (section 193(2)). However, the section 193(2) duty ceases if the applicant becomes homeless intentionally from the accommodation made available for their occupation. The applicant has the right to request the local authority to review its decision under section 202(1)(b). If the applicant is dissatisfied with the decision on the review, he can appeal to the county court on any point of law arising from the decision or, as the case may be, the original decision (section 204(1)). By section 79 of, and paragraph 4 of Schedule 1 to, the HA 1985, tenancies granted under section 193 by the housing authority are not secure, unless the housing authority informs the tenant otherwise.

49. Following the acceptance of the main housing duty in 2010, Mr Akerman-Livingstone was given the property as temporary accommodation. MDC did not intend the property should be Mr Akerman-Livingstone's permanent home. He has no security of tenure there. In 2011, MDC offered Mr Akerman-Livingstone a property in Street. He refused this on the grounds that it was not suitable for him in the light of his prior experiences. MDC decided that their housing duty was at an end. Mr Akerman-Livingstone exercised his right to a review of that decision but he was unsuccessful. He did not appeal to the county court.

50. Because MDC no longer owed Mr Akerman-Livingstone the main housing duty, Aster sought to obtain possession of the property. On 18 July 2011, Aster gave the applicant one month's notice to quit and took proceedings for possession. The particulars of claim stated that Mr Akerman-Livingstone had "a non-secure tenancy" temporarily pending determination of an application made to MDC for housing assistance pursuant to Part VII of the HA 1996.

51. On 22 December 2011, Mr Akerman-Livingstone served a defence. He contended that the decision or the act of determining the non-secure tenancy by serving the notice to quit was unlawful and that any eviction would be disproportionate and unlawful on the grounds of Article 8. Mr Akerman-Livingstone contended that he

should not be evicted until permanent suitable accommodation had been found or MDC explained why it was not providing him with suitable alternative accommodation.

52. Mr Akerman-Livingstone then applied again to MDC on the basis that he was threatened with homelessness. They accepted his application. The proceedings were adjourned generally on 10 July 2012. MDC decided that the main housing duty was again owed and in September 2012 they offered Mr Akerman-Livingstone a property in the same street in Glastonbury as the property. However, Mr Akerman-Livingstone did not engage with the process because (on the assumption which the Court must make at this stage) of his disability. MDC decided that the duty to provide housing for Mr Akerman-Livingstone was again discharged because he did not accept any suitable accommodation offered to him. Mr Akerman-Livingstone did not seek a review of this decision, even though he was legally advised at the time.

53. Aster then applied to restore the possession proceedings. Directions were given by the Bristol County Court on 10 December 2012. Aster filed a reply. In it, Aster took a point about causation which was not pursued for the purposes of the summary disposal of the proceedings. Aster contended that the decision to apply for eviction did not arise from any factor related to disability or protective characteristics but was related to MDC's decision which had not been the subject of either a review or an appeal to the court.

54. Mr Akerman-Livingstone contended that the question of causation raised a triable issue on which the claimant's case was genuinely disputed and on which the court would need to hear evidence and that it is not therefore appropriate for summary disposal. Mr Akerman-Livingstone continued to assert that eviction would be disproportionate because of his disability and his need for treatment. He contended that he had been a model tenant and that there were no concerns about rent, tenancy management or behavioural problems.

55. In my judgment, the circumstances of this case are not sufficient to outweigh the interest of the social landlord. MDC has offered him accommodation. Mr Akerman-Livingstone has been on MDC's Homefinder Somerset system since the issue of the proceedings, but he has not bid. During the adjournment of the proceedings he refused the further offer of accommodation at 37 Northload Street, Glastonbury. That property is not said, still less shown, to have been unsuitable.

56. In addition, Mr Akerman-Livingstone has had adequate opportunity to challenge the discharge of MDC's statutory duty. Furthermore the potential prejudice to him of a possession order being made is mitigated by the fact that MDC will continue to owe him the more limited duties under the HA 1996 to help him to find accommodation. In fact, since Aster served notice to quit, MDC has already attempted to assist Mr Akerman-Livingstone obtain other accommodation. There is no suggestion as respects his condition that he will suffer serious or lasting harm as a result of the possession order.

57. Mr Luba's response is that the alternative systems do not meet Mr Akerman-Livingstone's needs because he is unable to engage with this process. If that argument is taken to its logical extreme, Aster could never obtain a possession order or would be dependent on Mr Akerman-Livingstone receiving treatment and his disability

being resolved, which has not so far occurred. I do not consider that it would be reasonable to require the housing authority or Aster to go that far. Moreover Mr Luba has not asked for any conditions to be attached to a possession order to mitigate its effect on Mr Akerman-Livingstone.

58. The judge came to the same conclusion.

Ancillary application by Mr Akerman-Livingstone for permission to amend his defence to plead that he is, after all, an assured shorthold tenant

59. Mr Akerman-Livingstone applied on the eve of the hearing of his appeal for permission to amend the defence so as to plead that, far from being a non-secure tenancy as asserted by Aster, his tenancy was an assured (shorthold) tenancy protected by the Housing Act 1998 Part 1 so that under section 21 of that Act Aster had to give him two months' notice, which it had not done. On that basis, HHJ Denyer QC should not have granted a possession order. Mr Akerman-Livingstone accepts that he could be evicted if a two months' notice to quit were served. He submits that this is a pure point of law and that permission to amend should therefore be given.

60. The significance of this point is that, if it succeeded, Aster would have to start these proceedings over again having first given Mr Akerman-Livingstone the correct notice, but the outcome would be the same.

61. Mr Grundy opposes the application. He submits that it involves also the withdrawal of admissions because in his defence Mr Akerman-Livingstone accepted that the notice to quit had determined the tenancy. The grant of permission would cause prejudice. First, proceedings had been ongoing for some two and a half years. If the tenant had taken this point previously, the section 21 notice could have been served long ago. Second, Aster was liable to suffer prejudice because the property was held subject to a head lease and the head lessor (a property developer) had now given notice requiring possession. Moreover, Aster had to deliver up the premises with vacant possession so that it may be liable in damages for breach if the possession order is not made in time. Third, paragraph 7.2 of the Practice Direction supplementing the CPR Part 14 (dealing with withdrawal of admissions) shows that the court can take into account the prejudice to the head lessor as well as the prejudice to themselves, though, if Aster served a section 21 notice, it could be enforced by Mr Akerman-Livingstone's new landlord on Aster surrendering its lease to the head lessor.

62. I would dismiss the application to amend. The benefit to Mr Akerman-Livingstone is small in comparison with the costs and prejudice to other parties involved. It would therefore be disproportionate to allow it.

CONCLUSION

63. Accordingly I would dismiss both the appeal and the application to amend.

Lady Justice Black

64. I agree.

Lord Justice Briggs

65. I also agree.