



Neutral Citation Number: [2020] EWHC 2182 (Admin)

Case No: CO/5057/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 07/08/2020



Before:

HIS HONOUR JUDGE JARMAN QC

Between:

DAVID FOLEY

Claimant

- and -

**THE COUNTY COUNCIL OF THE CITY AND
COUNTY OF CARDIFF**

Defendant

Mr Adam Corbin (instructed by **Michelmores LLP**) for the **claimant**

Mr Robin Green instructed by the **defendant**

Hearing dates: 20 July 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and released to Bailii. The date and time for hand-down is deemed to be 10.30 am Friday 7 August 2020.

HH JUDGE JARMAN QC:

Introduction

1. The claimant challenges the making by the defendant council (the council) of a compulsory purchase order (the order) of a dwelling owned by him at 1 Cyril Crescent, Roath, Cardiff (the property). It is an end of terrace two storey property in a popular location about one mile from the city centre and close to local amenities, but has stood empty since 1994. In 2016 the council adopted The Cardiff Housing Strategy 2016-2021 (the strategy) which indicates that there are about 5000 people with a local connection in urgent, high, or medium need for accommodation. On page 25 it is stated that where a co-operative approach to bringing empty dwellings back into beneficial ownership fails, consideration will be given to compulsory purchase.
2. The order was made pursuant to statutory powers under Parts I and II of the Acquisition of Land Act 1981 and section 17 of the Housing Act 1985. It is well established that a compulsory purchase order should only be made where there is a compelling case in the public interest and where the purpose of making such an order sufficiently justifies interfering with the human rights of those with an interest in the land affected (see for example, *Margate Town Centre Regeneration Company Ltd & Ors v Secretary of State for Communities and Local Government and Anor* [2103] EWCA Civ 1178 at [17]).
3. In the statement of reasons accompanying the order, the council's case for making the order included observations that the property had stood empty since 1994, that it was unsuitable for occupation and deteriorating through lack of maintenance, that it was causing a nuisance to neighbouring properties, that complaints had been received regarding the vacant status and poor condition, and that it was considered to be detrimental to the amenities of the area. Reference was also made to the growing demand for housing in Cardiff and the number of homeless households in temporary accommodation in Cardiff being the highest in Wales. The council intends to auction the property for refurbishment as a residential property.
4. The claimant's challenge is brought under section 23 of the Acquisition of Land Act 1981 as a person aggrieved by the making of the order. The validity of it may be questioned under subsection (1) on the ground that the authorisation of the order is not empowered to be granted, and under subsection (2) that any relevant requirement has not been complied with. Section 24(2) provides that if the court is satisfied that the authorisation was not empowered or that the interests of the applicant have been substantially prejudiced by any relevant requirement not having been complied with, the court may quash the order.
5. The essence of the claimant's challenge is that in deciding to make the order, the council did not properly take into account that he has been suffering from chronic depression and anxiety for several years. The medical evidence filed in this appeal shows that this means he has low energy levels and has difficulty in dealing with day to day activities, difficulties with concentration and social functioning, and needs help to manage his affairs. It is not in dispute that he has suffered with these conditions

over such a period and that they amount to protected characteristics within the meaning of sections 4 and 6 of the Equality Act 2010 (the 2010 Act).

6. The claimant submits therefore that the council is in breach of its duties under the 2010 Act, that the decision to make the order was irrational and disproportionate, was procedurally unfair and/or in breach of the claimant's rights under the Human Rights Act 1998.

Background

7. The background to the matter can be summarised from a report dated 27 April 2018 (the report) by Lucy Marley, a neighbourhood services officer employed by the council on behalf of the council's head of housing enforcement, who had engaged with the claimant on the issue of the property over a number of years. The report was addressed to the council's director of communities, housing and customers services and requested that the order be made in respect of the property.
8. An officer first visited the property in late 2008 and in the spring next year wrote to the claimant setting out various options for returning the property into beneficial occupation and asking for his proposals. In his response by telephone he said that he had purchased the property a few years beforehand and was renovating it little by little but that he had family problems which hindered progress. He said that he intended to convert the property into two flats.
9. On a further visit in the spring of 2012 it was noted that internal walls were hacked back to stone and uPVC windows had been installed on the first floor. Subsequent letters in the summer and autumn of that year brought no response. After a further visit in December when no further progress was noted, the council wrote again informing the claimant that it intended to commence a compulsory purchase procedure early in the new year and enclosed an application pack for a Welsh Government scheme (the scheme) known as 'Houses into Homes' which included loans on favourable terms to fund refurbishment of empty house with a view to beneficial occupation. The claimant telephoned again in response to say that he had suffered significant problems including the death of his parents and a close friend which had hindered progress.
10. The claimant returned the scheme application the following spring but without supporting documentation, and, despite being chased by the council for these throughout the summer the documentation was not forthcoming. By telephone in August 2013 he informed the council that his depression was hindering progress, and was told that the scheme would help to complete the refurbishment, but matters could not go on indefinitely without formal action being taken. Despite further emails and phone calls, and agreement that a local councillor should liaise between the council and the claimant to help with the scheme application, no substantial progress was made until the spring of 2014.
11. In April 2014, the council served an improvement notice in relation to the side boundary wall and blown render on the side elevation of the property. There were further telephone conversations between the parties in which the claimant raised his problems already discussed. An inspection in July 2014 revealed that the blown render had been hacked off and removed but the boundary wall remain in the same

condition. Further inspections were made between then and January 2017, and a chasing letter sent, but there was no further progress on the renovations. Accordingly, in that month the council wrote to inform the claimant that the compulsory purchase procedure would be commenced which prompted a meeting of the parties at the property the following month.

12. A new floor and ceiling joists had been fitted by the time of the meeting and further building materials were on site. The claimant explained that he had personal and financial issues which had delayed progress. His plan now was to convert the property into six units of accommodation, for which he needed planning permission, and to apply to a local housing association for an empty property loan. Subsequent enquiries revealed that association did not provide such loans, and that by August 2017 the claimant had not made applications for planning permission or for a loan under the scheme. A further meeting took place between the claimant, Ms Marley and another officer of the council at its offices in October 2017. The claimant discussed his mental health and financial issues. The meeting ended with the officers indicating that progress had to be demonstrated, particularly in relation to the scheme loan. The council contacted the scheme administrator who confirmed that an application pack had been sent to the claimant but further inquiries early in the new year revealed that no application had been made for the scheme loan or for planning permission.
13. Again, the council sent letters indicating that a compulsory purchase procedure would be commenced and in an e-mailed response in March 2018 the claimant stated that he had been unwell but was recovering. In reply the council stated that the procedure would be proceeded with but could be held in abeyance if notable progress was made.
14. The claimant made an application for a scheme loan, but did not include in that application the requisite planning permission or building regulation approval or costs estimates. The officer dealing with that application emailed Ms Marley on 3 April 2018 to inform her of that, to ask how long the property had been empty, and to say she would be kept in the loop with the application. It was said that the claimant had stated that he would apply for these approvals when the loan had been agreed, but it was pointed out to him that the loan would not be authorised until he had the relevant approvals.
15. Ms Marley emailed a response the same day, which included the following passages:

“He came into the offices for a meeting...and we made it clear then that he has to submit all that before he can get a loan. He’s not quite grasping it. Really frustrating. The property has been empty for many years, more than 10 I believe. Yes, please do keep me up to date!”
16. In April 2018, the claimant emailed the council to authorise liaison with a person assisting him, a Mr Dinnick. There were telephone conversations between Mr Dinnick and Ms Marley in which she indicated that she was aware of the difficulties which the claimant was facing, and that the procedure would continue but would be suspended if further progress were made. She agreed that for the claimant to proceed with renovation would be far more preferable to the council than an order. The procedure continued therefore, and the report was finalised.

17. On the 25 September 2018, the director of communities, housing and customer services of the council considered the report and issued a written decision under the council's schemes of delegations to make an order. The reason for the decision was set out as follows:

“The property is unlikely to be returned to beneficial occupation within a reasonable timescale. Since there is no real prospect of the property being returned to residential use, acquisition through the making of a CPO and onward sale is the most effective course of action.”

18. Consultations were then carried out in October 2018 and the claimant was asked for any comments. These came in a long email on 13 November 2018. In it he apologised for the delay but said he had been busy with benefit reviews. He said that he had support from the administrator of the benevolent fund for the Chartered Institute of Building, of which he is a member. They had had a meeting at which they had discussed selling his home to finance the renovations. In the meeting the claimant had explained that he had suffered depression and anxiety since the death of his mother in 2007 and that as a consequence his home had become extremely cluttered. He was two thirds of the way through decluttering but would need until the end of the year to complete the process so that his home would be fit to market. He continued that he did not have the money to apply for a scheme loan, which in any event would not be sufficient to fund the renovations, and so he intended to sell his home.

19. The email continued:

“One problem my builder and I had was trying to bring the cost of the works to convert the property into six flats within the Houses into Homes Loan of £150,000 but this will no longer be a problem. As stated above I have discussed these proposals with the Chartered Institute of Building Benevolent Fund Administrator who believes this scheme is feasible and the Institute is supporting me with my living costs till next March. I would therefore request that you allow the time I need to sell my home and I will then have the finance to immediately proceed with the building work at 1 Cyril Crescent...This is my only chance of securing a stable financial future for myself as I have no chance of returning to work at my previous level of being a Building Surveyor after not working in the industry since 1999 and the stress levels of the work environment would not be suitable for my health.”

20. Ms Marley responded by email the same day and emphasised the high demand for housing in Cardiff. She indicated that the option of selling his home had been an option available to the claimant for many years. The email ended as follows:

“...the council will continue with the compulsory purchase procedure for the present in order to safeguard its position in the event that you are not able to secure the necessary finance for your preferred plans for 1 Cyril Crescent, or that further

delays occur for any other reasons. I hope you can appreciate the Council's position given the significant delays thus far.”

The making of the order

21. By a notice dated 26 June 2019 the council gave notice that it had made the order and was about to submit it to the Welsh Ministers for confirmation. It was specified that any objection must be sent to the Planning Inspectorate by 7 August 2019. The notice was delivered to the claimant by hand on the same day.
22. On 6 August, the claimant duly sent a written objection to the Inspectorate, which included the following:

“Please note, I am in discussion with the Environmental Services Team at Cardiff City Council regarding the possible sale of this property to the Council by negotiations. In view of the CPO timetable however, I must lodge an objection to protect my position. I shall be grateful therefore if you will note the objection but take no further action until my discussions with the Council are concluded.”
23. Later in the objection, the claimant said this:

“I wish to oppose the making of the CPO on the grounds that I am currently in negotiation for the sale of the land and property to a property investor and developer...I am hopeful of a successful resolution to these negotiations but have also made arrangements to meet with estate agents at the property to arrange for it to be marketed for a private sale. I accept that the property has been empty for a considerable period of time. I have undertaken a large amount of repair and refurbishment and improvement to the property.”
24. The claimant then set out a list of such works, which included that floor joists and decking, ceiling joists and uPVC windows, all on the first floor, which had been noted by council officers. The objection ended thus:

“In summary whilst accepting that the property has not been returned to occupation in a timely manner I am now confident that the course of action I am now taking through negotiations...will result in the property being completed and returned to occupation before the end of this year.”
25. On 19 August, the council informed the Inspectorate that it agreed to the claimant's request for a period of abeyance and indicated that it could agree a 6 week period. However, the Inspectorate the next day replied to the council and wrote to the claimant saying that it had a duty to proceed in determining the matter as swiftly as possible and did not consider that processing the matter would adversely affect continued negotiations.

26. On 9 September 2019, the claimant wrote to the Inspectorate withdrawing his objection. He gave no reason at the time but in his witness statement in this appeal, he says that he withdrew because his health had declined, and he made the withdrawal in an attempt to eliminate the source of his stress. Accordingly, the next day the Inspectorate passed the matter to the Welsh Government for determination. Power to confirm the order was given on its behalf by letter dated 11 October 2019. By letter dated 22 November 2019 to the claimant, the council gave notice of the confirmation with a copy of the order.

The council's approach to the claimant's disabilities

27. It is not disputed that the council made no assessment of the claimant's disabilities at any time or of how they impacted upon his ability to deal with the property. The council's approach to the claimant's disabilities is set out in Ms Marley's witness statement dated 18 March 2020 filed in this appeal, at paragraph 59 as follows:

“...Mr Foley has told me about his personal problems (in particular, the deaths of his parents and his depression and anxiety) on a number of occasions and I have taken these into account in my approach to the case. However, at no stage did Mr Foley provide medical evidence suggesting that he had an inability to comprehend what was happening or to take appropriate action, and given his background as a former property surveyor for the Council, the clear content of the correspondence from him (for example his emails to me of 8 March and 13 November 2018, and to Rosa Tambini of 4 April 2018), the detailed works specification and plans drawn up by him in 2017, and my dealings with him generally I did not consider that his personal problems prevented him from engaging with the process leading up to the making and confirmation of the Order, the possibility of which had first been raised as long ago as 2012.”

28. In the penultimate paragraph of the statement, Ms Marley says that in recommending the making of the order, it seemed to her that the real problem was that the claimant lacked the means to renovate the property within a reasonable period of time.
29. This challenge was lodged by claim form dated 23 December 2019. In the grounds dated 2 March 2020, there are four grounds set out, namely illegality, irrationality and proportionality, procedural unfairness, and Human Rights. I shall deal with each in turn.

Ground 1: Illegality

30. Mr Corbin, on behalf of the claimant, submits that the council in making the order is in breach of four of its duties under the 2010 Act, namely the duty not to discriminate, the duty to make reasonable adjustments, the duty to have due regard to the need to eliminate discrimination, and the duty to train staff and ensure that any information published is accessible by those with protected characteristics.
31. The first of those duties is set out in section 15 of the 2010 Act, which provides:

“(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.”

32. Mr Green, on behalf of the council, accepts that the making of the order treated the claimant unfavourably, as it deprives him of the property against his wishes, although he will receive the market value in compensation which he will be able to invest. He submits that the order was not made because of the claimant’s disability but because the property was empty with no planning permission and the claimant lacked funds to renovate the property, and that was likely to remain the position for the foreseeable future. Mr Corbin submits that the unfavourable treatment was impatience, as demonstrated by Ms Marley’s email in April 2018, and this was a result of the claimant’s disabilities.
33. However, in my judgment the situation developed after April 2018. It is clear from the claimant’s email in November 2018 that by then he had abandoned the idea of a loan under the scheme, for two reasons. The first was that he did not have the funds to obtain the necessary permissions and documentation, but secondly that the loans under the scheme would not be sufficient to fund the plan which he then had which was to convert the property into six flats. Accordingly, with professional assistance his plan then was to sell his home to fund the works. The delay at that time was to declutter his home, which clutter had arisen because of his disabilities. He had completed two-thirds of that project and asked to have until the end of 2018 to complete it.
34. Although Ms Marley responded to the effect that the council would continue with the compulsory purchase procedure, she also made it clear that this was to protect the council’s position should the claimant not be in a position to fund his plans. It was not until well after the end of 2018 that the procedure progressed. By the middle of 2019, the claimant’s plans had changed again, and he was negotiating to sell the property. It appears that he had abandoned the plan to sell his home and that accordingly he realistically recognised that without funding the only real option was to sell the property. He asked for more time to complete negotiations for sale. The council was agreeable to this, but the Inspectorate was not. As far as the council was aware these negotiations came to nothing because the claimant then withdrew his objection to the order.
35. I am not satisfied that the making of the order was because of something arising in consequence of the claimant’s disabilities so as to amount to discrimination within section 15 of the 2010 Act. If it was, then in my judgment it was proportionate in the circumstances set out above to achieve a legitimate aim, which was to bring a dwelling which had stood empty since 1994 back into beneficial occupation when there was a need for such accommodation in Cardiff.
36. The second duty is to make reasonable adjustments. Sections 20 and 21 of the 2010 Act set out the framework for the duty to make reasonable adjustments for those with protected characteristics as follows so far as material:

"20. Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

...

21. Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

37. Schedule 2 paragraph 3 of the 2010 Act, applied by section 31(1) and (9) to the making of reasonable adjustments, provides that the reference to a disabled person in section 20(3) is to disabled persons generally.

38. In the grounds, it is asserted that the council failed to make any adjustments to accommodate the claimant's disability, including, but not limited to the following examples:

"SUGGESTED ADJUSTMENT A

12. The Claimant has a disability which has slowed (and at times halted) his work on the Property, required in order to make it habitable and thus avoid the consequences of a decision by the Defendant to compulsory purchase the Property pursuant to s. 17 of the Housing Act 1985.

13. The defendant has not made any adjustments in its decision to acquire the Property, and then make the Compulsory Purchase Order, such as: by assessing the Claimant's disability, and by agreeing a programme or works and timetable which

fitted with the Claimant's disability which would be reviewed over time where there were changes in the Claimant's condition.

SUGGESTED ADJUSTMENT B

14. The Claimant's disability has hindered his understanding of the decision to acquire the Property, and the Compulsory Purchase Order process, which has meant that he has not understood what actions needed to be taken to avoid the decision to acquire the Property, and the making of the Compulsory Purchase Order (including the statutory inquiry process).

15. The Defendant has not made any adjustments to assist the Claimant in understanding those processes, such as by assessing the Claimant's disability, and providing the Claimant with a fee undertaking in order that he might take professional advice, or agreeing to appoint a professional third party to otherwise support him.

16. The Defendant has failed to make either of the specific, suggested adjustments referred to above, or any adjustments at all, and has not given the regard that is appropriate in all the particular circumstances, in contravention of its obligations to the Claimant under the Equality Act 2010."

39. There is an issue between the parties as to whether the making of the order comes within the meaning of "provision, criterion or practice" in section 20(3) of the 2010 Act.

40. The phrase "provision, criterion or practice" is not defined, but was considered by the Court of Appeal in *Ishola v Transport for London* [2020] EWCA Civ 112. Lady Justice Simler, giving the lead judgment, said at paragraphs 38 and 39, referring to the authority of *British Airways Plc v Starmar* [2005] 1RLR 862:

"In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one.

In that sense, the one-off decision treated as a PCP in Starmer is readily understandable as a decision that would have been applied in future to similarly situated employees. However, in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of the element of repetition about it. In the Nottingham case in contrast to Starmer, the PCP relied on was the application of the employer's disciplinary process as applied and (no doubt wrongly) understood by a particular individual; and in particular his failure to address issues that might have exonerated the employee or give credence to mitigating factors. There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way."

41. Mr Green submits that the claimant has failed to identify a provision, criterion or practice of the council as opposed to a one-off decision to purchase a particular property based on the particular circumstances of the case. However, in my judgment it is clear from the strategy and the statement of reasons to the order that the council has a practice of bringing empty houses back into beneficial ownership and of using compulsory purchase procedures to do so where a co-operative approach fails. In my judgment this comes within the meaning of the phrase.
42. In my judgement, having regard to the dealings between the parties between 2009 and the making of the order, the council did make reasonable adjustments. The making of such an order was first mooted in 2012, but the claimant raised his disabilities then and again in 2013, 2014 and 2017. The council took these into account and did not progress the procedure until 2018. Later that year, the plans of the claimant changed, with the benefit of professional assistance, and the council did not progress the order until well after the end of 2018, which is the time that the claimant asked for to finish decluttering his home in order to sell it to fund the renovations. When his plans changed again, the council agreed to his request for time to finalise negotiations for the sale of the property, although the Inspectorate did not.
43. As to how the claimant's disabilities impacted on his understanding of the processes involved, the way he puts it in his witness statement in the appeal dated 9 January 2020 at paragraph 9 was that "any lack of understanding or engagement I displayed with the compulsory purchase process" was due to his disabilities. No further detail is given as to such a lack. At paragraph 35, he says that he struggled with understanding exactly what paperwork was required for a scheme loan, and refers to Ms Marley's email dated 3 April 2018.
44. However, that email was in response to the email of her colleague in which it was said that the claimant wished to have the loan authorised before obtaining the necessary approvals. His reluctance to obtain these is clearly explained in his email of 18 November 2018, namely that he did not have the money to pay for them but in any

event the available loans would not be sufficient to fund the plan which he then wished to pursue. That and his objection to the order in my judgment demonstrates a sufficient understanding of these matters.

45. Accordingly, in my judgment there is no breach of the duty under section 20(3) of the 2010 Act.
46. The third duty which the claimant relies upon is that under section 149(1) of the 2010 Act which requires the council as applied to the present case, in the exercise of its functions, to have due regard to the need to (a) eliminate discrimination, harassment, victimisation and other conduct prohibited by the 2010 Act; (b) advance equality of opportunity between persons who are disabled and persons who are not disabled; and (c) foster good relations between persons who are disabled and persons who are not disabled.
47. In *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), Scott Baker and Aikens LJ sitting in the Divisional court considered the duty in respect of proposed Post Office closures. After referring to the judgment of Dyson LJ in relation to analogous provisions under the Race Relations Act in *R (Baker) v Sec State for Communities and Local Government* [2008] LGR 239 at paragraph 31, the court said at paragraphs 89 to 96 that there was no duty on a public authority to carry out a formal disability equality impact assessment, but at most there is a duty to consider to do so, along with other means of gathering information. After referring the authorities, the court then identified six principles as to how such an authority may fulfil its duty to have due regard to the identified goals.
48. The principles for present purposes may be summarised as follows:
 - i) The decision makers must be made aware of the duty. An incomplete or erroneous appreciation of the duty will mean that due regard has not been paid.
 - ii) The duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered.
 - iii) The duty must be exercised in substance, with rigour and with an open mind. However, the fact that an authority has not mentioned specifically the duty is not determinative of whether the duty has been performed, although it is good practice to do so.
 - iv) The duty is non-delegable.
 - v) The duty is a continuing one.
 - vi) It is good practice to keep records showing the duty had been considered and relevant questions pondered.
49. The Court of Appeal recently revisited this duty in the context of a social landlord seeking possession from a disabled tenant and her children, one of whom was also disabled, on the grounds that the tenancy had been granted on the basis of a false statement made knowingly or recklessly by or on behalf of the tenant. Patten LJ, giving the lead judgment in *Luton Community Housing Ltd v Durdana* [2020] EWCA

Civ 445, observed at paragraph 18 that the scope for action will vary from case to case depending upon the particular function which is performed and the restrictions imposed on the authority by the particular regime.

50. He continued at paragraph 20:

“There was some discussion during the hearing of this appeal about the content of that duty. Looked at simply in terms of s.149(1), the duty is expressed at a high level of generality. It is common ground that we are concerned only with s. 149(1)(b) which speaks of advancing equality of opportunity: a concept which had no immediately obvious application to the position of a social housing provider seeking to obtain possession from even a disabled tenant. But the respondent relies on the extended definition in s.149(3) and, in particular, (3)(b) which requires the authority to have due regard to the need to take steps to meet the needs of (in this case) the respondent and her daughter as disabled persons so far as they are different from the needs of other non-disabled persons. These steps include, in particular, taking account of their disabilities: see s.149(4).”

51. In that case, whilst the court recognised that it is theoretically possible for the duty to be complied with in ignorance of what it consists of, the housing officer in question, by her own admission had not taken into account the likely effect of the disabilities in the proposed eviction. It was held that there was a breach of duty in that case, but at paragraph 29 reference was made to section 31 of the Senior Courts Act 1981 and to the well-established principle that the court will refuse to dismiss a claim for possession where a breach of s.149 is relied upon by way of defence if satisfied that it is highly likely that the outcome would not have been substantially different had no breach of duty occurred. On the facts of that case, the claim was remitted back to the judge to decide whether it was reasonable to make the order for possession.
52. Mr Corbin submits that the council has not demonstrated any element of any one of those principles in its dealings with the claimant in this case.
53. Mr Green submits that beyond a bare allegation of breach, it is not clear how precisely it is said that the duty was breached. If the order stands, the claimant will be compensated by an award equivalent to the market value of the property under sections 1 and 5(1) of the Land Compensation Act 1961 which he can invest in another property or how he chooses. If the property remains in his ownership it is likely it will remain empty for the foreseeable future, denying other people in need of housing, including persons with protected characteristics.
54. In my judgment the scope for action in this particular case was very limited. The council was entitled to come to the conclusion after many years of attempting a co-operative approach that the real reason for lack of progress was the lack of funds and that that was unlikely to be resolved within a reasonable time. Unlike the *Durdana* case, this was not a case where possession was being sought of the claimant’s home, but of an investment property which had stood empty without producing any income for over 25 years in respect of which the market value would be paid. Unlike that case, Ms Marley took into account the claimant’s disabilities in her approach to the

case, as is shown by the chronology, and discussed these matters with him in correspondence and in meetings. In my judgment there was no breach of this duty.

55. In case I am wrong about that, I should consider whether the principle applied in the *Durdana* case, namely even if there were a breach is it highly likely that the outcome would have been the same without a breach, applies on the facts of the present case. As was recognised in that case, section 31 as referred to deals with the refusal of relief on an application for judicial review. However, reference was made to *Aldwyck Housing Group Ltd v Forward Ltd* [2019] EWCA Civ 1334, where at paragraphs 21 to 25 Longmore LJ rejected a submission that once a breach of this duty was established there was no room for the court to exercise its discretion to grant relief on the claim. In doing so he had regard to previous authorities relating not just to possession cases but cases where ministerial decisions were being challenged.
56. In my judgment the court has a discretion whether or not to quash the order, even if a breach of duty has been established. In my judgment for the reasons set out in the statement of reasons accompanying the order and having regard to the exceptionally long time which the property has stood empty it is highly likely that the outcome would have been the same had no breach occurred. I would in any event decline to exercise my discretion to quash the order.
57. The fourth duty relied upon is that under section 153(2) and schedule 19 of the 2010 Act and the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 (WSI 2011/1064), namely to train staff and to ensure that any information published is accessible by those with protected characteristics, and assess and monitor the impact of policies and practices. There is no evidence before me of such training or assessment.
58. However, in my judgment this adds little if anything in this case to the arguments raised in respect of the duties set out above and for the reasons already given there is no relevant breach. It follows that ground 1 is not made out.

Ground 2: Irrationality and disproportionality

59. Mr Corbin submits that the decision to make the order was based on the council's own view of the claimant's disabilities and relies upon the witness statement dated 9 January 2020 of Grace Myahalaleel filed in the appeal by the claimant. Ms Myahalaleel says that she had a telephone conversation with Ms Marley in October 2019 in which the latter said that the claimant's health problems were one of the main reasons that the council made the order and the council believed that would be an effective way of helping him in that he would no longer need to struggle with the renovations. She also says that in the same conversation Ms Marley said she did not understand how the claimant's medical issues had prevented him from fully developing the property. That does not appear to be disputed. Accordingly, Mr Corbin submits that that council did not taken into account properly the claimant's disability. He says there is no reference to it in the statement of reasons. He also submits that the officers report suggests that the net proceeds of sale of the property would be passed to the claimant net of expenses, when there is no power to pass on its costs, although this was not set out in the grounds of appeal
60. However, the statement of reasons refers to the claimant consistently maintaining that his personal and financial reasons has impeded progress in the renovations, but later

informing the council in November 2018 that he would sell his home to finance the works on the property. It was stated that an internet search carried out in January 2019 did not show that his home had been placed on the market. It was also stated that a comprehensive summary of the council's involvement is included in the officer report which was appended to the statement of reasons. This set out the claimant's references to his disability as summarised in the background above. The statement of reasons also made reference to the council carrying out a valuation, if access was obtained to the property, in order to determine the level of compensation payable if the order is confirmed, and to the council's belief that the claimant would not return the property into use within a reasonable time.

61. On a fair reading of the statement of reasons and appended documentation as a whole, in my judgment that showed a balanced consideration of the public interest against the claimant's interest. The comments attributed to Ms Marley in October 2019 must be seen in the context of many years of engagement between the council and the claimant and a change of plan in November 2018 and again in August 2019 when it appeared that the real problem was lack of funding. The decision to make the order in this context was not irrational or disproportionate.
62. Given the stringent requirements before such an order is made, and the reasons given for making the decision leading to the order, I am not persuaded that the reference to deduction of costs in the report is sufficient to vitiate the director's decision.

Ground 3: Procedural unfairness

63. Mr Corbin submits for the reasons advanced under ground 1, the making of the order was inadequately explained to the claimant and he was not offered any support or other consideration during the process which addressed his disability. It will be apparent from my findings in respect of those reasons that I do not accept that submission.

Ground 4: human rights

64. It is not in dispute that the council must not act in a way which is incompatible with the European Convention of Human Rights, see section 6(1) of the Human Rights Act 1998. Article 1 of the First Protocol to the Convention states:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest...”

65. Mr Corbin submits that the claimant as well as the council had the objective of returning the property to beneficial ownership, but that objective could be achieved in a less interfering way than compulsory purchase by engaging constructively with the

claimant or by using powers such as repairs notices under the 1985 Act as it had done in the past, see *Baker v First Secretary of State* [2008] EWCA Civ 141.

66. However, in my judgment both those approaches had been tried by the council and had not brought forth any real progress over a 10 year period of engagement since 2009 which would justify a conclusion that the property would be brought back into beneficial ownership within a reasonable time immediately before the making of the order. The order was in the public interest and in accordance with the stringent requirements for making such an order. The council was entitled to deem it necessary to make the order to control the use of the property in accordance with the general interest.

Conclusion

67. In conclusion, none of the grounds succeed and the order is valid.
68. I would be grateful if counsel would file a draft order, agreed if possible, within 14 days of hand down, with written submissions on any consequential matter which is not agreed. I will then make a determination on the basis of those submissions.