

The claimant instigated possession proceedings against the defendant on the ground that he caused nuisance and anti-social behaviour to neighbouring residents, in breach of his obligations as a tenant. The defendant admitted material breaches but argued that they arose in consequence of his disability in the nature of personality and behavioural disorders and that the possession proceedings discriminated against him contrary to the Equality Act 2010.

The parties agreed terms of a suspended order and the Court granted that order recording that the claimant accepted that the defendant's disability was an Equality Act protected characteristic and that it was reasonable to make an order for possession but to suspend it on terms that the defendant committed no further material breach of the terms of his tenancy.

As accepted by the Court of Appeal, the Judge in the County Court, in making the suspended possession order, was satisfied that a suspended order would not amount to disability discrimination because although it constituted 'unfavourable treatment' of him as a result of his conduct arising in consequence of his disability, the claimant had shown this unfavourable treatment to be a proportionate means of achieving a legitimate aim.

The defendant breached the terms of the suspended possession order almost immediately and the claimant obtained a warrant for the execution of the possession order. The defendant responded by making an application to stay the warrant. At the stay hearing, the defendant argued that whilst it was not seeking, on a ground of alleged discrimination, to upset the making of the suspended possession order, he was seeking to challenge the claimant's decision to enforce it in reliance on the alleged breaches.

The claimant argued that unless there had been a material change of circumstances since the making of the suspended possession order, there was no issue for the court to reconsider under sections 15 and 35 of the Equality Act 2010. The District Judge agreed with the claimant and, having heard evidence in respect of the alleged breaches, dismissed the defendant's application for a stay.

The defendant appealed the District Judge's decision which was overruled by the Recorder on the basis that consideration of sections 15 and 35 of the Equality Act 2010 had been excluded improperly and should have been considered afresh at the enforcement stage. The warrant was suspended and the matter remitted to the District Judge.

Having been granted permission to bring a second appeal, the claimant appealed the Recorder's decision to the Court of Appeal on the basis that when making the suspended possession order the District Judge had determined that the suspended order (and therefore the enforcement of it absent a material change in circumstances) did not discriminate against the defendant because of his disability.

Therefore, save where there is a material change of circumstances affecting the defendant, the enforcement of the SPO following further breaches would not be discriminatory. No such material change was argued on behalf of the defendant and therefore there was no need for the court to engage in an assessment of whether the execution of the warrant would be discriminatory. The claimant accepted that the landlord's Equality Act duty not to discriminate against a tenant is a continuing one. As a result there will be cases in

which there will have been a material change of circumstances by the date of enforcement such as to require the landlord to satisfy the court afresh that, notwithstanding such change, eviction will still be a proportionate means of achieving a legitimate aim and so not discriminatory. However, this was not such a case. The suspended possession order involved no discrimination against the defendant by the claimant. Absent any material change of circumstances occurring between that order and the application to suspend its execution, it was an abuse of process for the defendant to seek to re-open the lawfulness of the claimant's claim to recover possession.

The Court of Appeal agreed and held that when making a suspended possession order the court had undertaken the relevant proportionality inquiry. It had satisfied itself that the terms of suspension were proportionate and, in the event of material breach, the order could lawfully be enforced.

The tenant had no right, absent any relevant change of circumstances, to require the court to re-consider the same question upon the tenant's application to suspend the warrant. The recognition of such a right would be a recipe for repeated applications of a vexatious nature.

Obiter, and importantly, the Court of Appeal also determined the claimant's alternative argument and held that even if it was wrong about the need for the Judge to reconsider the issue of discrimination under sections 15 and 35 of the Equality Act 2010, the Judgment demonstrated that she had considered there would be no such discrimination because eviction would be a proportionate means of achieving a legitimate aim. This will provide some comfort to landlords that the appellate courts will look to substance over form when it comes to the issue of proportionality.