Neutral Citation Number: [2018] EWHC 40 (QB)

Case No: 7BS0048C

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
ON APPEAL FROM THE TORQUAY AND NEWTON ABBOT COUNTY COURT

Bristol Civil Family Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 16/1/2018

Before :

MR JUSTICE DINGEMANS

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Between :

	Teign Housing	**Appellant**
	- and -	
	Richard Lane	**Respondent**

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Nicholas Grundy QC (instructed by **Capsticks LLP**) for the **Appellant**
Russell James (instructed by **Cartridges Law**) for the **Respondent**

Hearing date: 18th December 2017

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Judgment Approved

Mr Justice Dingemans:

Introduction

1. 1. This is an appeal by Teign Housing against the order of His Honour Judge Simon Carr ("the Judge") dated 23 June 2017 in the Truro County Court dismissing Teign Housing's claim against Richard Lane ("Mr Lane") for possession of a flat known as 56 Priory, Bovey Tracey, Devon ("the flat"). This is a one bedroom ground floor flat. Mr Lane occupies the flat with two pet dogs.

2. 2. Mr Nicholas Grundy QC on behalf of Teign Housing submits that the Judge incorrectly introduced a concept of a "relevant breach" of the tenancy agreement and therefore wrongly failed to find certain breaches of the tenancy agreement proved, and that notwithstanding Mr Lane's mental disorder of a paranoid personality disorder it remained reasonable, legitimate and proportionate to order possession, so that the appeal ought to be allowed and possession ordered. Mr Russell James on behalf of Mr Lane accepts that what the Judge intended by use of the phrase "relevant breach" is not immediately clear, but relies on the fact that the Judge had said that even if he was wrong about grounds of possession it would not have been reasonable to order possession and has served a Respondent's Notice to the effect that it would not be reasonable to order possession even if further grounds for possession were made out. Mr James submits that any order for possession would amount to disability discrimination and that the appeal should be dismissed.

Relevant factual background

1. 3. Teign Housing provides social housing. The flat is a ground floor flat in a detached block of four flats in Bovey Tracey. Mr Lane, who is a 33 year old man, had previously been a tenant of Teign Housing at other properties in Teignmouth and Newton Abbott. The evidence showed that Mr Lane was a vulnerable person and had suffered from anti-social behaviour from another tenant when living as a tenant of Teign Housing in Newton Abbott. Mr Lane had moved to the flat in Bovey Tracey in August 2016 pursuant to a tenancy agreement dated 23rd August 2016 ("the tenancy agreement"). Some of the neighbouring tenants in the detached block of flats are also vulnerable persons.

2. 4. Before moving into the flat Mr Lane had a meeting with Mr Hanrahan, who was then Chief Executive Officer of Teign Housing. There was an issue between Teign Housing and Mr Lane about what was agreed at that meeting. It was common ground that Mr Hanrahan agreed that an area of communal garden would be fenced off for Mr Lane's dogs. It appears from the witness statements that although other tenants might have agreed to this proposed fencing off when Mr Lane visited the flat to see whether to apply for it, those other tenants felt that they had not been given a choice about agreeing to the fencing off and the proposed area needed to be adjusted to allow them to get to their bins.

3. 5. After moving in Mr Lane carried out alterations to the gas flue for the flat on 27th August 2016. Mr Lane contended that he had understood that in his meeting with Mr Hanrahan, Mr Hanrahan had given permission for Mr Lane to move the gas flue and fixtures and fittings in the kitchen, but if Mr Lane had not been given permission he had, because of his mental disorder, honestly believed that he had such permission so that if he had acted in breach of conditions of the tenancy it would not be reasonable to order possession.

4. 6. Problems arose between Mr Lane and other neighbouring tenants. Neighbouring tenants complained about loud music. On 27th August 2016 Teign Housing was informed about the works removing the flue. Mr Lane was upset that the fenced off area of the garden had been changed.

5. 7. On 8th September 2016 Mr Lane installed CCTV fixing it to the walls of the flat, and altered the fixtures and fittings in the kitchen. There was a factual issue about whether that had been agreed with Mr Hanrahan and where the CCTV, once installed, was pointing. Other tenants complained about being watched on CCTV.

6. 8. On 22nd September 2016 Teign Housing became aware that Mr Lane had carried out extensive works to the kitchen at the flat. As a result of concerns about disturbance to asbestos Mr Lane was moved back to his previous premises on 3rd October 2016. On 5th October 2016 Mr Lane returned to the flat and asked the contractor to leave and Mr Lane changed the locks. On 12th October 2016 Mr Lane allowed Teign Housing access to the flat. Further investigations showed that there was no problem with asbestos.

The proceedings below

1. 9. Teign Housing served a notice seeking possession on 13th October 2016. Teign Housing brought proceedings for possession on 21st October 2016, and amended Particulars of Claim were served on 22nd November 2016. Teign Housing claimed possession of the flat on a number of grounds in proceedings. Possession was sought under the Housing Act 1988 ("the Housing Act") pursuant to grounds set out in schedule 2. The two main grounds relied on were: (1) ground 12, a breach of a term of the tenancy other than one relating to the payment of rent; and (2) ground 14, causing nuisance and annoyance. The particular acts included: (1) removing fixtures and fittings in the kitchen without consent; (2) removing a gas flue without consent; (3) excluding contractors from the flat; (4) installing CCTV without permission so that the cameras covered communal areas and unsettled the other tenants; (5) playing loud music so as to cause nuisance and annoyance; (6) behaving aggressively to neighbours; (7) threatening a member of Teign Housing's staff in a telephone conversation; and (8) leaving an untaxed car blocking access to the communal car park.

2. 10. The proceedings were defended on the bases that: (1) breaches of the tenancy agreement had not been proved, in part because Mr Hanrahan had given permission for works to be carried out, and Mr Lane had not caused nuisance and annoyance; (2) it would not be reasonable to make an order for possession; and (3) an order for possession would amount to disability discrimination.

3. 11. Dr David Bickerton, a consultant psychiatrist, was appointed the single joint expert and produced a report for trial dated 31st March 2017. The report is careful and helpful. It sets out the details of Mr Lane's diagnosis of Attention Deficit and Hyperactivity Disorder ("ADHD") when a child, and his attendance at a specialist school and issues which had occurred there. That report identified that Mr Lane suffered from a paranoid personality disorder, possible adult attention deficit hyperactivity disorder and harmful use of alcohol. It was noted that a personality disorder was a deeply ingrained, pervasive and maladaptive pattern of behaviour. Mr Lane had a pervasive distrust and suspicion of others and their motives.

4. 12. Dr Bickerton noted that Mr Lane had had problems with alcohol and the use of cannabis. Dr Bickerton noted that Mr Lane was taking a sedative antidepressant which was calming but not curative, prolonged psychotherapy was required for the paranoid personality disorder and medication might assist with the possible adult ADHD. It was recorded that Mr Lane would only engage with support services if he desires. It was also noted that compliance with court order would be difficult for Mr Lane because of his condition. The report concluded, and it is common ground, that Mr Lane is disabled, within the meaning of the Equality Act 2010.

The judgment of His Honour Judge Carr

1. 13. The claim for possession was heard by the Judge on 5th and 6th June 2017. By a judgment dated 23rd June 2017 the Judge dismissed the claim for possession. He noted the background and complaints in paragraphs 2 and 3 of the judgment. The Judge dealt first with the factual matters, and then turned to the legal framework.

2. 14. The Judge set out the medical evidence as it was "key to understanding events" (paragraph 5 of the judgment). The Judge noted that Mr Lane had a pervasive mistrust and suspicion of others and their motives, along with an unjustified belief that others are trying to harm or deceive him. Innocent remarks were perceived to be personal attacks leading to

an angry or hostile exchange. Mr Lane found personal interaction extremely challenging. The Judge noted that Dr Bickerton recorded that because of his illness Mr Lane would find it difficult, if not impossible, to comply with orders restraining or restricting his behaviour (paragraph 5 of the judgment).

3. 15. The Judge recorded that the other tenants of the flats were older than Mr Lane, and had enjoyed a very quiet and tranquil existence before Mr Lane's arrival, meaning that any disturbance, however mild, would have a significant impact on the other residents (paragraph 6 of the judgment). The Judge noted that the challenges that Mr Lane presented as a tenant were obvious to Teign Housing as it was obvious to the court from Mr Lane's demeanour and the manner of his evidence, because of his ill-health (paragraph 7 of the judgment). The Judge rejected Teign Housing's criticism of Mr Lane's failure to engage with the Community Mental Health Team ("CMHT"), holding that there was patchy engagement, but engagement (paragraph 8 of the judgment). The Judge held that the engagement had not been carried through because the CMHT had wrongly concluded that Mr Lane did not have a mental health problem with which they could assist.

4. 16. The Judge held that Teign Housing's employees had underestimated the impact of Mr Lane's ill-health and failed to consider whether his behaviour was linked to his illness rather than being difficult and obstructive for the sake of it (paragraph 8 of the judgment).

5. 17. The judge then summarised the effect of the evidence of: Mr and Mrs Stevens (paragraphs 9-11 of the judgment); Mr Wootton, who was described as clearly very vulnerable indeed (paragraph 12 of the judgment); Mr Palfrey, recorded as displaying his own vulnerability (paragraph 13 of the judgment); Mr Lewis, the employee of Teign Housing who had most day to day contact with Mr Lane (paragraphs 14-15 of the judgment); Ms Garnett, the most senior manager at Teign Housing to give evidence (paragraph 16 of the judgment); and the witness statement of Ms Johnson, who was on holiday at the hearing of the trial. The judge summarised Mr Lane's evidence (paragraph 18 of the judgment) and the evidence from Mrs Moors, Mr Lane's mother (paragraph 19 of the judgment).

6. 18. The Judge then set out his findings of fact, which are relied on by both sides. He considered that the disagreement between the parties had its roots in Mr Lane's psychiatric condition noting that Mr Hanrahan of Teign Housing would have wanted to give Mr Lane reassurance but would not have made the agreements alleged by Mr Lane allowing him to do work with his gas supply, rip out fixtures and fittings or install a fence which excluded other tenants. The Judge found that there was no evidence of any agreement as to parking or CCTV (paragraph 21 of the judgment). The Judge found that Mr Lane had a belief, however misguided, that there was some sort of general agreement because, as his mother put it, he heard what he wanted to hear (paragraph 22 of the judgment).

7. 19. The Judge found that Mr Lane's psychiatric condition meant that Mr Lane gave long and rambling replies, he saw nothing wrong in threatening to attend the address of employees of Teign Housing, did not see his desire to record everything as intimidating, saw nothing wrong in running his engine for up to half an hour outside the flats, and saw himself as the victim. The Judge found that having regard to the psychiatric evidence there was nothing malevolent or deliberately confrontational in his actions because his paranoid personality disorder explains entirely how he presents (paragraph 23 of the judgment).

8. 20. The Judge noted that Mr and Mrs Stevens were very clear that they wanted Mr Lane gone and found that, on the evidence, they were capable of exaggerating or manipulating evidence (paragraph 24 of the judgment).

9. 21. The judge then dealt with each of the allegations. So far as noise was concerned the Judge noted that there was a lack of detail from other witnesses other than the Stevens, and the clear motivation on the part of the Stevens to have Mr Lane removed "mean the Claimant has failed to establish any relevant breaches by Mr Lane which, in any event, were limited in nature" (paragraph 25 of the judgment).

10. 22. As to CCTV the Judge had no doubt that Mr Lane believed that he had been given permission to install cameras when no permission was given. The Judge found "whilst unsettling for the other occupants, given Mr Lane's honest belief that it had been authorised, it cannot amount to a relevant breach". The Judge held that even if he were wrong about that "neither on its own nor as part of a cumulative picture, can the making of a possession order be reasonable or proportionate, even having the fullest regard to the other residents" (paragraph 26 of the judgment).

11. 23. In relation to what the judge described as "the problems in the back garden" the Judge found "I have no doubt that Mr Lane believed he had been given permission to carry out the works but no such permission was granted. Whilst likewise unsettling to the other occupants, given Mr Lane's honest belief it had been authorised, it cannot amount to a relevant breach". The judge repeated that if he were wrong the making of a possession order would not be reasonable or proportionate, even having the fullest regard to the other tenants (paragraph 27 of the judgment).

12. 24. In relation to the fouling by dogs the Judge noted that the evidence was very limited. He had seen photographs (which I have also seen) of a situation "which must have been very unpleasant, but I am aware after the Environmental Health served an abatement notice no enforcement proceedings have ever been required. I do not find, therefore, this amounts to a relevant breach". The Judge then repeated his phrase about not making a possession order (paragraph 28 of the judgment).

13. 25. In relation to the van the Judge described this as more complex and that there was no justification for parking or running the van as he did. The Judge noted it was an infrequent problem and held "while I find that this amounted to a relevant breach of Mr Lane's tenancy, neither on its own nor as part of a cumulative picture, would the making of a possession order be reasonable or proportionate, even having the fullest regard to the effect on other residents" (paragraph 29 of the judgment).

14. 26. In relation to "the first weekend when Mr Lane interfered with the gas supply and ripped out cupboards and other fixtures" the Judge noted that this must have been frightening and stressful for the other occupants, although Mr Lane wrongly thought he had permission to do that. The Judge noted that in fact there was no risk to the gas supply and no asbestos was exposed. The Judge held that "together with the other concerns about damage to the flat, including the front door, this would amount to a breach of Mr Lane's tenancy" before finding that neither on its own nor with other breaches would the making of a possession order be reasonable or proportionate even having regard to the other tenants (paragraph 30 of the judgment).

15. 27. The judge finally dealt with the problems of Mr Lane's general interaction with other residents and with employees of Teign Housing. The Judge noted that "Mr Lane can present as very aggressive, threatening and intimidating" noting that his desire to record everything made matters stressful and unpleasant for those dealing with him. The Judge considered that Teign Housing should have de-escalated matters with him before holding that "nothing about this element of his conduct can properly be said to be a breach of the tenancy agreement" before repeating his holding that even if he was wrong an order for possession would not be reasonable nor proportionate (paragraph 31 of the judgment).

16. 28. The Judge summarised his findings as: rejecting the collateral contracts argument; recording that he had found some limited breaches of the tenancy agreement and the terms implied by statute; but making "a possession order would not be reasonable, proportionate or fair". The Judge therefore did not address the Equality Act 2010 but said that in the light of the medical evidence he would have concluded that a possession order would have amounted to disability discrimination (paragraph 32 of the judgment).

The issues on appeal

1. 29. The issues raised by the appeal are: (1) whether the Judge should have found that Mr Lane's actions set out in paragraphs 25, 26, 27, 28 and 31 of his judgment amounted to a breach of the tenancy agreement. It was submitted that the Judge's concept of a "relevant breach" had no legal meaning; (2) whether the Judge failed to have regard to the prospects of Mr Lane complying with the terms of his tenancy agreement in the future and did not give sufficient weight to the impact of Mr Lane's behaviour on his neighbours when considering the issue of whether to make an order for possession (suspended or otherwise); (3) whether, in circumstances where it was common ground that Mr Lane was disabled, and that there was a link between Mr Lane's disability and conduct, the Judge's finding that eviction would not be a proportionate means of achieving a legitimate aim did not involve a sufficient focus on the effect of Mr Lane's behaviour on others.

2. 30. A Respondent's Notice was served on behalf of Mr Lane noting that if there were further breaches which were ascertained, it would not be reasonable to order possession and any order for possession would amount to disability discrimination.

Relevant provisions of the Tenancy

1. 31. When permission to appeal was granted the order granting permission to appeal identified that it would be helpful for the parties to identify the relevant terms of the tenancy agreement and the relevant evidence in the appeal bundle said to evidence each alleged breach. The Skeleton Argument on behalf of Mr Lane identified the relevant provisions but this was not done on behalf of Teign Housing. Time was therefore taken at the hearing in an attempt to identify the relevant provisions of the tenancy agreement which Teign Housing alleged had been breached and the relevant evidence for each breach.

2. 32. The following were relevant clauses of the tenancy agreement:

    1. 32.1 clause 15.2 "you must get our written permission before making any alterations to your property or garden …";

32.2 clause 19.5 "you must keep the property in a good and clean condition and use the fixtures and fittings responsibly";

32.3 clause 25.2 "we will not allow any sort of harassment … annoyance or nuisance by you … we will take whatever action we can … to deal with these issues. This may include … applying for a court order to evict you …";

32.4 clause 25.5. "you … must not cause or allow a nuisance, annoyance, disturbance or intimidation to any other person. Examples of nuisance, annoyance or disturbance include … loud music … dogs … fouling, intimidating or threatening behaviour …";

32.5 clause 25.7.10 "you … must not … park on any road … near to your home in a way that might obstruct … other road users … or any access to driveway";

32.6 clause 26.2 "… if you park any vehicle there must be properly taxed, roadworthy and insured".

Relevant statutory provisions

i. 33. So far as is relevant the Housing Act provides:

33.1 "7(1) the court shall not make an order for possession of a dwelling-house let on an assured tenancy except on one or more of the grounds set out in schedule 2 to this act …. (4) if the court is satisfied that any of the grounds in Part II of Schedule 2 to this act is established, then … the court may make an order for possession if it considers it is reasonable to do so";

33.2 "9(2) on the making of an order for possession of a dwelling-house let on an assured tenancy … the court … may –(a) … suspend execution of the order … (3) … on any such … suspension … the court, unless it considers that to do so would cause exceptional hardship to the tenant or would otherwise be unreasonable … may impose such other condition as it thinks fit";

33.3 "9A(1) this section applies if the court is considering under section 7(4) whether it is reasonable to make an order for possession on ground 14 set out in Part 2 of schedule 2 (conduct of tenant or other person). (2) The Court must consider, in particular- (a) the effect that the nuisance or annoyance has had on persons other than the person against whom the order is sought … (c) the effect that the nuisance or annoyance would be likely to have on such persons if the conduct is repeated";

33.4 "Schedule 2 Part II … (Ground 12) Any obligation of the tenant … has been broken or not performed; … (Ground 14) the tenant … (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing".

i. 34. Section 15 of the Equality Act 2010 prohibited discrimination arising from disability, which applied, by section 35, to the management of premises including by eviction. Section 136 made provision for the burden of proof.

Relevant provisions of law

i. 35. In cases where a claim for possession is brought on discretionary grounds under the Housing Act 1988 the Court has to address the following questions: (1) has the landlord made out a ground for possession (section 7(1) of the Housing Act); (2) is it reasonable in all the circumstances, including the effect of nuisance on neighbours, to make a possession order (sections 7(4) and 9A of the Housing Act); (3) should the possession order be suspended (section 9(2) of the Housing Act); (4) if possession is suspended what terms of suspension should be considered.

ii. 36. It is established that the issue of whether there is a breach of a tenancy agreement does not require personal fault, see *Kensington & Chelsea v Simmonds* (1997) 29 HLR 507. Courts ought to be aware that serious breaches of tenancy agreements needed to be marked, see *West Kent Housing Association v Davies* (1999) 31 HLR 415 at page 425, and neighbouring tenants are entitled to live free from the anxiety of a recurrence. The fact that treatment might improve the position of the tenant was a relevant factor, see *Croydon London Borough Council v Moody* (1998) 31 HLR 738.

iii. 37. The Court of Appeal identified the trial judge's duty when considering the issue of reasonableness in *Cumming v Danson* [1942] 2 All ER 65, which is "to take into account all relevant circumstances as they exist at the date of the hearing … in a broad common sense way … giving weight to the various factors in the situation". *Upjohn v Macfarlane* [1922] Ch. 256 was a case where a tenant had been induced by the landlord's agents to act in a particular way which was held to be relevant to the issue of reasonableness. In the same way a deluded belief that a tenant had permission to act in a certain way is relevant to the issue of reasonableness.

iv. 38. The approach to an appeal considering reasonableness was set out in *Cresswell v Hodgson* [1951] 1 All ER 710 where the Court of Appeal said "… when the legislature gave this overriding discretion to the county court judge to consider whether it is `reasonable to make … an order', it gave the court a very wide discretion which it is most undesirable to … interfere with" and the question for the appellate court was whether the Judge "has so plainly gone wrong in law that this court should interfere, presumably by way of order a new trial". Reasonableness involves a consideration of the position of both parties.

v. 39. If possession is ordered the issue of whether to suspend the order for possession arises. This is an issue that looks to the future. The Court will need to look for evidence that the past behaviour will cease, see *Manchester City Council v Higgins* [2006] HLR 14. If it is inevitable that a tenant will breach the conditions of a suspended order, the court should not make such an order, see *Lincoln City Council v Bird* [2015[EWHC 843 (QB); [2015] 2 P&CR DG12. The tenant will need to produce "cogent" evidence that there is a sound basis for hope for the future, thereby pitching the standard at a realistic level, see *City West Housing Trust v Massey* [2016] EWCA Civ 704.

vi. 40. Where issues of disability discrimination under the Equality Act 2010 are raised, further questions need to be considered. In *Aster v Akerman Livingstone* [2015] UKSC 15; [2015] AC 1399 the Supreme Court considered the relationship between the Housing Act and the Equality Act and identified that the Court should adopt a structured approach, see paragraph 28. The landlord would have to show that there was no less drastic means of solving the problem than ordering possession see paragraph 34. Some less drastic means were considered at paragraph 22 of *Birmingham City Council v Stephenson* [2016] EWCA Civ 1029; [2016] HLR 44. In this case the Court should consider whether: (1) Mr Lane can show that he has a mental disability; (2) whether Mr Lane can show that there was a sufficient causal link between the mental disability and the conduct on which the decision to evict is based; and (3) if so whether Teign Housing can show that evicting Mr Lane is a proportionate means of achieving a legitimate aim. When considering whether evicting Mr Lane would be a proportionate means of achieving a legitimate aim it is necessary for Teign Housing to show that there was no less drastic means of achieving its aims and that the effect of eviction on Mr Lane would be outweighed by the benefits to Teign Housing.

vii. 41. It might be noted that both in *Aster v Akerman-Livingstone* and *Birmingham v Stevenson* the issue of reasonableness did not arise. It was common ground that the Judge could consider the issue of disability discrimination when considering the issue of reasonableness. This is because it cannot be reasonable to make an order for possession which would involve disability discrimination.

The judge was wrong to reject some grounds for possession because of his use of the phrase "relevant breach"

i. 42. Teign Housing proved the installation of the CCTV cameras at the flat by photographs, and it was common ground at the trial that Mr Lane had installed CCTV cameras as he contended that he had been given permission to install them. The Judge recorded that Mr Lane believed that he had been given permission, and there was material which showed that the Judge was entitled to make that finding of fact. However the Judge went on to say "whilst unsettling for the other occupants, given Mr Lane's honest belief that it had been authorised, it cannot amount to a relevant breach". The fact that Mr Lane believed that his actions had been authorised does not provide him with a defence to a claim for breach of clause 15.2 of the tenancy agreement preventing the making of alterations without written permission. A breach of clause 15.2 of the tenancy agreement would be a ground for possession under ground 12 of Part II of Schedule 2. In these circumstances it is not clear what the Judge meant by the statement that it could not amount to a "relevant breach". I did consider whether the Judge might have intended to say that although a breach of the tenancy agreement had been established it would not be reasonable to make an order for possession given all the relevant circumstances including Mr Lane's honest but mistaken belief that he had been authorised to install CCTV cameras. However it was common ground that this could not be the meaning intended by the Judge because the Judge went on to say that even if he were wrong about the absence of a relevant breach, the making of a possession order would not be reasonable. Mr James, in his helpful submissions on behalf of Mr Lane, was unable to provide any reasonable explanation of what was intended to be meant by the concept of "relevant breach". In these circumstances I accept that the concept of "relevant breach" was not a basis on which the Judge should have rejected Teign Housing's claimed ground for possession. This still leaves the issues about: whether the ground for possession was made out on the evidence; whether the making of an order for possession would be reasonable; and the defence of disability discrimination.

ii. 43. The evidence showed that Mr Lane installed the CCTV cameras at the flat and it was common ground that this was an alteration contrary to clause 15.2 of the tenancy agreement. The Judge was therefore wrong not to have found that Mr Lane breached the terms of clause 15.2 of the tenancy agreement by installing CCTV cameras and that this amounted to a ground for possession. I should as a matter of fairness to the Judge record that the way in which Teign Housing approached identifying the specific breaches of the tenancy agreement before the Judge (and before me on appeal) was less than helpful because they did not relate Mr Lane's alleged wrongful activity to the relevant clauses of the tenancy agreement. This conclusion does not mean that possession should have been ordered (given the issues of reasonableness and disability discrimination to be considered) but it does raise issues about the proper disposal of the appeal.

iii. 44. In relation to the fouling by dogs the Judge relied on the fact that there had been no enforcement proceedings after service of an abatement notice and held "I do not find, therefore, this amounts to a relevant breach". The fouling by the dogs appears to have become a problem after service of the possession proceedings (dating from early 2017) and it was not therefore pleaded as a ground for possession under clause 25.5 of the tenancy agreement or ground 14 of Part II of Schedule 2 to the Housing Act when proceedings were commenced by Teign Housing or in the amended Particulars of Claim. However it was addressed in the witness statements and evidence and in submissions at trial and no pleading point was taken. This was because fair notice of the allegations had been given and it was recognised that this issue would be relevant to the issues of reasonableness and disability discrimination. In these circumstances it was submitted that the Judge should have found that this was a breach of the tenancy agreement, and that although not a pleaded ground for possession, the finding of a breach should have formed part of the reasonableness assessment to be made by the Judge. Mr James accepted that the reason given by the Judge for finding that this was not a "relevant breach", namely that there had been no enforcement proceedings, did not deal with the issue of whether the very extensive dog fouling shown in the photographs amounted to a nuisance, annoyance or disturbance for the purposes of clause 25.5 of the tenancy agreement before service of the abatement notice. Mr James pointed out however that the Judge had said even if he was wrong about whether the fouling amounted to a breach making a possession order would not be reasonable because no enforcement proceedings had been necessary.

iv. 45. In my judgment the Judge should have found that the evidence set out in the photographs of very extensive fouling by dogs left in the garden did breach clause 25.5 of the tenancy agreement, that this was not a separate ground for possession, but that this was a factor which was to be taken into account in deciding whether it would be reasonable to order possession and in assessing the disability discrimination defence. The fact that no enforcement proceedings were required after service of the abatement notice is an important factor to be considered in deciding whether it is reasonable to order possession, although I note that there was evidence in the supplementary witness statements (paragraph 7 of Mr Stevens' supplementary witness statement and paragraph 10 of Mr Lewis' supplementary witness statement) that there were still 10 piles of dog faeces in the garden after service of the abatement notice. There was no finding on this evidence by the Judge so it is not clear whether the Judge accepted this evidence.

v. 46. So far as what the Judge termed as "the problems in the back garden" the Judge's finding that "I have no doubt that Mr Lane believed he had been given permission to carry out the works but no such permission was granted. Whilst likewise unsettling to the other occupants, given Mr Lane's honest belief it had been authorised, it cannot amount to a relevant breach" is difficult to follow. First this is because Mr Lane's honest belief in whether he had been given permission would not have been an answer to a breach of the provisions of the tenancy agreement, for the same reasons given above relating to the CCTV cameras. However the statement is also difficult to follow because it is not clear what works the Judge found were carried out by Mr Lane in the back garden. It is apparent that Teign Housing agreed to provide a fenced off area of garden for Mr Lane's dogs. It is also apparent that the area to be fenced off was reduced after representations from the neighbouring tenants, which caused Mr Lane to become upset. It also appears that the relevant works were carried out by Teign Housing's contractors. There was witness evidence that Mr Lane had removed ornaments and damaged raspberry bushes planted by other tenants, and there was also witness evidence that Mr Lane cleared an area for parking and removed a yucca plant. It is not clear from the judgment that the Judge accepted the evidence. The position is unclear. The fact that Mr Lane appears to have been promised one thing in relation to the fencing of the garden but given another is a relevant factor in relation to the assessment of reasonableness and the disability discrimination defence. If Mr Lane damaged raspberry bushes planted by other tenants and removed a yucca plant the evidence, if accepted, might prove a breach of clause 25.5 of the tenancy agreement giving rise to a ground for possession under ground 12 of Part II of Schedule 2 of the Housing Act. I will address the absence of findings on this matter when considering the issue of disposal of the appeal.

vi. 47. In relation to the problems of Mr Lane's general interaction with other residents and with employees of Teign Housing the Judge noted that "Mr Lane can present as very aggressive, threatening and intimidating" finding that his desire to record everything made matters stressful and unpleasant for those dealing with him. The Judge considered that Teign Housing should have de-escalated matters with him before holding that "nothing about this element of his conduct can properly be said to be a breach of the tenancy agreement". This conclusion is criticised because it is said that the judge's own finding "Mr Lane can present as very aggressive, threatening and intimidating" must mean that he acted in breach of paragraph 25.5 of the tenancy agreement prohibiting any nuisance, annoyance, disturbance or intimidation, or that Teign Housing had proved a ground for possession under ground 14 of Part II of Schedule 2 of the Housing Act.

vii. 48. It is right to record that the Judge's findings in this respect are not detailed, and most importantly that he has not considered his findings of fact of "aggressive, threatening and intimidating" against the relevant provisions of the tenancy. This is an error because there is force in Mr Grundy's submission that it appears that the findings might, properly analysed, support a finding of a breach of the tenancy agreement and therefore a ground for possession under ground 12 of Part II of Schedule 2 of the Housing Act or be a ground for possession under ground 14. However whether there was a breach is likely to depend on the nature of the aggression, threat and intimidation and its extent. For example there was reference to Mr Lane picking up an axe handle which had nails in it and using it as a walking stick in an incident which appeared to cause Mr Lewis to fear for his safety. I have not seen the CCTV of this incident and I do not consider that without seeing the CCTV and without seeing and hearing the witnesses I can safely say either that there was a breach of the tenancy agreement or that there was not a breach of the tenancy agreement. On the face of it the issue of whether there was a breach of the tenancy agreement would require further findings of fact.

Judge entitled to reject the complaint relating to loud music

i. 49. Mr Grundy on behalf of Teign Housing submitted that the Judge was not entitled to reject the complaint about loud music. I do not accept this submission. This is because the Judge was entitled to reject the evidence of Mr and Mrs Stevens, and to note the lack of proper detail from the other witnesses. It is accepted that the Judge used the expression "failed to establish any relevant breaches" when considering this complaint, and that the term "relevant breaches" was not explained. The use of the term "relevant breaches" was an error for the reasons given above in relation to the CCTV cameras. However in the light of the clear findings of fact about the quality of the evidence the use of the phrase "relevant breaches" does not show that the Judge should or might have found a breach of the terms of the tenancy agreement.

Proper disposal of the appeal

i. 50. As noted above the Judge did find breaches of the tenancy agreement in relation to the parking of the van, the interference with the gas supply, and the ripping out of the kitchen. For the reasons given above, the Judge should have found further breaches of the tenancy agreement (so far as the installation of the CCTV is concerned, and a breach of the tenancy agreement so far as the dog fouling was concerned) and should have made further findings in relation to the activities in the back garden and assessed the aggression, threats and intimidation against the provisions of clause 25.5 of the tenancy agreement to decide whether there had been a breach of the tenancy agreement or a further ground for possession under ground 14.

ii. 51. Mr James submits that even if the Judge should have found further breaches of the tenancy agreement (and even if the issue about nuisance and intimidation were determined against him at any future hearing) the appeal should still be dismissed. This is because the Judge had said in relation to each distinct point that even if he were wrong about finding no breach of the tenancy agreement, it would not be reasonable to order possession even taking account of the effect of Mr Lane's actions on other tenants, and because the Judge had said he would have found that any order for possession would amount to disability discrimination.

iii. 52. Mr Grundy submitted that no regard should be paid to the Judge's conclusion that even if he were wrong about the breaches it would not be reasonable to order possession because the Judge did not have a fair opportunity to reflect on the breaches of tenancy which were proved, because he had dismissed them. Mr Grundy submitted that the judge had failed to pay any or sufficient regard to the interests of the other tenants, as he was required to do pursuant to section 9A of the Housing Act, and that it was reasonable to order possession. Mr Grundy submitted that the medical evidence made clear that Mr Lane would not be able to comply with any conditions which might be imposed when suspending an order for possession, so possession ought to be ordered immediately. It was said that although it was common ground that Mr Lane suffered from a disability, namely his mental disorder, and that disability had caused or contributed to Mr Lane acting in breach of the provisions of the tenancy agreement, this did not prevent the court making an immediate order for possession. This was because the making of an order for possession would be justified and proportionate given the effect on other tenants.

iv. 53. I should record that I do not accept Mr Grundy's submission that the Judge did not take into account the interests of the other tenants. This is because the Judge made express reference to the tenants and their vulnerabilities in his judgment.

v. 54. I also accept that the issue of reasonableness gives a very wide discretion to the trial Judge, and that it is undesirable to interfere with the exercise of such a discretion. However for the reasons given above the Judge was wrong not to find further breaches of the tenancy agreement established relating to the CCTV cameras and dog fouling. The Judge was wrong to use the phrase "relevant breach" in relation to his decision relating to the "problems in the back garden", but I am unable to determine whether there was any breach of the tenancy agreement. The judge was wrong not to test his conclusion about Mr Lane presenting as "very aggressive, threatening and intimidating" against the specific provisions of clauses 25.2 and 25.5 of the tenancy agreement and ground 14 of Schedule 2 but I am unable to determine whether if the Judge's findings about Mr Lane's behaviour would have led to a finding of breach of the tenancy agreement or a determination that ground 14 of schedule 2 was made out.

vi. 55. In my judgment in circumstances where the Judge has erred by not finding further breaches of the tenancy agreement it is difficult to place weight on his conclusion that it would not have been reasonable or proportionate to make an order for possession. This is because it is apparent that the Judge did not have the opportunity to reflect on other relevant breaches of the tenancy agreement and their effect on other tenants, because he had failed to find those breaches. Further it is apparent that further findings of fact relating to the back garden and the aggressive, threatening and intimidating behaviour need to be made. The question therefore is whether, on the material that is before me, I can say that an order for possession ought either to be made or should not be made, compare *Aster v Akerman Livingstone* at paragraph 62.

vii. 56. I am satisfied that I cannot allow the appeal and make a finding that possession ought to be ordered. This is because the assessment of whether it is reasonable to order possession is very fact sensitive, and there are important factors militating against the grant of possession in this case, including Mr Lane's mental health condition identified by Dr Bickerton and the difficulties which appear to have been caused from the outset about the area to be fenced in for Mr Lane's pet dogs.

viii. 57. I have therefore considered whether I can say that I should dismiss the appeal because I can be satisfied that any Judge hearing the matter again at first instance would not make an order for possession, suspended or otherwise. I am satisfied that I should not dismiss the appeal on this basis. This is because Teign Housing might be able to show that, given the breaches of the tenancy agreement which have been established and further breaches of the tenancy agreement which might be established showing grounds 12 and 14 of Part II of schedule 2 have been made out, it was reasonable to order possession and that such an order would not amount to disability discrimination. I should note that even if the Judge did conclude that an order for possession should be made there is a real possibility, notwithstanding the medical evidence showing that compliance with some conditions might be difficult, that a judge would conclude that such an order for possession might be suspended on terms such as engagement with mental health services, the use of the garden or the positioning of vans.

ix. 58. In these circumstances I will allow the appeal against the order dismissing the claim for possession and I will remit the action to be retried. This will enable all the issues between the parties to be addressed in a new trial.

Other matters

i. 59. As it is common ground that the issue of reasonableness and disability discrimination will take account of present circumstances, further directions will be required from the Truro County Court to ensure that both parties have fair notice of the matters and evidence on which each side proposes to rely. The parties will therefore need to liaise and attempt to agree and apply for directions providing for: (1) the exchange of documents identifying why it would, or would not, be reasonable to order possession and why an order for possession in these circumstances would, or would not, be a proportionate means of achieving a legitimate aim; (2) the exchange of further statements evidencing any further matters on which reliance is placed; and (3) updating the medical evidence.

ii. 60. It is apparent from all the evidence in this case that Mr Lane does not want to be a tenant at the flat and wants to swop to other accommodation, and Teign Housing do not want Mr Lane to remain a tenant in the flat in Bovey Tracey. It is also apparent that a Court considering issues of reasonableness and disability discrimination might consider whether alternative accommodation might avoid future problems, see *Aster v Akerman Livingstone* at paragraph 56. This may be a factor that the parties address in their documents referred to above.

Conclusion

i. 61. For the detailed reasons set out above the appeal against the order dismissing Teign Housing's claim for possession is allowed, and the action will be remitted to be retried. I am grateful to Mr Grundy and Mr James and their respective legal teams for their assistance.