Neutral Citation Number: [2018] EWCA Civ 854

Case No: B5/2016/2926 & A & B

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Bristol County Court
Recorder Rowlands
9PA50382

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2018

Before:

LORD JUSTICE PATTEN
LORD JUSTICE PETER JACKSON
and
LORD JUSTICE COULSON

- -

Between:

Jacqueline Vera Green	**Appellant**
- and -	
Southern Pacific Mortgage Ltd	**Respondent**
- and -	
Equality & Human Rights Commission	**Intervener**

- -

Richard Drabble QC & Stephen Cottle (instructed by **South West Law**) for the **Appellant**
Robin Allen QC & Clifford Payton (instructed by **TLT Solicitors**) for the **Respondent**
Catherine Casserley (written submissions only) (instructed by **Commission for Equality & Human Rights**) for the **Intervener**

Hearing dates: Tuesday 6th & Wednesday 7th March 2018

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Approved Judgment

Lord Justice Coulson:

Introduction

1. In a written judgment dated 19 November 2015, Ms Recorder Rowlands, sitting in the County Count at Bristol, rejected the appellant's defence to the respondent's claim for possession. By an order dated 2 December 2015, the appellant was ordered to give the respondent possession of the property no later than 17 December 2015. The appellant appealed and, on 24 March 2017, permission to appeal was granted.

2. The defence to the possession claim, and the points raised on this appeal, arise out of the application of sections 19-21 of the Disability Discrimination Act 1995 and the replacement provisions at section 15 and 29 of the Equality Act 2010 (which I shall call "the relevant Equalities legislation"). For that reason, permission was granted to the Equality and Human Rights Commission ("the Commission") to intervene in this appeal to the extent of providing written submissions.

3. The relevant Equalities legislation provides as follows:

> "**Disability Discrimination Act 1995**
>
> 19. (1) It is unlawful for a provider of services to discriminate against a disabled person—
>
> > (a) in refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide, to members of the public;
> >
> > (b) in failing to comply with any duty imposed on him by section 21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service…
>
> 19. (3) The following are examples of services to which this section and sections 20 and 21 apply –
>
> > …
> >
> > (e) facilities by way of banking or insurance or for grants, loans, credit or finance…
>
> 20. (1) For the purposes of section 19, a provider of services discriminates against a disabled person if –
>
> > (a) for a reason which relates to the disabled person's disability, he treats him less favourably that he treats or would treat others to whom that reason does not or would not apply; and
> >
> > (b) he cannot show that the treatment in question is justified.

20. (2) For the purposes of section 19, a provider of services also discriminates against a disabled person if —

(a) he fails to comply with a section 21 duty imposed on him in relation to the disabled person; and

(b) he cannot show that his failure to comply with that duty is justified.

(3) For the purposes of this section, treatment is justified only if—

(a) in the opinion of the provider of services, one or more of the conditions mentioned in subsection (4) are satisfied; and

(b) it is reasonable, in all the circumstances of the case, for him to hold that opinion…

21. (1) Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect…

(6) Nothing in this section requires a provider of services to take any steps which would fundamentally alter the nature of the service in question or the nature of his trade, profession or business….

Equality Act 2010

15. (1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

19. (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> > (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> >
> > (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> >
> > (c) it puts, or would put, B at that disadvantage, and
> >
> > (d) A cannot show it to be a proportionate means of achieving a legitimate aim…"

4. This appeal has been argued almost exclusively by reference to the provisions of the 1995 Act. It was common ground that there is no meaningful difference for these purposes between the relevant provisions of the 1995 Act and those of the 2010 Act. This similarity was expressly noted in *Finnegan v Chief Constable of Northumbria Police* [2013] EWCA Civ. 1191.

5. The appellant bought 164, Claverham Road, Bristol BS49 4LW ("the property") in 1994. In August 2006, she applied to the respondent to re-mortgage the property. The Recorder found that this was to allow her to pay for improvements to the property and to pay off loans.

6. The mortgage offer was dated 19 October 2006. The loan amount was £96,000. The type of mortgage was stated to be "repayment". The term was 20 years. There was a fixed rate of 5.59% until 30 November 2008 when it became a variable rate at 1.35% above LIBOR. The offer letter stated that "the terms of this mortgage reflect past or present financial difficulties".

7. On 13 November 2006, the appellant and the respondent entered into a mortgage deed. The deed stated that the appellant "charges the Property by way of legal mortgage with payment of all the money referred to in clause 2.1 of the Mortgage Conditions". It provided that the respondent was the proprietor of a registered legal mortgage over the property.

8. Section C set out the Loan Conditions. These included the following:

> "**Loan Conditions**
>
> **Repayment of the Loan**
>
> > 1. The Borrower must repay the Loan with interest over the Repayment Period by making the Monthly Payments. …
> >
> > 3. Each Monthly Payment is collected by Direct Debit from a current account maintained by the Borrower with a bank or building society approved by the Company…

What the Company may charge interest on

11. The Company will charge the Borrower interest every day on the balance debited to his or her Loan Account at the end of that day.

…

13. The Company can make further debits to the Borrower's Loan Account as follows:

(a) the Company will debit the Borrower's Loan Account with any relevant sum and any expenses on the date on which the Company incurs them; and

(b) on each Payment Day, the Company will debit the Borrower's Loan Account with interest that the Company has charged since the last Payment Day.

…

Changing the Monthly Payment

15. The Company may change the Monthly Payment at any time for any of the following reasons:

(a) to reflect a change in the Interest Rate;

(b) to provide for the repayment of any Expenses with interest;

(c) to reflect any change in the Repayment Period which is agreed between the Borrower and the Company; and

(d) to ensure that the Loan Amounts are paid by the end of the Repayment Period.

…

Default

21. This clause applies if:

(a) the Borrower fails to pay any money it is due under the Loan Conditions;

(b) the Borrower breaches any of the terms of the Mortgage;

(c) the Mortgage is no longer valid or legally binding for any reason;

> …
>
> If this clause applies, the Company may demand that the Borrower immediately pays the Company the Loan Amounts.
>
> …
>
> **The Company's Expenses**
>
> 23. The Borrower must pay all costs and expenses that the Company reasonably incurs in connection with the Loan or the Mortgage including, without limitation:
>
> (a) the costs the Company incurs in any legal proceedings (whether brought by or against the Borrower or any other person) relating to the Loan or Mortgage;
>
> (b) the costs the Company incurs in exercising or enforcing any of its legal rights under the Loan Conditions or Mortgage…
>
> 24. The Company can recover all Expenses from the Borrower on an indemnity basis.
>
> 25. The Borrower must pay all expenses on demand from the Company. If the Borrower does not pay them, the Company will debit the Expenses to the Borrower's Loan Account under clause 13 of this section and charge the Borrower interest on them until the Borrower pays them.

The "Loan Account" was defined as "the account the Company keeps for recording credits and debits under the Loan Conditions."

9. Section D set out the Mortgage Conditions. These included the following:

> "4 **Mortgagor's obligations**
>
> 4.1 The Mortgagor must:
>
> (a) put and keep the Property in good repair;
>
> (b) comply with the terms of any lease under which the Property is held, and any covenant, restriction or obligation which affects the Property
>
> …
>
> 4.2 The Mortgagor must not, without the Lender's written consent (such consent not to be unreasonably withheld) undertake any of the following:

> (a) alter the property; or
>
> (b) grant to any third party, or allow any third party to obtain rights in the Property…
>
> 7. **Lender's rights and remedies**
>
> …
>
> 7.3 If any event occurs which gives the Lender the right to demand immediate payment of all the money owing under any loan agreement, the lender may do any of the following:
>
> (a) take possession of the Property;
>
> (b) sell the Property;
>
> (c) exercise any of the other powers given to the Lender by the Law of Property Act 1925…"

10. It is not in dispute that the appellant has a protected characteristic, namely a disability; she has been severely depressed since the death of a close friend for whom she cared during the last months of her life. In addition, the Recorder found (and it is no longer in dispute) that the respondent was aware of the appellant's disability by the time that the possession proceedings were issued on 26 March 2009. The Recorder found that the respondent never considered the appellant's disability and that their *ex post facto* justifications of their treatment of her amounted to "poor conduct" on their part.

11. The appellant got into repayment difficulties within a few months of entering into the mortgage deed. She had taken out insurance to protect herself should she be unable to make the repayments, and she made a claim on that insurance, first on the basis of her unemployment, and then on the basis of disability, for the period between 1 February 2007 and 17 November 2008. At that point, the insurance ran out and the appellant was unable to make the repayments required by the mortgage.

12. As noted above, the possession proceedings were commenced on 26 March 2009. They were subject to the pre-action protocol for possession proceedings which had been introduced on 19 November 2008. Amongst other things, the pre-action protocol stipulated that:

> "**6. Postponing the start of a possession claim**
>
> A lender should consider not starting a possession claim for mortgage arrears where the borrower can demonstrate to the lender that the borrower has –
>
> (1) submitted a claim to
>
> (a) the Department of Work and Pensions (DWP) for Support for Mortgage Interest (SMI); or

> (b) an insurer under a mortgage payment protection policy; or
>
> (c) a participating local authority for support under a Mortgage Rescue Scheme,
>
> and has provided all the evidence required to process a claim;
>
> (2) a reasonable explanation of eligibility for payment from the DWP or from the insurer or support from the local authority; and
>
> (3) an ability to pay a mortgage instalment not covered by a claim to the DWP or the insurer in relation to a claim under paragraph 6.1 (1)(a) or (b)…
>
> **7. Alternative dispute resolution**
>
> 7.1 The court takes the view that starting a possession claim is usually a last resort and that such a claim should not normally be started when a settlement is still actively being explored. Discussion between the parties may include options such as:
>
> (1) extending the terms of the mortgage;
>
> (2) changing the type of a mortgage;
>
> (3) deferring payment of interest due under the mortgage; or
>
> (4) capitalising the arrears."

13. It has never been suggested that the respondent failed to comply with the pre-action protocol. Whilst the appellant was, at this time, in receipt of SMI, that fell short of the full amount due each month, and there was no ability to pay any part of the monthly repayment that was not covered by the SMI.

14. On 29 April 2009, the North Somerset Citizen's Advice Bureau, who were acting for the appellant, wrote to the respondent in these terms:

> "We write on behalf of our client regarding the mortgage arrears. We are currently assisting Ms Green to obtain mortgage interest payments from the Department for Works & Pensions and understand that an Interim award of £75 per week has been made. We will assist our client to request a hearing of 0/05/09 to be adjourned while the mortgage interest is resolved.
>
> We also believe that by allowing our client to switch to an interest-only mortgage and capitalise the arrears she will be in a position to meet the contractual interest payments and remain in her home. There is significant equity in the property, in the

> region of £90,000. We would be grateful of your prompt response to this proposal."

15. Although it had been the appellant's case that the request to change the terms of the mortgage in the letter of 29 April 2009 had been made on a number of previous occasions, the Recorder found as a fact that this was the first time that the request had been made. This request is the crucial event in this appeal. It is the appellant's case that the respondent acted in breach of the relevant Equalities legislation in refusing to accede to this request.

16. On 19 June 2009, the respondent wrote to the CAB asking for updated income and expenditure details before they could consider any modification to the terms of the mortgage. Thereafter, on 3 July, the respondent refused to convert the mortgage to an interest-only arrangement. The Recorder noted that that letter did not mention the appellant's disability or explain why the option to convert was "not available". This pattern was subsequently repeated some weeks later: on 27 July, the respondent asked for further information before the request to switch could be considered, but on 10 August they again refused the request. On this occasion it was said that this was because the appellant did "not meet our assessment criteria". It was later accepted that the respondent had no such criteria.

17. Both letters from the respondent said that "whilst we endeavour to assist our customers where possible, we are not obliged to alter the terms of the loans." Before the Recorder there was evidence that the respondent had a practice or policy whereby they refused to allow any borrowers to convert repayment mortgage accounts to interest-only, whether on a temporary or permanent basis. This was called the "no conversions" policy.

18. On 28 August 2009 South West Law wrote to the respondent's solicitors on behalf of the appellant. Amongst other things they said:

> "We note that the loan was taken out in November 2006 and that possession proceedings were issued on 26 March 2009. It follows from this that this loan is a Regulated Mortgage Contract which falls within the framework of guidance from the Financial Services Authority…
>
> Can you please confirm whether the loan can now be transferred to interest-only. We understand that the DWP are paying mortgage interest at the monthly rate of £329.33. As we understand from your paperwork it would appear that the interest element of the monthly instalment in July 2009 was £198.09. On that basis the payments from DWP go some way towards discharging the arrears…
>
> When our client has raised the question of transferring the mortgage to interest-only with your client she has been told on a number of occasions that she does not meet the relevant criteria. When asked what the relevant criteria were, no real answer was given. We would ask that you provide us with detailed reasons as to why you are unwilling to agree to switch

> the mortgage to interest-only if that is your client's position. I should say that our client has indicated that two years ago the property was valued at around £195,000 so clearly there is a substantial body of equity to protect your client. We would remind that under the protocol if your client is unwilling to agree to a proposal made by our client, then you are obliged to give written reasons…"

19. The possession proceedings continued. On 22 December 2011, the Financial Services Ombudsman recommended that there be an interest-only period of 9 months. The Ombudsman did not address any discrimination issue. The Recorder found that, on the evidence, this recommendation was not put in place by the respondent, and she regarded the respondent's evidence on this subject as unsatisfactory. However, it also appears that, to be put into effect, the appellant had to approve the Ombudsman's decision in writing, and there is no evidence that she did so.

20. Between 2011 and 2015, interest-only payments were made by DWP, pursuant to the long-standing SMI scheme. But from 5 June 2015, the DWP payments were reduced, leaving a shortfall on the interest due under the mortgage. The appellant did not pay the difference, although she assured the Recorder that she could and would make such payments; moreover, the financial evidence also showed that she was in a position to make partial payments but had not done so. By the date of the hearing before the Recorder in September 2015 the total figure for principal, arrears and costs was £181,703.37. It is now put at the staggering sum of about £300,000, divided broadly into one third mortgage arrears, two-thirds costs and expenses.

The Judgment

21. The hearing before the Recorder lasted three days. There were three witnesses of fact, including the appellant herself, and two bundles of documents. In reaching her conclusions on the matter of disability discrimination, the Recorder had the assistance of an assessor.

22. The appellant's defence to the possession proceedings relied, in part, on the European Convention on Human Rights. At paragraphs 44-46 of her judgment, the Recorder indicated how and why such a claim was wrong in law and did not in any event pass the proportionality test. She therefore dismissed the defence based on Article 8. Before us, Mr Drabble QC accepted that no appeal arose on that part of the judgment.

23. The Recorder then moved to the claim pursuant to the relevant Equalities legislation. She concluded (paragraphs 52-53) that, although causation was a difficult question, the appellant's disability had caused the arrears. At paragraphs 57-58, she found that, notwithstanding that, the bringing of the possession proceedings on 26 March 2009 did not relate to the appellant's disability. She found that the respondent "would obviously have taken possession proceedings against anyone in arrears 'as per due course'. The [appellant] was being treated no less favourably than anyone else in arrears." She therefore found that there was no basis on which she could find that the respondent discriminated unlawfully against the appellant when commencing possession proceedings.

24. For the purposes of this appeal, the heart of the judgment is at paragraphs 59-75 of the Judgment. The Recorder said that the critical question was whether the request to change to an interest-only mortgage in April 2009 was a reasonable adjustment that the respondent should have made: "whether the *practice, policy or procedure* - the refusal to change to interest-only - *makes it impossible or unreasonably difficult for disabled persons to make use of the service* - the mortgage service." For a number of reasons, the Recorder considered that the refusal did not make it impossible or unreasonably difficult.

25. The steps in the Recorder's reasoning were as follows:

    i) The "service" contemplated by the legislation was the mortgage over the whole of its life, from offer to redemption. "One cannot look at the monthly instalments alone: one must also look at the question of redemption." (Paragraph 64).

    ii) The failure to allow the change from repayment to interest-only did not make it impossible for the appellant to access the service in the first place. On the contrary, she had done so (paragraph 65).

    iii) "All being well", the Recorder said that it would also be possible for the appellant to redeem the mortgage at the end, although that may well leave her homeless and destitute because she said she could not pay the repayment element of the instalments. "Although the switch would make it possible for the [appellant] to service the mortgage repayments, it would have no impact at all on her ability to redeem the mortgage at the end of the term." (Paragraph 65).

    iv) For these reasons, the Recorder found that the failure to allow the change to the repayment terms did not make it impossible or unreasonably difficult for the appellant to make use of the service.

    v) If, contrary to that conclusion, this had been a case where it was impossible or unreasonably difficult for the appellant to access the service, the Recorder found that, although a repayment mortgage had many similarities with an interest-only mortgage, they were "fundamentally different". (Paragraph 70). "It would mean imposing on the lender a riskier, more unsatisfactory repayment vehicle."

    vi) A switch to an interest-only mortgage was "a chancy thing"; it was not good practice to lend on an interest-only basis. The security in that situation was so speculative and precarious that the proposed change to interest-only was not a reasonable adjustment (paragraph 71).

    vii) There was no substantive difference between the 1995 Act and the 2010 Act and that, under the latter, there was never a time when there was a reasonable step for the lender to forgo its security, having regard to the appellant's disability.

26. The Recorder also emphasised, in a passage of her Judgment to which Mr Drabble QC did not refer until his submissions in reply, that the proposed switch to an interest-

only mortgage was not a good solution for the appellant herself, because she would run the risk of being homeless and heavily indebted in ten years' time even if the relief she sought was granted. The Recorder said that "she would, in my view, be better off biting the bullet now, moving to a smaller property or a rented property, and having security in that new home, than living on the edge for the next ten years" (paragraph 73). No objection to that finding of fact featured in the skeleton argument or oral submissions and in my view, it is incontrovertible on the evidence.

The Legal Landscape

27. Section 22 of the 1995 Act and section 35(1) of the 2010 Act provide an express statutory defence to a claim by a landlord for possession if the tenant can show that the claim is discriminatory so as to be unlawful: see *Lewisham LBC v Malcolm* [2008] UKHL 43; [2008] 1 AC 1399. Although Lord Bingham said at paragraph 19 of his judgment, that such a defence would not be "made out very often", Lady Hale, at paragraph 104, disagreed, saying that she would have expected the defence to be made out "quite often".

28. There is no equivalent statutory provision in relation to a mortgagee's possession claim. There is no legislation which expressly limits the mortgagee's rights either at common law or under the Law of Property Act 1925. Leading counsel for both parties agreed with the Commission that, as far as they are all aware, this is the first case in which the Equalities legislation has been raised as a defence to a mortgagee's claim for possession.

29. The respondent argued that, pursuant to the terms of this mortgage, it had a contractual right to immediate possession of the property and to a possession order to secure that outcome: see *Fourmaids v Dudley Marshall* [1957] 1 Ch. 317. Although a provision in a mortgage deed that, so long as certain payments are made, the mortgagee will not go into possession, comprises a contracting out of those rights (see *Fourmaids* at page 321), that of course assumes the regular payment of those monthly instalments in accordance with the mortgage agreement.

30. Thus, the novel proposition advanced by the appellant in this case is that, following her non-payment of the agreed monthly instalments, the Equalities legislation obliged the respondent to accede to her request to change the basis of the mortgage, and to give up both the agreed security (represented by the term requiring the repayment of the loan over the 20 years of the mortgage) and the right of possession, and replace it with a different arrangement altogether, pursuant to which there was no right of possession and the ultimate security for the loan would depend on variable factors such as the value and condition of the property in 2026. Mr Allen QC said (and Mr Drabble QC did not demur) that there had never before been a case where it was said to be discriminatory to continue to enforce the security for a loan.

The Appeal

31. Although the boundaries between them were sometimes fluid, the appellant raised three issues on this appeal. Those three issues arose out of the relatively narrow way in which the appellant's case was put, which was to the effect that the respondent acted unlawfully under s.19(1)(b) by discriminating against the appellant (as defined

in s.20(2)), in failing to make reasonable adjustments to its practice or policy pursuant to s.21(1).

32. The three issues were as follows:

i) First, it was said that the judge's approach to the definition of 'service' was flawed because it should have been defined by reference to the broad nature of the 'services' offered by a lender like the respondent (which were themselves subject to a detailed regulatory regime), not simply the service actually provided. It is said that the Recorder ignored the fact that a major purpose of the provision of the service was to allow the borrower to occupy the residential premises purchased with the mortgage finance for the term of the mortgage.

ii) Secondly, the appellant submitted that the proposed switch to an interest-only mortgage was a reasonable adjustment to its lending policy which the respondent ought to have made, particularly because the respondent was required by Codes of Practice and other guidance to take flexible steps to assist existing mortgagors. This issue necessarily involved a prior consideration of the practice/policy in question and the extent to which it denied the appellant access to the service.

iii) Thirdly, the appellant said that the judge was wrong to conclude that the proposed change to an interest-only arrangement was a fundamentally different thing to the repayment mortgage that had been agreed. This argument did not take up very much time during the appeal, the focus being very much on the 'reasonable adjustment' issue.

Ground 1: 'The Service'

33. Pursuant to s.19(1), it is unlawful for a provider of services to discriminate against a disabled person in a number of specified ways. Sub-section (a) refers to "any service which he provides…to members of the public". Sub-section (b), which is what this case is concerned with, refers to a situation where "the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of *any such service*…" In addition, s.21(1) refers to 'a service which he provides', and s.21(6) refers to 'the service in question'.

34. There was a debate between the parties as to the proper characterisation of the service provided by the respondent in this case. Each side sought to characterise the service in extreme terms, which then informed their respective cases on 'reasonable adjustment'.

35. Thus, by its primary argument, the respondent sought to identify 'the service' in highly restricted terms, arguing that, when analysing what the service was, the loan and the mortgage should be treated separately, and that what mattered was the loan (because that was what was being provided by the respondent). It was said that the mortgage was merely the security for the loan. In addition, the respondent argued that the service came to an end when the appellant failed to pay the monthly repayments and the respondent was entitled to possession. That allowed Mr Allen QC to argue that no service was being provided by the time that the possession proceedings were commenced, so that the relevant Equalities legislation simply did not apply.

36. I disagree with that analysis. The loan and the mortgage are inextricably linked and, taken together, form the service that was offered to the appellant. To differentiate between the two parts of the transaction would be an uncommercial and artificial exercise.

37. Similarly, I do not accept that the service had come to an end by the time of the possession proceedings. Some mortgage repayments, coming from the DWP, continued to be made. There was an ongoing relationship between the parties. However the service is defined, it did not come to an end in March 2009.

38. At the opposite end of the spectrum, the appellant (and the Commission) argued that the service was the provision of a loan which allowed the borrower to occupy her property. More widely, they submitted that 'the service' had to be construed by reference to 'the services' referred to in s.19(1), and that this brought with it the whole regulatory regime relating to the provision of financial services. These arguments were designed to facilitate the submission that 'the service' identified in s.19(1)(b) embraced all kinds of residential mortgage, including the repayment mortgage that the appellant had entered into, and the interest-only mortgage which she said she should have been offered, and which was a possible option under the regulatory regime.

39. In my view, 'the service' that is under consideration in these sections of the Equality legislation is that which was actually provided by the respondent to the appellant. It should not be defined too broadly, otherwise the 'reasonable adjustment' mechanism becomes too general and possibly too sweeping in its effect. The respondent is a provider of services, but what matters for this purpose is the service that it actually provides to the appellant. The two should not be elided.

40. Further, the appellant's definition of the service over-states the significance of the occupation of the property by the appellant. First, she occupied the property long before the mortgage deed. Secondly, the Recorder found that the purpose of the re-mortgage was to pay for improvements and pay off loans; she made no finding about continued occupation. Moreover, there was no absolute requirement that the appellant had to occupy the property: the terms of the mortgage would have permitted letting, provided that the arrangements were not such that the respondent could reasonably object to them. So, contrary to the suggestion at paragraph 20 of the Commission's skeleton argument, this was not a case where letting (and therefore non-occupation) was prohibited.

41. Moreover, even if it is accepted that the continuing occupation of the property by the appellant was an important feature of the service, that occupation still depended on the making of monthly repayments of the loan. So where, at paragraph 23 of her skeleton on behalf of the Commission, Ms Casserley contended that "occupying the property itself is an inherent part of the provision of the loan", that assertion is incomplete, because it omits to note that such occupation was dependent upon the making of the monthly repayments.

42. The respondent's alternative definition of the service in question was that it was a repayment mortgage which involved a single loan of a fixed sum, with the property as security and no facility to increase the amount of the loan.

43. I accept this characterisation of 'the service'. The parties freely entered into a mortgage agreement whereby, in exchange for the promise of making monthly repayments, a sum of £96,000 was loaned to the appellant with the property as security. It was not a bank loan or some other overdraft arrangement whereby, depending on the terms, the loan could continue even if repayments were not made. The terms of the mortgage were clear.

44. This definition is consistent with the numerous references in the case law to the effect that the true nature of a mortgage is as a security for money lent, to be repaid over a fixed period of years: see, for example, *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883, per Russell J at page 895.

45. The essence of the appellant's complaint is that she should have been offered an interest-only mortgage. But that would have been a different service, with a different loan, and (on the respondent's case and the judge's findings) a different and uncertain security. That different service was never offered, and the appellant had no legal right to be offered it. She wanted a new loan, with new terms, because she was in default. It was no part of the service being provided by the respondent that the appellant could make interest-only repayments and ignore the capital sum.

46. Support for the proposition that an interest-only mortgage was a different service to the service which the parties had agreed in 2006 can be found in the regulatory regime dealing with financial services (which is examined in greater detail in paragraphs 68-72 below). That guidance repeatedly draws a distinction between the different types of mortgage that might be offered by a lender. Those distinctions are drawn for good reason, because different regulations apply to different types of mortgage. So under the regulatory framework, the provision of a repayment mortgage is one service; the provision of an interest-only mortgage is a different type of mortgage and therefore a different service.

47. The decision of this court in *Edwards v Flamingo Land Ltd* [2013] EWCA Civ. 801 seems to me to be directly relevant to the analysis of 'the service' under s.19(1)(b) and s.21(1). In that case, the complaint was that the sit-down restaurant service provided should have been adjusted so as to allow for the provision of take away food. The claimant's argument was that the service was the provision of meals, and that, since that would include both a restaurant and a take away service, s.19(1) and s.21(1) were engaged. Longmore LJ rejected that submission. He said:

> "11. In my view this is too broad an approach. An owner or operator of a restaurant/bar is not a mere meal provider; he provides a service which can be best described as "serving meals and drinks at tables prepared with chairs and eating equipment such as glasses and cutlery". That may be outside or inside but it will usually be within the area operated as a restaurant. To my mind that is different from the service of a take away establishment which provides food and drink to be consumed away from the premises without any accompanying services. One establishment could, of course, provide both services but the services are distinct from one another.

> 12. If it were otherwise, both a sophisticated and unsophisticated restaurant could be required pursuant to section 21 of the 1995 Act to take reasonable steps to provide a takeaway service for disabled customers. Conversely a takeaway establishment could be required to take reasonable steps to allow disabled customers to eat inside the area of the takeaway establishment but so to require would, in my view, require the service provider to provide a different service from that which he provides or is prepared to provide.
>
> 13. Melissa's claim obtains some credence from the fact that there is an area of land just outside the restaurant and bar which is already prepared with picnic tables and that such area is within the theme park owned by Flamingo Land as a whole. But the existence of picnic tables on nearby land cannot make any difference of substance. Suppose that the picnic area was situated a little distance away across a road or a river. It could scarcely be said that the restaurant then had a "policy" not to serve takeaway meals which might require to be adapted for disabled persons. The restaurant just would not be providing a takeaway service."

48. In addition, at paragraph 16 of his judgment, where Longmore LJ accepted that Flamingo Land would also have had a defence by reference to s.21(6) (a fundamentally different service) he thought that the better view was that "the defendant is providing a restaurant service and there is therefore no policy which requires adaptation." In the same way here, I consider that the service should not be too broadly defined (the provision of all possible kinds of mortgage) and was instead the provision of a particular type of mortgage, namely a repayment mortgage.

Ground 2: Reasonable Adjustment

49. Although much of the focus in this appeal was on the issue of reasonable adjustment under s.21(1), there are two precedent questions: what was the policy, and did that policy make it impossible or unreasonably difficult for disabled persons to access or make use of the service which the respondent provided to other members of the public?

50. The policy identified by the Recorder was "the refusal to change to interest-only". She did not elaborate on this. The evidence before her was that the two letters from the respondent (paragraphs 16-17 above), which both said that the respondent was not obliged to change the terms of the mortgage, were written because the respondent's policy was not to allow existing mortgagors to change to interest-only mortgages. This was the 'no conversions' policy to which I have referred in paragraph 17 above. As far as I can tell, this was the only policy or practice in this case on which s.21(1) can bite, and I approach the other issues on that basis.

51. Did that policy make it impossible or unreasonably difficult for the appellant to access the service? In my view, the plain answer to that is No, for two reasons.

52. First, as explained above, an interest-only mortgage was not the service being provided. The service was the provision of a repayment mortgage which the appellant accessed without difficulty in 2006. There was no service involving interest-only mortgages. Indeed, this makes plain the unreality of the appellant's definition: they want to define 'a service' as including something (an interest-only mortgage) which the respondent did not supply to existing borrowers with a capital repayment mortgage, whether disabled or not.

53. Secondly, even if the appellant is right, and 'the service' included interest-only mortgages, there was no evidence that that it was impossible or unreasonably difficult for disabled people to access the service when compared to the access offered to other members of the public. The policy was not to provide interest-only mortgages to existing repayment mortgagors, whoever they were. Access to the respondent's services were therefore "on the same terms as non-disabled people": see paragraph 94 of the judgment of Lady Hale in *FirstGroup Plc v Paulley* [2017] UKSC 4.

54. Or course, depending on the facts of the case in question, there may be times when, in order to remove the barriers otherwise facing disabled people, it is necessary for there to be a degree of affirmative action in their favour. That can be most obviously seen in two employment cases, *Archibald v Fife Council* [2004] UKHL 32 and *Griffiths v The Secretary of State for Work and Pensions* [2015] EWCA Civ 1265.

55. Both cases were concerned with different parts of the Equalities legislation to those with which this court is concerned. In *Archibald*, the applicant's case on appeal centred on the Council's policy that, for an existing employee to fill an existing vacancy, there had to be a competitive interview. The House of Lords concluded that the employer's duty was capable of extending to the placing of an employee in the same or a higher grade post without competitive interview, if that was reasonable in all the circumstances. And in *Griffiths*, where the policy was concerned with absences from work and the attempt to stop pay if the absences reached a certain point, this court found that such provisions would inevitably "bite harder" on the disabled, or a category of them, than it did on the able-bodied. The appeal was, however, rejected on the basis that it had been open to the tribunal to find that the proposed adjustments to this policy had not been reasonable.

56. I agree with Mr Allen QC that what these cases are endeavouring to ensure is a pragmatic solution; an "equality of results rather than equality of treatment", as Lady Hale put it in *Firstgroup*. In the present case, there was no need to make any adjustments to bring about an equality of result because the 'no conversions' policy applied to all. It was not a policy that "bit harder" on a disabled borrower compared to a non-disabled borrower.

57. For these reasons, I consider that s.21(1) does not apply at all. That means that this appeal must fail.

58. However, for completeness, I am prepared to assume, just as the Recorder did, that the policy did somehow restrict access to those with disabilities. Was there an obligation to make reasonable adjustments to the policy pursuant to the Equalities legislation?

59. The duty to make reasonable adjustments is an anticipatory duty: see *Roads v Central Trains Limited* [2004] EWCA Civ 1541 at paragraph 11. The duty is owed to disabled persons at large in advance of an individual disabled person coming within the purview of the public authority exercising the relevant function: see Lord Dyson MR in *Finnigan v Chief Constable of Northumbria Police* [2013] RWCA Civ 1191; [2014] 1 WLR 445 at paragraph 32.

60. The decision in *Finnigan* is also important because, at paragraph 38 of his judgment, Lord Dyson noted that, once a potential reasonable adjustment has been identified by the claimant, the burden of proving that such an adjustment is a not a reasonable one to make shifts to the defendants.

61. As might be expected, in determining what steps it is reasonable for a service provider to have to take, the court applies an objective test: see *Allen v Royal Bank of Scotland Group PLC* [2009] EWCA Civ 1213 at paragraph 40.

62. In the present case, the question is whether it would have been reasonable to adjust the 'no-conversions' policy to offer disabled persons an interest-only mortgage? In my view, for the reasons noted below, and even assuming that the relevant burden of proof was on the respondent, that would not have been a reasonable adjustment.

63. The critical element of a repayment mortgage is the security for the mortgagee represented by the property in question, and the right to its possession. If the repayments are not made, the mortgagee can take possession of the property and sell it immediately, so as to redeem the value of the loan originally made. Such security is regarded as generally good because it is reasonably certain.

64. By contrast, with an interest-only mortgage, any security is represented by the value of the property at the end of the term. That may provide sufficient security for the loan, but it may not. The mortgagee has no control over, or even knowledge of, the ultimate security which the property might represent. It would depend on all sorts of things outside the mortgagee's control: condition, valuation, the state of the property market so far in the future. Yet it is the mortgagee who bears the risk that, at the end of the term, the property will not be adequate security for the loan.

65. This was the issue at the heart of the Recorder's judgment:

> "70. Much of the argument in this case is centred around this issue. Is a repayment mortgage fundamentally different from an interest-only one? They have many similarities. They both involve the advance of monies, secured on properties, repayable over a period of years. The claimant argues that there is a fundamental difference in that there is a guarantee of repayment with a repayment mortgage; an interest-only mortgage is a far chancier matter. In *Flamingo Land*, the Court of Appeal held that providing a take away food service was a fundamentally different matter from providing sit-down service. There is in both cases the provision of food, but the packaging and service aspects are different. In the same way, in my view, the provision of an interest-only mortgage is very different, indeed fundamentally different, from providing a

> repayment mortgage. It is something that would not normally be provided by the lender, just as the Coach House at Flamingo Land did not normally provide take-away meals. It would mean imposing on the lender a riskier, more unsatisfactory repayment vehicle.
>
> 71. A switch to an interest-only mortgage is a chancy thing. I was taken at length to the mortgage industry codes on offering interest-only mortgages. I accept that they mainly post date the decision I am considering and that there has been a shift towards more prudent lending, and I accept that the guidance contains exceptions for existing customers. Nevertheless, the guidance embodies good practice. It is not good practice to lend on an interest-only basis. The repayment plan is speculative. Over a period of over 20 years, which was what was contemplated in this case, much may happen. House prices may go up or down. SMI may be curtailed. Whilst nothing of the kind is suggested in relation this defendant, another person in the same situation might trash the property. The security is speculative and precarious. It is, in my view, so speculative that the change to interest-only is not a reasonable adjustment under section 21 when the defendant proposed it in 2009."

66. For myself, I would agree with those passages, and particularly the Recorder's description of an interest-only mortgage. On that basis, it would be unreasonable to require the respondent to adjust its 'no conversion' policy generally so as to offer it to disabled persons. That would be requiring the respondent to accept a lesser form of security, and to give up the right to possession, in circumstances where that was not the way that the respondent conducted its business.

67. The appellant's case was that the various codes and written guidance dealing with the provision of mortgages required the respondent to be flexible and that, particularly in circumstances where the mortgagor might be getting into difficulties, the mortgagee was obliged to consider other forms of lending, including interest-only payments.

68. Amongst the material to which the court was referred were the following:

i) A document emanating from the *National Homelessness Advice Service*, which was not dated, which indicated that if someone was in difficulties in repaying their mortgage, the lender "can suspend part of your repayment, allowing you to make 'interest-only' payments (i.e. move a repayment mortgage onto an interest-only basis)."

ii) A press release from the *Council of Mortgage Lenders* ("CML") also undated, which indicated there was no prohibition on interest-only mortgages.

iii) The CML guidance of October 2011 which indicated that one option open to a lender was to "consider changing the type of loan". The document indicated that good practice required that "upon expiry of an agreed temporary switch to interest-only, the account converts back to a repayment mortgage unless a

further extension of the temporary switch has been deemed appropriate and agreed with the customer."

iv) Guidance from the *Financial Services Authority* ("FSA") of October 2011 in respect of 'Forbearance Impairment Provisions-Mortgages'. This also referred to temporary reductions in payments or transfer to interest-only terms. Paragraph 4 of the summary reads:

> "Forbearance benefits the customer in supporting them through periods of difficulty and enabling them to remain in their property. However, forbearance provided without careful consideration of the individual circumstances of the customer, the potential for future recovery; can place them in an even worse position and lead to increased difficulty in achieving recovery. This may lead to the mortgage moving permanently onto non-*sustainable terms* or to higher losses for both the customer and the firm if repossession takes place. From a prudential perspective, these kinds of accounts have a higher long-term loss-risk which should be accounted for within reporting by firms. *Sustainable terms* are defined as revised contractual terms where the mortgage can be fully serviced over its full life."

v) The FSA document of December 2011 entitled 'Mortgage Market Review: Proposed package of reforms'. This stressed that the most important point of any repayment strategy was that it was credible, given the circumstances of the consumer. It identified a risk with interest-only mortgages: "The consumer will need to sell and leave their home at the end of term – which is far easier to state as an intent at the outset of the mortgage than when the time comes. If a borrower wishes to downsize at the end of the term, but does not have enough equity to buy a smaller property, they may find themselves in difficulty, particularly if they have reached the end of their working life and have not budgeted for ongoing housing costs in retirement."

69. In addition, the appellant relied particularly on the Mortgage Code of Business, sections 11 and 13 produced by the *Financial Conduct Authority* ("FCA"). The court was taken to the version extant in 2009, and the subsequent version of 2014. In the 2009 version, section 13.3 was entitled "Dealing fairly with customers in arrears: policies and procedures". This required, amongst other things, that the lender use reasonable efforts to reach an agreement with a customer over the method of repaying any payment shortfall. Section 11 required the lender to put in place a written policy setting out the factors it will take into account in assessing a customer's ability to repay. Section 11.3.6 provided that "where the regulated mortgage contract is an interest-only mortgage, and the firm is unable to establish the cost of the associated repayment vehicle, the payments described in 11.3.5 may be based on an equivalent repayment mortgage".

70. Unsurprisingly perhaps, following the property-related financial crisis of 2008–2009, the later MCOB document is more circumspect. Indeed, section 11.6.41 states that:

> "(1) A mortgage lender may only enter into an interest-only mortgage, or switch a repayment mortgage onto an interest-only basis for all or part of its term, if:
>
> (a) it has evidence that the customer will have in place a clearly understood and credible repayment strategy; and
>
> (b) as far it is reasonably able to assess at that time, the repayment strategy has the potential to repay the capital borrowed and any interest reasonably expected to be accrued under the interest-only mortgage."

Section 11.6 contains a series of other warnings and restrictions relating to interest-only mortgages, although it makes clear that these rules do not prevent a lender from making a temporary concession by which he accepts payment of interest only (11.6.43). The provision at 11.6.46 suggests that the agreement of an interest-only mortgage with the appellant now would constitute a breach of the FCA's rules.

71. Although there was some debate about the transitional provisions relating to the two different versions of the MCOB document, I do not consider it necessary to go into those in any detail. I do however note that section 11.7.1 of the transitional arrangements makes clear that a mortgage would not be varied to interest-only if the customer was taking on additional borrowing or if the proposed transaction was not in the customer's best interests.

72. Where does all that take us? In my view, Mr Drabble QC is right to say that the regulatory framework does not say in terms that all interest-only mortgages would amount to imprudent lending. The risk will always depend on the facts. But, beyond that, the regulatory framework amounts to no more than saying that mortgage providers in the position of the respondent are obliged to be flexible and should provide what assistance they can to those who find themselves unable to make repayments. As part of that approach, they are obliged to consider the possibility of interest-only mortgages, particularly by way of temporary forbearance to existing customers although, following the credit crunch, even such temporary arrangements are less likely to be offered than before. But the regulatory regime makes plain that interest-only mortgages represent "a higher long-term loss-risk". Critically, in my view, there is nothing in any of the regulatory documents which have been drawn to our attention which indicate that, regardless of questions of valuation and residual equity, a mortgagee is obliged to offer an interest-only mortgage to anyone who is in difficulties in making the monthly repayments of the original loan.

73. The appellant sought to argue that the switch would have been a reasonable adjustment because the financial position now demonstrates that, because of the SMI payments made by the DWP, a switch to an interest-only mortgage would have allowed her to remain in the property, and that the shortfall in the repayments would have been met by the increased equity in the property. So she says that her considerable indebtedness could have been avoided if the respondent had agreed to the request made in April 2009.

74. The difficulty with that submission, as I see it, is the extensive hindsight which it involves. The appellant's financial position in the middle of 2009 was stark. The court

was shown a financial statement produced on behalf of the appellant, dated June 2009, which showed that, even with the DWP payments, there was a monthly cash shortfall of £250 odd, and debts of almost £10,000, with no basis on which any of those could have been repaid. Moreover, it was not known at that time for how much longer the SMI payments might be made, nor the extent to which the property might retain its residual equity.

75. For those reasons, I do not consider that it is fair now to criticise the respondent because, in 2009, they did not agree to the proposal to switch. The appellant was already in debt; her debt was inexorably increasing month on month, even with the SMI payments, which were not themselves guaranteed; and she had no way of paying back the £10,000 she owed to others. There was nothing about the appellant's position which made it reasonable for the respondent to alter its 'no conversions' policy or the terms of this particular mortgage.

76. For these reasons, I do not consider that it was a reasonable adjustment within the meaning of s.21(1) to require the mortgagee in this case to abandon the security which it had agreed with the appellant, and instead to accept a much more speculative and uncertain security by way of an interest-only mortgage.

77. For that reason too, I consider that this appeal must fail.

Ground 3: 'Fundamentally Different'

78. The final issue is whether or not the interest-only mortgage which the appellant says she should have been offered was fundamentally different to the mortgage that she had originally agreed. Although it is unnecessary to deal with this point in any detail, given my views on the other issues, I summarise my conclusions below.

79. The Commission sought to argue that the approach to 'fundamental difference' should be based on a narrow interpretation of those words, because it was an exception to the anti-discrimination provisions. That was not how this court approached the question in *Flamingo Land*, nor does it seem to be justified to skew the normal rules of interpretation in this way. 'Fundamental difference' is not a true exception, but a provision concerned with the scope of the application of the Equalities legislation.

80. In my judgment, *Flamingo Land* is again relevant. Longmore LJ found that a restaurant service was different from the service of a take away establishment "which provides food and drink to be consumed away from the premises without any accompanying services". Similarly, here, the provision of a repayment mortgage was different from a provision of an interest-only mortgage which was not a service which the respondent offered to existing customers.

81. Moreover, for all the reasons already noted, I consider that the proposed interest-only mortgage was fundamentally different to the terms which the appellant had originally agreed. That can be tested in this way. If she had switched to interest-only, it is not the appellant's case that in 2026 she would be able to sell the property, repay the loan, and have enough left to buy a small house for herself. On the contrary, on the Recorder's findings, she would be unable to pay off the loan at the end of the term, and be left homeless and destitute, whilst the respondent's security would be chancy and uncertain. Everything guaranteed by a repayment mortgage would be absent. That

demonstrates the fundamental difference between the type of mortgage agreed and the type of mortgage requested on the facts of this case. Merely because an interest-only mortgage might, in other circumstances, and depending on the residual equity in the property, have been granted to another mortgagor, does not mean that it is not fundamentally different to a repayment mortgage. In my view it is. It goes to the 'core' of the service, to use the test advocated by the Commission.

82. That is therefore the final reason why, in my view, this appeal must fail.

Direct/Indirect Discrimination

83. For completeness, I note that there was originally a separate claim for indirect discrimination which the Recorder rejected for the same reasons as she had rejected the primary claim. Although this separate claim is referred to in paragraph 35 of Mr Drabble QC's skeleton argument, no new point was there raised, a conclusion Mr Allen QC recorded at paragraph 13 of his own skeleton argument. In those circumstances it is unnecessary to say anything more about it.

Conclusions

84. Accordingly, for the reasons set out above, I would dismiss this appeal.

Lord Justice Peter Jackson:

85. I agree that this appeal must be dismissed. In my view, Miss Green's case fails on Ground 2 because it was not impossible or unreasonably difficult for disabled people to make use of the service, and because changing the basis of her mortgage to interest-only was not a reasonable change for Southern Pacific Mortgage Ltd. to be required to make. It also fails on Ground 3 because such a change would have fundamentally altered the nature of the service in question. Each of these conclusions disposes of this appeal. Where I respectfully differ from my colleagues is in relation to Ground 1 and the definition of the service provided by Southern Pacific. This difference has no effect on the outcome in this case but may be material on another occasion. I also add some observations of my own in relation to the costs of these proceedings, which Coulson LJ rightly describes as staggering.

86. Summarising sections 19(1)(b) and 21(1)&(6) of the Disability Discrimination Act 1995, it is unlawful for a provider of services (including financial services) to discriminate against a disabled person by failing to take reasonable steps to change a practice, policy or procedure that makes it impossible or unreasonably difficult for such persons to use a service which he provides, or is prepared to provide, to other members of the public, provided that this does not require him to fundamentally alter the nature of the service in question.

"The Service"

87. In this case, I would define the service that Southern Pacific *"provides, or is prepared to provide, to other members of the public"* under section 21(1) as being the provision of secured loans for home purchase. It would in my view be too narrow to define the service as being restricted to:

a) the provision of a loan, brought to an end by the issuing of proceedings, that being Southern Pacific's primary case, argued for the first time on appeal (see 35 above), or

b) the service that was actually provided to this member of the public, that being Southern Pacific's secondary case (42 above), accepted by Coulson LJ.

88. I am in entire agreement with Coulson LJ in his rejection of Southern Pacific's primary case. It is to my mind surprising that a regulated lender should attempt to put itself beyond the reach of the equalities legislation by such legal casuistry.

89. I would not accept Southern Pacific's secondary case either, for these reasons:

(1) The fact that a different kind of mortgage was not offered to Miss Green begs the question whether she was entitled to such an offer; it does not answer it.

(2) The Recorder found at paragraph 37 of her judgment that at all material times Southern Pacific had the power, had it so wished, to convert the mortgage. I believe that this finding tends to run counter to the argument at paragraph 52 above.

(3) I read the guidance, the regulatory framework and the pre-action protocol as showing that the two types of mortgage sit cheek by jowl within the same service – provision of secured loans for home purchase – and not as showing them to be two different services.

(4) The definition in *Caunt* (44 above) of a mortgage as a repayment mortgage does not assist in a context where interest-only mortgages were recognised across the industry.

(5) I agree that *Edwards v Flamingo Land* (47-48 above) is directly relevant, but I consider that this case falls on the other side of the line drawn by Longmore LJ. Little is to be gained from transposing examples between the worlds of food and finance, but for the purposes of illustration the two types of mortgage are not in my view analogous to a restaurant and a takeaway (two services), but rather to a restaurant (one service) that can cater for a range of events and serve a wide clientele with a choice of dining areas and varied menus.

(6) The Recorder considered the service to be "the mortgage for the whole of its life, from offer to redemption". She reached this conclusion in response to Southern Pacific's case that the service consisted in the one-off provision of finance, a formulation she rightly rejected. It is not clear to me that she held the view that the service provided by Southern Pacific was restricted to repayment mortgages, because she instead based her decision on the 'fundamental alteration' exemption under s.21(6), but if she did hold a restricted view of the service that was being provided, I would disagree.

90. For these reasons, my conclusion is that the provision of an interest-only mortgage would have been a fundamental alteration to the nature of the service for the reasons given by Coulson LJ at paragraphs 63-65 and 81, but that it would nonetheless have been an alteration within the same service.

Costs

91. This case, in which a borrower has taken on a mortgage provider and lost, is a painful illustration of the adage 'Let the Borrower Beware'. When the proceedings began on 26 March 2009, Miss Green had borrowed £96,000 and was in arrears of £4,445.62. Nine years later, in addition to her original debt, Southern Pacific claim £269,000 for their legal costs, and having had the benefit of legal aid, Miss Green has a debt of £50,000 in that respect, which will in principle be subject to the statutory charge. The equity in her property, which stood at about £90,000 when the mortgage began, has been obliterated. Miss Green has of course created the conditions for this personal catastrophe by falling behind on her mortgage and fighting to remain in occupation of her home by making legal claims that have been determined to be unfounded at trial and on appeal. However, there are other aspects of the matter that deserve attention.

92. The scale of the costs. As set out at paragraph 8 above, paragraphs 23-25 of the mortgage deed allows Southern Pacific to recover its reasonable legal costs on an indemnity basis, add them to the debt and charge interest on them. In round figures, costs have been added to the debt at the average rate of around £2000 every month. Over this period, the mortgage interest falling due has fluctuated between just £172 and £463 per month.

93. Lack of costs control. There is no primary mechanism, short of a costs order, for controlling this costs expenditure. There is no statutory equivalent to s.20C of the Landlord and Tenant Act 1985, which empowers the court to disallow the landlord's legal costs in relation to court proceedings, where they would otherwise be contractually added to the tenant's service charge. In this case, Southern Pacific was ordered to provide a breakdown of legal costs in April 2011, but did not do so. The Recorder again ordered a costs breakdown to be provided, but none had reached her by the time she gave judgment. The full figures were only produced during the hearing of the appeal.

94. Costs responsibility. The Recorder, while making certain findings against Miss Green, was scathing about the conduct of Southern Pacific. Her judgment, which is excellent in its clarity, contains these observations:

> *"14. It is clear beyond argument that the Claimant gave no thought at all to the Defendant's position as a disabled person."*

and

> *"19. ... It is evident that once the Claimant had started proceedings, they gave little, if any, thought, to the possibility of stopping and compromising, even when aware of the Defendant's disability.*
>
> *20. The Claimant's position in relation to the proposed variation of the mortgage was unclear and it seems that at some stages, the Claimant was ready to consider a variation, and then at others there was a blank refusal."*

and

"36. A striking feature of the case presented by the Claimant is a lack of any evidence as to the reasons for refusing the Defendant's request to change to interest only. ...

37. What I have had is a series of after the event attempts to rationalise the refusal. These have been unpicked by the Defendant's advisers, one after another. There was a suggestion that it would have been giving the Defendant an advantage that could not be offered other clients of the Claimant because of the way the mortgage was underwritten; there was a suggestion that she did not meet the criteria, whatever criteria those may have been, and there was the pleaded case that the Claimant had stopped lending and that this would have been fresh lending. None of these cases has stood up in court and I do not propose to waste more time on them in this judgment. It is clear that at all material times the Claimant had the power, had it so wished, to convert the mortgage.

38. That these explanations were ever advanced at all is poor conduct on the part of the Claimant. That the Claimant put up two witnesses who continued to try to justify on this ex post facto basis the decision that was made was also poor conduct. That the Claimant has no written policy to deal with issues such as those raised by this case, far from unusual, is very poor indeed.

39. It seems to me to be very clear that the Claimant did not give any proper consideration to the request. It was an automatic refusal. They gave no consideration at all to the request that was informed by the fact the Defendant was under disability. They therefore gave no consideration to the impact that such disability might have on the decision-making process. Possession proceedings were seen as "due course" and there was nothing that could turn them from that course".

and

"62. There is no evidence of any reasoned decision to refuse the request. It seems that there was a blanket policy to refuse any such request."

and finally,

"86. ... Given that I have found no discrimination, I cannot award damages to the Claimant. I consider that their conduct towards the Defendant has been unsympathetic in the extreme and she has found the proceedings more stressful than they needed to be. The evidence shows that there has been a deterioration in her mental health. ..."

95. As to this last matter, the judgment records that Southern Pacific's 2009 defence to the DDA claim was to deny that Miss Green was disabled, a position it maintained in its amended reply and defence to counterclaim in December 2013 despite having received medical evidence in August 2013 that in the Recorder's view made it clear that she was disabled. That defence was only dropped at the point of the hearing in 2015. The Recorder understandably expressed herself to be troubled at this.

96. Taking all this into account, while Miss Green's own misfortunes and the decisions taken by her and on her behalf are the root cause of her unintended predicament, there must be concern about a situation where a borrower ends up paying for every bad argument that a lender chooses to run. The unreasoned approach of Southern Pacific must have added considerably to the legal costs and may have led Miss Green and her advisers to believe that their position was stronger than it was. Southern Pacific's practices, policies and procedures, insofar as they existed, were opaque from start to finish. It gave wholly inadequate answers to a routine customer request, presented a disingenuous defence to the proceedings and pursued a disorganised case at trial. The Recorder was left to interpret the disabilities legislation in relation to an organisation for whom the legislation might as well not have existed.

97. I find this state of affairs disturbing. Despite the dismissal of Miss Green's appeal, if any good purpose might now be served by this court directing an account of whether the contractual costs that have been claimed were all reasonably incurred (as they must be to be recoverable under clause 23 of the mortgage deed), I would favour that course.

Lord Justice Patten:

98. I agree that the appeal should be dismissed for the reasons which Coulson LJ has given. Although it makes no difference to the outcome of this appeal, I share his view that the service provided by Southern Pacific was limited to the secured repayment loan which it made and, cannot be characterised for the purposes of the legislation as encompassing mortgage lending generally. To do so would ignore the different commercial and regulatory considerations which govern the two types of lending relevant to this case.