The A-Z Of Housing Discrimination Case Law

London & Quadrant Housing Trust v Patrick

Iris Ferber KC & Alexander Adamou

Iris Ferber KC: Welcome to the latest episode of *Home Truths - The 42BR Housing Podcast*.

My name is Iris Ferber KC.

Alex Adamou: And I'm Alexander Adamou.

Iris Ferber KC: This series is all about housing discrimination case law. We will review 15 key cases and principles that have guided housing discrimination law over the last decade. We're calling it *The A - Z of Housing Discrimination Case Law*.

Alex Adamou: Because we're starting with the case of *Akerman-Livingstone v Aster Communities*, and we're ending with *Z*, or *Zee*, if that's your persuasion, *v Hackney London Borough Council*.

Iris Ferber KC: We'll be covering topics from procedural law to Section 15 and Section 19 claims, reasonable adjustments claims, the public sector equality duty, and positive discrimination.

Alex Adamou: Today, we'll talk about the case of *L&Q Housing Trust v Patrick*, which was decided by the High Court in May 2019.

Iris Ferber KC: Now Alex, in the last couple of episodes, we've talked about PSED cases, Public Sector Equality Duty cases, *Bracking* and then *Powell*.

Alex Adamou: Yes.

Iris Ferber KC: This case, Patrick, is another important PSED case, and it's often cited as **the** case authority in PSED skeleton arguments and submissions in housing cases.

Now, we're not going to go through in this podcast what the PSED is or the list of factors that public sector landlords have to have due regard to, if you, the listener, would like a refresher on that, please do listen again to our podcast on the case of *Bracking*, where we set out what the PSED, the Public Sector Equality Duty, actually is.

Okay, we're going to go straight to the facts in the *Patrick* case then, Alex.

What were the facts?

Alex Adamou: Well, this was an antisocial behaviour possession claim, and the background to this is particularly important, as we will discuss later on.

Mr. Patrick was an assured tenant of *L&Q*, and in October 2017, *L&Q*, and I'll use that just instead of *L&Q Housing Trust* for simplicity, obtained an ASB injunction against him because of intimidating and aggressive behaviour towards staff, and unfortunately also towards a particular neighbour in this case, he was making a bit of a nuisance of himself. They had also started to, once he had gotten that injunction, within days he was already breaching that injunction, and *L&Q* brought committal proceedings for that breach, they tried to get him put in prison for that. They had also started possession proceedings based on the discretionary ground of antisocial behaviour.

At the committal hearing, *Mr. Patrick* admitted some of the breaches, and in December 2017, he was sentenced by a circuit judge to about four weeks imprisonment, suspended for one year. But the key thing from that is that now *L&Q* had a mandatory possession ground, that

is ground 7A, for those of you that are reading along or looking at reference material, for the breach of the injunction, and so, they applied to amend their possession claim to rely on that mandatory ground.

The County Court gave permission for that amendment in May of 2018, and in June of that same year, *Mr. Patrick*'s legal team produced a defence in response to the amended claim, alleging for the first time that he'd suffered from a mental impairment, although they didn't specify what that was in the pleadings, and that will become relevant later, and alleging a breach of Section 15 of the Equality Act and a breach of the Public Sector Equality Duty.

So even though he had had legal representation all the way through the injunction proceedings, the possession proceedings, this was the first time in the history of this case that the Equality Act had been raised, and it wasn't particularised, it wasn't set out, and it wasn't specified. There was also no medical evidence at this particular point.

Then, only two days before the possession hearing was set to take place, *Mr. Patrick's* solicitors finally filed medical evidence which revealed a history of schizophrenia.

So that's the background, that's the history as we can see, quite a detailed one.

What happened at the possession hearing?

Iris Ferber KC: Well, Alex, are you going to be surprised to hear that the judge was not happy?

Alex Adamou: Of course not.

Iris Ferber KC: He was not happy that the medical evidence was filed so shortly before hearing.

It is worth noting, though, you might think, well, it's a possession hearing, that means it was a 10-minute listing in a block list, it wasn't actually, it was a longer listed hearing, it was before a circuit judge in Central London County Court, His Honour Judge Saggerson, and it did result in a fairly detailed extempore judgment. So it wasn't, in a sense, it wasn't quite so bad as filing loads of evidence before a 10-minute hearing, but it was pretty bad, the judge was not happy.

Alex Adamou: Of course.

Iris Ferber KC: What did the judge have by the time they got to this possession hearing?

The judge had the late medical evidence, the particulars of claim, the defence, the amended defence with the Equality Act pleadings in it, and skeleton arguments from counsel for both parties.

So, in some senses, as I say, it was not a typical possession hearing, however, nevertheless, it was a summary decision, and that's important for the appeal, that's why we're talking about this at the moment. In other words - instead of using the hearing as a directions hearing and listing the claim for trial based on the Equality Act defences, which was what *Mr. Patrick's* legal team were asking the judge to do, he decided, in accordance with the test for a first hearing of a possession claim or a first substantive hearing of a possession claim, to apply the possession claim test under Rule 55.8 and whether the claim was genuinely disputed on grounds which appeared to be substantial, and he decided that it was not. The test was not met.

In particular, he stated in his detailed, but extempore, judgment that the Section 15 claim was hopeless because it was plainly proportionate for *L&Q* to bring the possession claim and he held, importantly for this podcast, that even if there was a breach of the PSED it did not give rise to a good defence to the possession claim.

And the judge particularly, in terms of facts, the judge relied on the very severe effect of *Mr. Patrick's* behaviour on the particular neighbour that he had been targeting.

So, the judge made a mandatory possession order, suspended it for the maximum allowable statutory time of six weeks because of the disability, the schizophrenia that had by now been evidenced, and that was in June 2018, as you said, Alex.

In September, *L&Q* came to make the decision whether to enforce the order. It happened, that happened to take a little time, and it was in September 2018 that they made that decision and at that point, for the first time, when they were deciding whether to enforce, they did conduct a written assessment of the Public Sector Equality Duty. And in that written assessment, an *L&Q* officer decided that even having regard to all of the duties listed in Section 149 of the Equality Act, it was still justified to enforce the possession order.

Alex Adamou: Well, can we guess how *Mr. Patrick* felt about that decision?

Iris Ferber KC: Not happy.

Alex Adamou: No, unfortunately not.

He decides to appeal, and he appealed both the Section 15 decision and the Section 149 decision.

However, he only got permission to appeal on the ground relating to the Section 149. Effectively, of all the points that he tried to appeal, one, if I remember correctly survived, and that was that when the Public Sector Equality Duty defence was being decided at the hearing in June, rather than being listed for a full hearing with directions the court decided to summarily answer and assess the possession test under CPR 55.8 as we discussed.

So that appeal whisks its way off to the High Court, and it never went any further, it never got successfully appealed any further, so it never went to the Court of Appeal, it never went any higher and if I remember correctly his appeal was rejected, and we're going to go into the reasons why for that.

But maybe we take a pause there. Why is this case so often used as an authority for how people apply the Public Sector Equality Duty in housing cases?

I mean, he lost.

Iris Ferber KC: He did, and it's only a High Court decision, and there are lots of, well there are a good number of Court of Appeal decisions on Public Sector Equality Duty in housing cases.

So why *Patrick*?

I have an answer to that, Alex.

Alex Adamou: Ah. Well good.

Iris Ferber KC: That's why you've asked me, because you know I've got an answer to it.

It's because the High Court judge, Mr. Justice Turner, gave a really, really good description and summary of all of the case law and all of the principles relating to how the Public Sector Equality Duty operates.

You know, it's a good judgment to read and it's a good judgment to use, and that's why people use it.

He began by explaining the context of the enactment of the PSED, and he talked about the cases of *Bracking* and *Powell*, which our listeners already know all about, so he did all of that historical stuff, but then in

paragraph 42 of the judgment in *Patrick*, he did that thing that good judges sometimes do. He laid out in comprehensible, clear sentences with nice, clear headings what factors a judge needs to consider when a PSED defence relating to disability, particularly, specifically relating to disability is raised in possession claims.

Of course, he made it clear this wasn't the statute. It's just a judicial guideline, in particular cases there are going to be other factors, but frankly, it has stood the test of time, this case has been around since 2019, it's still cited regularly, it's a really useful list, so Alex, let's go through the list.

Alex Adamou: Absolutely, and for those that do get the chance, I would really recommend reading it. It almost reads a bit like a practitioner's text, it's one of those where if you write well enough, people are going to use it whether you say they should or not.

But let's start with the points, and this is point one, the first thing he addresses is the scope of the Public Sector Equality Duty in possession claims, which is whenever a public sector landlord is even contemplating starting a possession claim, or later when they make a claim or consider enforcement, the first question is going to be is - if or is a disabled person likely to be affected by that decision?

If they are, then the landlord is subject to the PSED.

Iris Ferber KC: Okay, so it's a very wide scope. It doesn't have to be the tenant, it could be any occupier, any person affected by the decision and it doesn't have to be a claim or enforcement, it can be contemplating starting the claim.

Alex Adamou: Exactly.

Iris Ferber KC: So very wide scope. Paragraph 42 of *Patrick*, point 1 sets out that scope.

Then point 2 the nature of the duty, and what Mr. Justice Turner says under that heading, the nature of the duty, is as follows 'it is not a duty to achieve a result. It is a duty to have due regard to the list of factors in Section 149 and the need to achieve the things that are listed in Section 149'.

That means weighing up the factors that are relevant to promoting the things listed in Section 149. So, weighing up the factors that are relevant to promoting the things that are listed in Section 149 against the material countervailing factors.

So, I've said that twice just to make sure we've got it in our heads, that's really important.

What does that mean?

He gives a really useful example of what that means in housing cases in practice, which I think illustrates it very well.

He says, 'a countervailing factor pulling against the public sector equality duty in possession cases is often going to be the impact of a disabled person's behaviour on the people around them, particularly neighbours'.

Alex Adamou: And obviously in this case, there was a particularly severe impact on *Mr. Patrick's* neighbour.

Iris Ferber KC: It was a good example of that situation, this case particularly. And he also gives a useful quote from a pre-Equality Act case called *Pieretti*, which is quite a good quote for describing what the point of the PSCD really is.

It is, and this is the quote, 'designed to secure the brighter illumination of a person's disability, so that to the extent it bears upon his rights under other laws, it attracts a full appraisal'.

So, I think that's quite a good quote. It's about appraisal of the person's disability and its effects, not about achieving a particular result.

Alex Adamou: Exactly, and just before we move on to point 3, I think that's because a lot of our listeners may be thinking, 'well, do local authorities not just use the assessment or the Section 146 as a way of almost justifying their actions?' But the point is that's not really the aim, that's not the point. The point is to give an overview and an assessment so that the decision can be made in light of all the relevant factors.

Iris Ferber KC: Exactly. Okay.

Alex Adamou: And that really brings us into point 3 which is why it's so important, this particular point, which is the making of inquiries.

You don't know how it's going to impact someone unless you ask about it, unless you go and do the digging.

So, there is no absolute requirement on a public sector landlord to undertake active enquiries about disability in every single potential possession case. This is not an overarching, wide-ranging floodgate of everything must be done, you must always ask. But if there is some information or some feature of the particular case that raises a real possibility that a person affected by a possession claim could be disabled, and that that might be relevant to the decision that's being made. If that is the case, then there is a duty to make further inquiries.

So, you need to look slightly beyond the surface in that respect, for example, is there a history of behaviour?

Have there been complaints of someone's mental status?

Those sorts of things. If you get that sort of little breadcrumbs of information like Hansel and Gretel, then you have to start following them.

Iris Ferber KC: And sometimes, Alex, it's true, isn't it that someone's behaviour can be so bizarre that even without anything else, most landlords would say there is something going on here, there's a mental health issue that we need to investigate.

Alex Adamou: Exactly.

Iris Ferber KC: So it is quite wide, the duty to make enquiries, but it's certainly not absolute.

Alex Adamou: No absolutely.

Iris Ferber KC: Okay.

Point four, substance over form, and listeners will remember this from our *Bracking* and *Powell* podcasts, this is a straightforward one.

The exercise of the PSED must be carried out in substance with rigor and with an open mind, it is not a tick box exercise.

Alex Adamou: And that really comes into the fact that the nature is a continuing nature, which is our point 5.

The duty is continuing. It's not a once and for all, you do it once, and you go, 'okay, well, we've done our bit' and everyone walks away. Just because an assessment's been done doesn't mean the duty is necessarily discharged, although a lawful assessment before a possession claim is started should be thorough enough to take into account all the likely consequences, although you might not, you might not be able to envisage everything, it's quite possible for circumstances to change during the proceedings or by the time a

possession order comes to be enforced, which means you need to redo that question, you need to redo that assessment. There may well need to be a further assessment if circumstances change.

Iris Ferber KC: So there has to be an eye on whether there is a change of situation requiring further assessment.

Alex Adamou: Exactly.

Iris Ferber KC: Okay, and then point 6, the timing of the assessment. There was quite a lot in this section of paragraph 42 of the judgment, the timing section, but basically the principle is that the later in time the disabled person raises their disability, the further along in the possession proceedings that issue becomes known to the landlord, and the greater the negative impact on staff and neighbours of the behaviour, the less likely it is that the court will be too concerned about getting a formal written assessment of the Public Sector Equality Duty.

I try to think about it like a sort of sliding scale - at one end of the scale is a landlord who knows all about the disability and its connections to the problems right from the start, before they've even contemplated seeking possession, then that landlord is going to be expected to conduct a thorough written assessment of all the factors in the Public Sector Equality Duty in good time before even starting any steps towards possession, before even issuing a notice or anything like that.

But on the other end of the sliding scale, if the landlord is effectively ambushed at hearing with a previously unknown medical condition in the middle of the proceedings, we're going to realistically have a far less formal assessment of the PSED, and that is fine and there could, of course, be cases somewhere in between those two extremes.

So that's about the timing.

Alex Adamou: Absolutely, and I'm sure we've both had examples where tenants have raised issues either at the first hearing or just after or in the first offense, that timing is always slightly fluid, but that really brings us on to point 7, which is recording the discharge of the duty.

If you make a decision, recording your decision and how you got there.

There is no explicit duty to make a written record of the PSED assessment, however, maybe this is just us coming from lawyers, but evidentiality is obviously going to be very important. It's obviously going to be very important to be able to explain to the judge, 'this is the decision that we made, and this is how we came to make that decision'. It just reduces the scope of argument about what and what hasn't been considered, it's much harder for a tenant to say, 'well, you didn't think of this' or, 'you should have included this' if you can point 'well, that's on page three' or 'that's on paragraph whatever'.

So, a conscientious assessment of the impact of a tenant's disability may well comply with the PSED even if the person making the assessment knew nothing about the PSED.

But landlords, you should not be taking the evidential risk, this is keeping that audit trail.

Iris Ferber KC: So finally then, in paragraph 42 of *Patrick*, point 8, the court's function.

The court, and I can't stress how important this is for in practical terms for those of us who practice in this area of law.

The court has a public law function only, in relation to the PSED. Has the public sector landlord carried out a rigorous and substantive assessment of the factors listed in Section 149 of the Equality Act?

So long as the court is satisfied that that rigorous and substantive assessment has been carried out, that's it, that's the end of the matter, the court does not get to carry out the assessment for itself. It's not like the reasonableness test in an ordinary possession claim, which the judge decides. This is a public law assessment, and it's for the landlord to carry it out. Due regard, which is the phrase in Section 149, just means having a proper and conscientious focus on the statutory criteria. That is all.

So having set out those 8 points so clearly and helpfully, Mr. Justice Turner applied them to *Mr. Patrick's* case, and Alex, you've given us a bit of a clue about what happened on the facts.

Alex Adamou: Yes, well, *Mr. Patrick* was not successful, and there were a number of factors that Mr. Justice Turner considered when looking to make that decision or when making that decision.

But one of the first things they noticed was the bare pleading of mental impairment and the failure to produce any medical evidence until two days before the possession hearing.

Now, Mr. Justice Turner considered that this meant that *L&Q* could only engage with their public sector equality duty two days before the hearing.

So the judge, first of all, said, 'you haven't given them a lot of time to do this'. So that naturally, given the points we've explained above, constrains their ability to be able to consider the matter in as thorough a manner as possible.

Iris Ferber KC: And is it possible then for a tenant to ambush a landlord like that?

What did Mr. Justice Turner think about that?

Alex Adamou: Well, Mr. Justice Turner was very forceful and said, 'that does not mean that *Mr. Patrick* got a free ticket to adjourn the hearing and have his defence on the Equality Act heard'. The judge was right to view the position of the neighbour who had been targeted as very important, so we look at those countervailing measures that we've already spoken about and the judge and *L&Q* were entitled to take the view that *Mr. Patrick's* disability did not actually change the appropriateness of seeking possession in this particular case.

Iris Ferber KC: And then the judge said something very important in paragraph 44 of the appeal judgment, which I'm just going to read, because it's better read than paraphrased.

He said this 'although the significance of the duty should not be underestimated, it is important that its fulfilment should not be regarded as involving any fixed hoops through which the public body must pass, regardless of the stage at or the circumstances under which the duty is engaged. Otherwise, a litigant seeking to rely upon the PSED could deliberately postpone revealing a disability for tactical advantage to the prejudice of others with a legitimate interest in the outcome of possession proceedings'.

Now, that's the end of the quote. The judge wasn't saying that this is what *Mr. Patrick* had done in particular. He was just saying that if raising disability late in the way that *Mr. Patrick* had done was a surefire way to delay a possession claim and get more directions and a later hearing, then it was going to get misused in the future.

Alex Adamou: Absolutely.

Iris Ferber KC: So just to finish this off, Alex, what about the assessment that *L&Q* did carry out at the enforcement stage later in September?

Alex Adamou: Well, that was also very important, because as we've discussed, there's a continuing duty, so they still need to have due regard even at that stage when deciding to enforce.

L&Q did engage with their continuing duty in this case and they did conduct a thorough, detailed, written assessment when they had more information in September 2018, and they concluded that their actions did comply with the Public Sector Equality Duty.

Now, *Mr. Patrick's* legal team in this case sought to attack that decision as a rear-guard action, effectively, retroactively justifying what they've already done or decided to do, designed to save the landlord from its earlier failures, basically, you're trying to fix what you'd already broken. But the judge in this case pointed out that couldn't possibly be correct because the Public Sector Equality Duty is not, as we've discussed, a once and for all duty.

The landlord did have a real and ongoing duty which changed with any change in circumstances, so it was appropriate to do a formal assessment in September before enforcement, that's what actually what you would expect the landlords to do in a case like this.

Iris Ferber KC: And finally, Alex again, useful for practitioners, the judge made some obiter comments about the effect of any breach of the public sector equality duty by a landlord. It's obiter because the judge at first instance and then the judge on appeal both decided there actually wasn't a breach of the PSED.

So, we're not going to spend too long on this. We also don't want to spoil our next podcast *Forward v Aldwyck Housing*, where this point is properly decided, the effect of a breach of the PSED.

But just on the obiter basis in *Patrick*, the High Court judge considered even if there is a breach of the PSED, if that breach is not material,

that's the words that Mr. Justice Turner used, if the breach is not material, then the court **can** make a possession order anyway.

In other words, breach of the PSED, even if proved, is not a complete defence to a possession claim.

The court still needs to go on and consider whether the breach makes any difference to the outcome, but as I say, that's an obiter statement. Listen to the next podcast for the authority on what to do with the effect of a breach of the PSED.

Alex Adamou: So, having heard Iris and I talk about this case, why is this case of *Patrick* useful?

Well, it means for those of us that are acting within this sector, you can go to paragraph 42,- it gives you a very clear and easy to follow set of principles applicable to PSED defences in housing claims. It gives you a very nice, easy to follow roadmap of how these sorts of defences should be done, how they should be evidenced, and effectively what you should do.

Iris Ferber KC: Yes, and this is key as well, isn't it, Alex?

It's a good case, a good set of facts, for understanding why it's so important to raise Equality Act defences early and with good particulars if you are representing tenants.

Alex Adamou: Absolutely.

Iris Ferber KC: Great. Well, thank you for joining us on this bite-sized journey through housing discrimination case law, starting at A, *Akerman-Livingstone*, and going through to Z, *Z v Hackney London Borough Council*.

Alex Adamou: We do hope you're enjoying this podcast series.

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Thank you for listening.