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Case Nos: CH-2023-000099
CH-2023-000271

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON SITTING AT WILLESDEN

The Rolls Building
Fetter Lane
London, EC4A 1NL

16 July 2024

Before:

MRS JUSTICE BACON

- -

Between:

STEVEN LAIDLEY
by his Litigation Friend the Official Solicitor

Appellant

- and -

METROPOLITAN HOUSING TRUST LIMITED

Respondent

- -
- -

MR TOBY VANHEGAN and MS STEPHANIE LOVEGROVE
(instructed by **GT Stewart Solicitors**) for the **Appellant**
MS CATHERINE ROWLANDS (instructed by
Metropolitan Housing Trust Ltd Legal Department) for the **Defendant**

- -

APPROVED JUDGMENT

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Tel No: 020 7067 2900. DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MRS JUSTICE BACON:

Introduction

1. The present appeals are brought in relation to proceedings concerning a possession order concerning a social housing flat at 57 Yeats Close, London NW10 0BW, which is currently occupied by the appellant, Mr Laidley. The respondent, the Metropolitan Housing Trust (the **Trust**) is the social landlord and the owner of the block of flats in question. In proceedings below, the Trust was the claimant seeking possession of the flat.

2. Mr Laidley has since August 2009 been the periodic assured tenant of the flat. He is in his late forties, lives alone and, very unfortunately, suffers from a serious mental health condition which has been diagnosed as delusional disorder. He has been found to lack capacity to conduct this litigation and is therefore represented by the Official Solicitor and counsel appointed by the Official Solicitor. That is apparently against his wishes: he does not accept that he is mentally unwell or that he lacks capacity. That is, indeed, part of the problem which gave rise to the Trust's application for possession of his flat.

3. The possession proceedings in the County Court were rather protracted for reasons which I will set out shortly. The upshot, however, was that following a trial at which numerous witnesses were heard and at which the judge also considered expert psychiatric evidence as to Mr Laidley's mental health, the judge allowed the Trust's claim for possession and ordered Mr Laidley to give possession of the flat by 2 February 2024.

4. The appeals are brought against two related orders of the judge. The first is an order dated 22 May 2023, but made on 17 April 2023, refusing to provide disclosure of the advice given to the court by the appointed Equality Act assessor. That decision was made during the first part of the trial before the remainder of the trial was adjourned. The second order, dated 15 December 2023, is the final order following the conclusion of the trial, allowing the Trust's claim for possession. That order has been stayed pending these appeals.

5. The appeals advance, between them, two grounds, both related to the court's use of the Equality Act assessor. The first ground is that the judge was wrong to refuse to disclose the assessor's evidence to the court. The second ground is that the judge wrongly used the assessor, by seeking her advice on issues that were not within her competence, and not seeking her advice on issues that were within her expertise.

The legal framework

Relevant provisions of the Housing Act 1988

6. The regime set out in the Housing Act 1988 provides security of tenure for assured periodic tenants such as Mr Laidley. Possession proceedings can only be commenced on one or more of the grounds set out in Schedule 2 of the Act. The Trust relied at the trial upon Grounds 12 and 14. Ground 12 is that:

> "Any obligation of the tenancy (other than one related to the payment of rent) has been broken or not performed."

7. Ground 14 includes, in so far as relevant:

> "The tenant or a person residing in or visiting the dwelling-house –
>
> (a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality".

8. Both Grounds 12 and 14 are grounds on which the court "may" order possession if the court concludes it is reasonable to do so: section 7(4) of the Housing Act 1988. The assessment of reasonableness will include consideration of all of the relevant circumstances.

9. In relation to Ground 12, the Trust relied on breaches of clauses 3.5 and 3.7 of Mr Laidley's tenancy agreement. Clause 3.5 provides, under the heading "Nuisance":

> "You must not cause nuisance to or annoy neighbours, or any others visiting or engaged in lawful activity in the locality of the property".

10. Clause 3.7 provides, under the heading, "Racial and Other Harassment":

> "(a) You must not harass anyone particularly because of their race, colour, religion, age, sex, sexual orientation, economic status, immigration status or disability. In particular, you must not do this on or near any of our properties. You must not allow anyone living with you or visiting you to do this.
>
> (b) 'Harassment' includes violence or threats of violence, insulting words or behaviour, damage or threats of damage to property belonging to someone else, writing threatening or insulting graffiti and anything else which is intended to interfere with the peace or comfort of someone else or cause offence to them."

The Equality Act 2010

11. Section 4 of the Equality Act 2010 sets out a number of protected characteristics, which includes disability. Section 6(1) defines a person having a disability as follows:

> "A person (P) has a disability if –
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

12. Section 15(1) provides that:

> "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."

13. Under s. 35, a person who manages premises is prohibited from discriminating against a person who occupies the premises by evicting or taking steps against the person, securing their eviction.

14. Section 149 further subjects public authorities, which includes bodies such as the Trust, to a public sector equality duty, which includes the requirement to have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act and to advance equality of opportunity between persons who share a protected characteristic and those who do not.

15. Finally, and of central importance to this appeal, s. 114(7) of the Equality Act provides:

> "In proceedings in England and Wales on a claim within subsection (1), the power under section 63(1) of the County Courts Act 1984 (appointment of assessors) must be exercised unless the judge is satisfied that there are good reasons for not doing so."

The power to appoint assessors

16. Section 63(1) of the County Courts Act 1984 provides:

> "In any proceedings in the county court a judge of the court may, if he thinks fit … summon to his assistance in such manner as may be prescribed, one or more persons of skill and experience in the matter to which the proceedings relate who may be willing to sit with the judge and act as assessors."

17. CPR 35.15 describes the role of an assessor appointed under section 63 of the County Courts Act, as follows:

> "(2) An assessor will assist the court in dealing with a matter in which the assessor has skill and experience.
>
> (3) An assessor will take such part in the proceedings as the court may direct and in particular the court may direct an assessor to –
>
> (a) prepare a report for the court on any matter at issue in the proceedings; and
>
> (b) attend the whole or any part of the trial to advise the court on any such matter.
>
> (4) If an assessor prepares a report for the court before the trial has begun –
>
> (a) the court will send a copy to each of the parties; and
>
> (b) the parties may use it at trial."

Factual and procedural background

18. The facts are set out fully in the judgment below. For present purposes a short summary is sufficient.

19. Mr Laidley has lived at the flat since 2009. It is a one-bedroom ground floor flat in a purpose-built block owned by the Trust. Since 2018 his neighbour, Mr El Nahas, has complained that Mr Laidley repeatedly and persistently bangs on the wall which divides the two properties, creating a disturbance. Mr El Nahas is an elderly man living alone and is not in the best of health.

20. The Trust has made very extensive efforts since early 2019 to speak to Mr Laidley to try and solve the problem. He has refused to engage with the Trust and denies that there is any problem. The Trust quickly realised that Mr Laidley needed support, and has been attempting, since around June 2019, to obtain help for him from the NHS Mental Health Support Services, his GP, and the London Borough of Brent Adult Social Care Services Team. None of that produced any resolution of the problem, in part because Mr Laidley refused to engage with such attempts as were made by the various members of the health and social services teams who contacted him.

21. In March 2020 the Trust issued its claim for possession. The claim was then stayed as a result of the Covid pandemic, and it was finally listed for trial in April 2023. By then, Mr Laidley's re-amended defence and counterclaim referred to various provisions of the Equality Act 2010, and contended in particular that Mr Laidley was disabled within the meaning of that Act, and that the Trust's claim discriminated against Mr Laidley in breach of that Act.

22. The judge sat with an Equality Act assessor appointed by the court, Ms Jill Tombs. On 17 April 2023, the first day of the trial, the judge refused an application by counsel for Mr Laidley, Mr Vanhegan, for the court to define the role of the assessor and for the assessor's advice to be given in open court (the **assessor application**).

23. On 18 April 2023, the second day of the trial, the Trust applied to adjourn the trial part-heard as a result of oral evidence given at the hearing by a senior officer from the London Borough of Brent. The purpose of the adjournment was for Brent to take further steps to try to secure better support and accommodation for Mr Laidley. The adjournment was opposed by Mr Laidley's counsel but granted by the judge. The order in relation to both the assessor application and the adjournment application was drawn up on 22 May 2023.

24. The first of the present appeals was then filed by Mr Laidley, seeking permission to appeal in respect of both the refusal of the assessor application and the adjournment of the trial. On 23 November 2023, Meade J refused permission to appeal the adjournment of the trial and adjourned the application for permission to appeal the assessor order until the end of the trial.

25. The trial resumed and was concluded on 4 and 5 December 2023. Unfortunately, it appears that the further efforts to engage with Mr Laidley between April and December were no more successful than the previous attempts had been. By the time of the restored hearing the Trust concluded that the only situation in which the London Borough of Brent would take action to accommodate Mr Laidley in supported housing with specialist mental health support would be if the Trust were to obtain a possession order which rendered Mr Laidley homeless.

26. At the conclusion of the final day of the trial, the judge gave a detailed judgment finding in favour of the Trust. The trial order was drawn up on 15 December 2023 and a second appeal was then filed by Mr Laidley, in relation to that order.

27. On 28 December 2023, Rajah J stayed the possession and costs orders pending determination of the appeals and, on 6 March 2024 Richard Smith J gave permission to appeal in relation to both the assessor order and the trial order on the grounds which I have set out above.

The 17 April 2023 judgment

28. The judgment on the 17 April 2023 assessor application was short. It recorded Mr Vanhegan's reference to the practice in cases such as *Owners of Bow Spring v Owners of the Manzanillo II (Practice Note)* [2004] EWCA Civ 1007, [2005] WLR 144 and *The Global Mariner* [2005] EWHC 380 (Admlty), which I will refer to later on in this judgment, and his submission that the approach adopted in those cases should also apply in the present case. The judge noted that those cases concerned nautical assessors who were experts in nautical disputes, which he considered was different from the situation of the Equality Act assessor. On that basis, he was not satisfied that the practice adopted in nautical cases was transposable to the present situation.

The trial judgment

29. The trial judgment was, by contrast, a very detailed judgment running to 87 paragraphs. At §§10 to 11, the judge described the role of the assessor in the proceedings as follows:

> "My Assessor, Ms Jill Tombs, is a long serving lay member of the Employment Tribunals. In that capacity she has considerable experience determining disputes which involve allegations of discrimination. I am grateful to her for the insight and experience she has provided on those matters within her specialist expertise, and which arise under the Equality Act 2010 in this particular case."
>
> "In the event, because the Trust accepts now that Mr Laidley is disabled, and that any relevant adverse conduct by him is related, at least in some way, to his disability, the focus of the Assessor's contribution (on both the claim and counterclaim) has been on the issue of whether his treatment by the Trust has been in proportionate pursuit of a legitimate aim."

30. The judgment then went on to set out in detail the evidence that had been before the court during both parts of the trial, including factual evidence from Mr El Nahas and his daughter, further evidence from another neighbour, evidence from five officers of the Trust and a senior officer from the London Borough of Brent, as well as the expert evidence of two consultant psychiatrists. On the basis of the evidence before him, the judge made the following findings:

    (a) Mr Laidley had caused nuisance and annoyance to his neighbour, Mr El Nahas, by banging on the wall of the flat. Mr El Nahas' evidence in that regard was corroborated by numerous other witnesses as well as a vast number of sound recordings made by Mr El Nahas on a mobile phone app. The noise from Mr Laidley banging on the wall was regular, consistent and disruptive noise taking place in the early hours of the morning, at night and throughout the day and was "certainly not insignificant".

(b) Mr Laidley's conduct in that regard breached his tenancy agreement and was a nuisance within the terms of Ground 14 of Schedule 2 of the Housing Act 1988.

(c) It was common ground that Mr Laidley is disabled in the meaning of section 6 of the Equality Act 2010. A report dated 12 October 2020 from Dr Grewal, a consultant psychiatrist, based on a face to face assessment of Mr Laidley in his home, concluded that Mr Laidley was suffering from a longstanding delusional disorder, impairing his ability to carry out day-to-day activities, and that it was likely that some of his behaviour was a consequence of his delusional disorder. Dr Grewal assessed Mr Laidley as lacking the capacity to conduct litigation.

(d) A second report dated 22 December 2022 by Dr Kumar, a consultant psychiatrist, based on a review of the relevant papers, likewise concluded that Mr Laidley had suffered from delusional disorder from 2012, and considered it likely that he also suffered from a paranoid personality disorder. Like Dr Grewal, Dr Kumar concluded that Mr Laidley lacked capacity for the purposes of these proceedings. He further opined that Mr Laidley's current accommodation was not suitable for him and that he should ideally be placed in supported accommodation where there were staff available to monitor his behaviour and mental state.

(e) There was no prospect of Mr Laidley engaging with help, stopping the noise or showing any insight into his behaviour, nor (in those circumstances) any likelihood of treatment or engagement with support services if he remained in the flat. It was therefore reasonable to order possession.

(f) The Trust had engaged with and complied with its public sector equality duty. It had produced three Equality Impact Assessments which clearly acknowledged that Mr Laidley was in a situation where he needed help with his mental health issues, and which balanced Mr Laidley's interests as a disabled person with the difficulties faced by his neighbour, Mr El Nahas.

(g) The Trust's application for possession sought to advance two legitimate aims: first, the Trust's responsibility to protect its tenants from nuisance, annoyance or harassment from other tenants; and secondly, the Trust's aim to use its housing stock sensibly. The legitimacy of those aims was not disputed by Mr Laidley's counsel.

(h) A possession order was proportionate in the circumstances. Mr Laidley was unwilling to engage with support services. He was therefore not receiving any treatment and had no insight into his condition. The Trust had no supported housing in the area nor any contract to provide any floating support to residents of the London Borough of Brent. The Trust had tried but failed to obtain any support from the London Borough of Brent. The only way that Mr Laidley was going to get any help was by forcing the hand of the local authority by the court making the possession order sought by the Trust. In that case, the most likely outcome was that Mr Laidley would be

assessed and provided with assistance by way of suitable long-term supported accommodation.

(i) Since the steps taken by the Trust were a proportionate pursuit of a legitimate aim, the counterclaim alleging discrimination and breach of the Equality Act was dismissed.

Ground 1

31. Mr Laidley's first ground of appeal is that the judge was wrong to refuse to disclose the assessor's evidence to the court.

32. Mr Vanhegan's starting point was to refer to the general common law principle of natural justice which, among other things requires that a party has a right to know the case against him at trial and the evidence on which it is based: see e.g. *Al Rawi v Security Service* [2012] 1 AC 531, §12 (per Lord Dyson). That principle has also been recognised in the case law on Article 6(1) of the European Convention on Human Rights, such as *Krcmár v The Czech Republic* (2001) 31 EHRR 41, where the European Court of Human Rights found at §40 that the concept of a fair hearing requires the parties "to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision".

33. Mr Vanhegan then referred to the postscript to the judgment of the Court of Appeal in *Manzanillo II* where Clarke LJ concluded that, contrary to previous practice, the evidence of a nautical assessor should be given openly, with the parties having the opportunity to comment on whether their advice should be followed. §58 of that judgment cites the passage in the *Krcmar* judgment to which I have just referred. Clarke LJ went on to say:

> "59. Where the court has evidence from an expert who has not been called as a witness by either party – and CPR 61.12 makes it clear that nautical assessors are such experts – the principle needs to be adapted to the procedure. Its effect is that any consultation between the assessors and the court should take place openly as part of the assembling of evidence. Because the judge is not bound to accept the advice he receives from the assessors (see *The Ansonia* [1920] 2 Ll L Rep 123, 124), the parties are entitled to an opportunity to contend that he should or should not follow it. In many, perhaps most, cases the questions and advice taken together will be susceptible of little or no argument that has not already been directed to the issues which have prompted the questions. But fairness requires the opportunity to be given.
>
> 60. The nautical assessor is a time-honoured example of the statutory court-appointed expert. CPR 35.15(4) now provides for the disclosure and use at trial of such experts' initial reports. CPR 35PD7.4 indicates that the parties are to be sent copies of any report prepared by the assessor, but that he or she will not give oral evidence or 'be open to cross-examination or questioning'. This sits comfortably with the traditional role of the nautical assessor, which in the past approximated to that of a special jury: hence the practice of formulating questions and – until 1867 – taking the answers in open court. It appears from a note to the report of *The Hannibal* [1867] LR

> 2 Ad&E 53, 56, that it was at the conclusion of judgment in that case that Sir Robert Phillimore announced that:
>
> > 'for the future in causes of collision and salvage, heard before the Trinity Masters, he should not sum up the evidence; but that the Court and Trinity Masters would retire and, on their return, the judgment of the Court would be given'.
>
> 61. Such a practice would not, in our view, be compatible with Article 6; and it is right that, except in cases where such a discussion is unnecessary in the light of submissions made earlier, the preferable modern practice of putting questions to the assessors after discussion with counsel should be complemented by a practice of disclosing their answers to counsel, either orally or in writing – in order that any appropriate submission can be made as to whether the judge should accept their advice."

34. That practice has been followed in subsequent cases involving nautical assessors such as *The Global Mariner*. A similar approach has been adopted in relation to the use of a medical expert appointed under the General Medical Council Health Committee Procedure Rules 1987 to assist the Fitness to Practise Panel of the GMC. In *Watson v GMC* [2005] EWHC 1896, Stanley Burnton J noted that a medical examiner advises on factual issues such as the medical significance of the information before the Panel. After referring to the requirement in CPR 35.15 for an assessor's written report to be sent to the parties and to the judgment in *Manzanillo II*, he held at §60 that:

> "… the authorities … establish that those who advise a tribunal on issues of fact, whether as its experts or as assessors, should do so openly, in the presence of the parties, and in circumstances in which the parties have an opportunity to make submissions on that advice before the tribunal makes its decision. This is, in general, what fairness requires."

35. Likewise, in *Halliburton Energy Services Inc v Smith International (North Sea) Limited (No. 2)* [2006] EWCA Civ 1599, the Court of Appeal considered at §§20–21 that it was appropriate to adopt the *Manzanillo II* approach in patent cases where a scientific advisor was appointed to assist the court. In the same passage it cited with approval the judgment of the Supreme Court of Canada in *The Federal Danube* [1997] 3 SCR 1278, where McLachlin J said in relation to the practice of appointing assessors in Admiralty cases, that:

> "First, assessors should be permitted to assist judges in understanding technical evidence. Second, assessors may go further and advise the judge on matters of fact in dispute between the parties, but only on condition of disclosure and a right of response sufficient to comply with the requirements of natural justice. I state these propositions as general guidelines, aware that it may be necessary or useful for the judge in a particular case, upon consultation with the parties, to vary how assessors are used and what procedures should be followed, depending on the nature of the trial and the issues to be determined.

> The essential is that the principles of natural justice that protect a fair trial should in all cases be preserved."

36. Mr Vanhegan argued that the same principles should apply to other assessors appointed by the court, including in this case an Equality Act assessor. The right to a fair trial therefore, in his submission, necessitates disclosure of any evidence or advice provided by an Equality Act assessor to the court.

37. Ms Rowlands, for the Trust, disagreed, referring to *Ahmed v University of Oxford* [2002] EWCA Civ 1907, where the Court of Appeal rejected a submission that the advice of an assessor appointed pursuant to s. 67(4) of the Race Relations Act 1976 in a claim of discrimination on racial grounds should have been disclosed by the judge to the parties. The court considered that s. 67(4) assessors were not covered by the terms of CPR 35.15, but were appointed under a distinct statutory regime. In reaching that conclusion, however, the court made the following comments as to the role of assessors under CPR 35.15:

> "22. … in relation to the role assessors are to play, CPR 35.15 provides that the part to be taken is 'as the court may direct.' That leaves a wide discretion to the court as to the role to be played. Under CPR 35.15 the court may direct a report to be prepared, and if it does so that report must be sent to the parties and the parties may use it at trial. The court may also direct that the assessor 'attend the whole or any part of the trial to advise the court on any such matter.' The absence of any suggestion that any advice must be revealed to the parties in contrast to the position where a report is directed, would indicate that even in the CPR 35.15 context, it is not envisaged, at any rate as a matter of course, that advice will be revealed in order to allow the parties to make submissions on it.
>
> 25. So the use that a judge makes of assessors is very much within his discretion. It will depend on the type of case. It will depend on how far assessors are fulfilling an evidential role and how far simply assisting in the decision making process, and of course a judge will have in mind at all times what fairness to the parties requires.
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> …
>
> 30. The reality is that it is impossible to lay down strict rules of general application as to the way in which assessors may be used. Where assessors are appointed under CPR 35.15, the court has a broad discretion on how to use the same and the type of assistance they give may vary widely, dependent upon the character of the litigation. They may have an evidential function (in which event disclosure to the parties will be the normal rule) and a function which is more involved in assisting the evaluation of evidence (in which event disclosure to the parties will not be the normal rule and only occur if fairness demands it)."

38. The court considered (at §34) that under s. 67(4) of the Race Relations Act the primary role of the assessor is to assist in the evaluation of evidence. In such a case, the court said:

> "That militates against any general obligation of disclosure prior to judgment. Of course there may be circumstances where disclosure will be necessary. For example, where a point arises as a result of the assistance of the assessors which the parties clearly did not have in mind and which they should be entitled to address, disclosure should be made. Furthermore assessors, despite their primary role, may provide a piece of information akin to expert evidence, and here, once again disclosure should be made. But overall parties should appreciate that the assessors under section 67(4) are using their experience to help the judge decide the facts, and should be prepared to address the judge and assessors on the issues of fact without disclosure of the assistance that the assessors are giving the judge in evaluating the evidence."

39. The Race Relations Act has now been repealed, and the requirement to appoint an assessor set out in s. 67(4) of that Act has now been subsumed into the more general provision at s. 114(7) of the Equality Act.

40. While the judgment in *Ahmed v University of Oxford* preceded the judgments of the Court of Appeal in *Manzanillo II* and *Halliburton Energy Services*, and the judgment of Stanley Burnton J in *Watson*, I do not regard the later judgments as having adopted an approach inconsistent with the approach set out in the passages from *Ahmed* which I have cited above. What is clear from the authorities is that assessors may be used in a variety of contexts, both under general provisions such as s. 63(1) of the County Courts Act and CPR 35.15, and under specific regimes such as the former s. 67(4) of the Race Relations Act and CPR 61.13 for assessors in Admiralty claims.

41. It is therefore not possible to set out any universal rule as to the nature of the assistance that assessors will provide to the court and the extent to which disclosure of their advice and evidence will be required. Rather, the role of the assessor will turn on the nature of the case, the particular issues that are in dispute, and the extent to which the judge considers that assistance is required. While s. 114(7) requires that the power to appoint an assessor under s. 63(1) of the County Courts Act must be exercised unless the judge is satisfied that there are good reasons for doing so, both s. 63(1) and CPR 35.15 give the judge a wide discretion as to the use that is then made of an assessor so appointed.

42. The comments made by the courts regarding nautical assessors, in cases such as *Manzanillo II*, were made in a specific context in which the assessor is acting as a court-appointed expert, and in that capacity providing evidence to the court. Likewise, a scientific assessor may be appointed to advise the court on matters of scientific and/or technical fact, as was the case with *Watson* and *Halliburton*. In such cases where the assessor performs an evidential function in the proceedings, disclosure of their advice and evidence will be the normal rule, in order that the parties can make submissions on the material which the assessor has provided to the court. CPR 35.15 makes clear that disclosure will, in particular, be required where an assessor is directed to provide a report for the court.

43. In other cases, however, such as *Ahmed v University of Oxford*, where the role of the assessor is not to provide evidence to be used at trial, but is simply to assist the judge in understanding or evaluating the evidence provided by the parties, no duty of disclosure

arises under CPR 35.15, and the advice provided will not normally be disclosed unless fairness requires it in the particular circumstances.

44. There is no inconsistency between that and fair trial rights arising at common law or under Article 6(1) of the European Convention since the assessor in such a case is not either providing evidence or filing submissions in a trial. The assistance of the assessor should not therefore normally involve the provision of any material on which the parties have not had the opportunity to comment. Rather, the assessor will bring their experience and expertise to bear on the evaluation of the material already before the court. As the *Ahmed* judgment makes clear, however, circumstances may arise where it could be necessary to disclose the comments of the expert to the parties for their further submissions, for example where the assessor provides evidence not hitherto before the court, or raises a point which the parties had not had the opportunity to consider.

45. In the present case, pursuant to s. 114(7) of the Equality Act, the assessor was appointed under s. 63(1) of the County Courts Act, and the general provisions of CPR 35.15 therefore applied. In this case, as the judge explained, by the time of the trial it was common ground that Mr Laidley was disabled within the meaning of the Equality Act and that the conduct complained of was caused at least in part by his disability. The role of the assessor was therefore not to give evidence as to matters of fact regarding Mr Laidley's disability and its consequences. Rather, her role was to assist the judge in the evaluation and assessment of the evidence in order to determine whether the Trust's claim was a proportionate pursuit of a legitimate aim. That is a paradigm example of a case where no general obligation of disclosure arises.

46. It is fair to say that the judge, in his short *ex tempore* judgment on 17 April 2023, did not address the authorities in great detail, and did not explicitly draw a distinction between the use of an assessor to provide evidence to the court, including scientific or technical evidence, and the use of an assessor to assist the judge in the evaluation and assessment of evidence already before the court. That is no doubt because of the relative brevity of the arguments raised at the hearing, by comparison with the more detailed discussion in the written and oral arguments of counsel in this appeal. Nevertheless, it is apparent from §§10–11 of the trial judgment that the issues remaining in dispute by the time of the trial were not ones of fact relating to Mr Laidley's disability, but rather concerned the weight to be given to the facts as set out by the factual and expert witnesses. That was why the assessor's role was, as the judge recorded, limited to assisting the judge in that evaluative exercise.

47. Mr Vanhegan submitted that because the assessor's advice was not disclosed to the court, it could not be said with certainty that the assessor limited her advice to matters of weight and evaluation, rather than straying beyond that into providing factual or expert evidence which should then have been disclosed. Mr Vanhegan did not, however, identify anything in the judgment which suggested that the judge had taken account of anything other than the evidence provided by the parties during the trial.

48. Speculation that the assessor might, contrary to what is recorded in the judgment, have provided evidence which was not referred to by the judge but which influenced the judge's conclusions, cannot form a basis for a requirement for the assessor's advice to be disclosed to the parties. Indeed, if it were otherwise, it would be impossible for an assessor ever to provide advice to a judge that was not disclosed to the parties.

49. The assessor's role in this case did not therefore require disclosure of her advice to the judge. I dismiss the first ground of appeal.

Ground 2

50. Mr Laidley's second ground of appeal is that the judge sought the assessor's advice on proportionality and legitimate aim, which were issues not within her competence, and did not rely upon her advice in relation to the issues of whether Mr Laidley was disabled or whether the Trust had breached its public sector equality duty under s. 149 of the Equality Act.

51. Starting with the issue of whether Mr Laidley was disabled, that did not call for any evidence from the assessor as, by the time of the trial, the fact of Mr Laidley's disability and the impact on his conduct was not disputed by the Trust. §79 of the judgment also recorded that Mr Vanhegan had not suggested that the Trust was doing anything other than pursuing a legitimate aim. The central disputed question was therefore the proportionality of the Trust's actions in relation to Mr Laidley. That question was relevant, in particular, to Mr Laidley's defence and counterclaim alleging discrimination contrary to various provisions of the Equality Act.

52. In his skeleton argument, Mr Vanhegan submitted that the issue of proportionality was a legal question which obviously would be a matter for the judge and was not for the assessor to opine on. At the hearing he modified that submission, and accepted that the assessment of proportionality by the judge was a mixed question of fact and law, which involved weighing up the facts and evidence before the court.

53. I agree. There was no dispute at the trial as to the concept of proportionality as a matter of law. The question was rather the application of that concept, weighing all of the evidence before the court as to Mr Laidley's conduct, the impact of that conduct on his neighbour and the Trust, the Trust's attempts to obtain support for Mr Laidley as an alternative to seeking to evict him, and the impact on Mr Laidley of evicting him.

54. That exercise of weighing and evaluation was a matter with which Ms Tombs was well-qualified to assist, as a long-serving member of the Employment Tribunals, with experience of handling disputes involving discrimination allegations. Ms Tombs' CV had been provided to the parties on 26 January 2023, when notified of the appointment of her as the court assessor. If Mr Vanhegan had considered that the assessor's qualifications rendered her unsuitable to assist with the issues that remained for determination in the case, he could have made that submission. Neither side, however, at any point either prior to or during the hearing, took any issue with the suitability of the assessor.

55. Finally, regarding the Trust's public sector equality duty under s. 149 of the Equality Act, the judge's conclusions at §§75–76 of the judgment were that the Trust did engage with its duty and had discharged its responsibilities accordingly. The judge referred to the three Equality Impact Assessments provided by the Trust, and concluded that the Trust had, in those assessments, taken into account Mr Laidley's interests as a disabled person and balanced them with the difficulties being faced by Mr El Nahas. The judge therefore clearly regarded those assessments as raising proportionality issues. Given that the judge has recorded that the assessor had provided assistance in relation to the proportionality of Mr Laidley's treatment by the Trust, it would therefore appear likely that the assessor did indeed provide advice on this issue.

56. Even if she did not, as I have noted above, the judge has a wide discretion regarding the use to which an equality assessor is put. Mr Vanhegan did not identify anything in the judge's assessment of the public sector equality duty at §§75–76 of the judgment which indicates that if that assessment was made without seeking the advice of the assessor, it was procedurally unfair or contrary to the requirements of s. 114(7) of the Equality Act, s. 63(1) of the County Courts Act or CPR 35.15.

57. I therefore dismiss the second ground of appeal.

(This Judgment has been approved by the Judge.)

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Tel No: 020 7067 2900. DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com