Neutral Citation Number: [2022] EWHC 2328 (QB)

Case No: F90BM154

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 14/09/2022

Before :

MR JUSTICE COTTER

- -

Between :

Dudley Metropolitan Borough Council	**Claimant**
- and -	
Marilyn Mailley	**Defendant**

- -
- -

Michelle Caney (instructed by **Dudley Metropolitan Borough Council**) for the **Claimant**
James Stark (instructed by **Community Law Partnership**) for the **Defendant**

Hearing dates: 29 & 31 March 2022, 1 April 2022 & 7 June 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE COTTER

Mr Justice Cotter:

1. The Claimant seeks possession of 19 Uffmoor Estate, Halesowen, West Midlands B63 4JR ("No 19") from the Defendant, Ms Marilyn Mailley.

2. No 19 was let to the late Mrs Dorothy Mailley, the Defendant's mother, on 2nd May 1965. The Defendant has lived at No 19 since she was aged 11years. She is now aged 68.

3. Had Mrs Dorothy Mailley died at home at any time from the date that Section 30 Housing Act 1980 (the predecessor of Section 87 Housing Act 1985) came into force in October 1980 until the date in October 2016 that it became clear that she no longer had any realistic prospect of returning home (from the nursing home into which she had been admitted for respite care earlier that year), the Defendant would have been entitled to succeed to her mother's tenancy pursuant to Section 87 Housing Act 1985. Further, at the time when she retained mental capacity Mrs Dorothy Mailley could have assigned the tenancy to her daughter Marilyn as a qualifying successor under Section 91(3) Housing Act 1985 (although the Defendant had a lasting power of attorney, she could not use that power for her own benefit). There can be little doubt that Mrs Dorothy Mailley would have wanted the Defendant to continue living at No 19.

4. Amongst other issues this case raises the effect of a period of time spent in residential care by a person with no mental capacity and whether it should deprive a member of the family who had resided with them at a property of their right to succeed to that property.

5. The Claimant's case is simple. In October 2016 Mrs Dorothy Mailley, who was then resident in a care home with no prospect of return to her home, ceased to occupy No 19 as her only or principal residence. As such her tenancy ceased to be secure as the tenant condition was not satisfied. The Claimant served a notice to quit upon Mrs Dorothy Mailley at the care home and as a result her tenancy came to an end. Thereafter her daughter, the Defendant, who remained living at the property, was a trespasser, and the Claimant is entitled to possession.

6. The Defendant defends this claim on a number of grounds

   (a) Firstly, that the decision to institute and prosecute these proceedings is unlawful in public law terms. Paragraph 9.10 of the Claimant's Letting Policy states:

   "Lodgers left in occupation will not qualify for tenancy transfer or alternative accommodation under 9.10 above if they are not eligible to be accepted on to the Waiting List. Such applicants will be required to leave, subject to review

by a Team Manager if requested. The Team Manager may consider exceptional circumstances as described in Section 19." (Underlining added)

Paragraph 9.8 states:

"Where the property is occupied by someone not qualified to succeed (e.g. because of a previous succession) or where a successor other than a spouse/civil partner/common law partner is under occupying, the provisions in 9.10 for lodgers left in occupation will be applied. If the tenancy cannot be granted, possession will be sought, subject to a review by a Team Manager if the occupant so requests. Where the property has been adapted for the remaining occupier, or the remaining occupier has a learning disability or a severe and enduring mental health issue and could not cope with relocation, the Housing Manager may agree to grant the tenancy or where there are other exceptional circumstances refer as an exception or appeal in accordance with Section 19."

Section 19 refers to "Exceptions, Appeals and Reviews". It states at paragraph 19.2:

"Exceptions to policy in the following areas may be agreed by the authorised officers where there are exceptional circumstances:
..
c) To allow an allocation outside the usual occupancy standards or designation or restriction on property types – authorised by Team Manager (Housing Occupational Therapy), Team Manager (Team/Customer Services) or Head of Service."

It is the Defendant's case that the Claimant failed to follow its own policy in that the Defendant was not given a right of review.

(b) Secondly, that the Defendant's eviction from No 19 would be a breach of Article 8(2) ECHR in that it would not be proportionate to a legitimate aim and unlawful as a matter of public law having regard to the personal circumstances of the Defendant. In particular the relevant circumstances are the likely consequences for her mental health were she to be evicted from her home.

(c) Thirdly, that properly interpreted in accordance with Section 3 Human Rights Act 1988, the Defendant should be treated as having been entitled to succeed to her mother's secure tenancy when she was removed permanently from her home. If Section 87 Housing Act 1985 cannot be read down as including within those entitled to succeed the members of the family of those removed from their home by reason of their ill health (and who due to mental incapacity cannot assign their secure tenancies under Section 91(3) Housing Act 1985 to qualifying successors when they are removed from their homes due to ill-health), then Section 87 Housing Act 1985 is incompatible with Article 14 ECHR. There is no rational connection with a legitimate aim for a qualifying successor whose parent has been required to cease to occupy the property in

such circumstances to be treated any differently from a qualifying successor whose parent died at home and a declaration to that effect should be made under Section 4 of the Human Rights Act 1998.

7. Following the amendment of the defence in 2019 and the transfer of this claim to the High Court the Secretary of State for Communities and Local Government was informed of the application for a declaration of incompatibility but has not chosen to intervene to advance any justification for the difference in treatment of a person in the Defendant's position from the qualifying successor of a parent who dies at home or is capable of assigning the tenancy to the successor when due to ill-health they have to be removed into residential care.

Evidence

8. I heard from Ms Kamlesh Sharma and Ms Cheyrl Scrivens on behalf of the Claimant and also the Defendant. There was also a large bundle of relevant documentation.

9. I also heard expert evidence from Dr Series, a consultant old age psychiatrist on behalf of the Claimant and Dr Waheed, a consultant liaison psychiatrist, on behalf of the Defendant.

10. Unfortunately, ill health due to Covid resulted in a protracted hearing.

Chronology

11. Having considered all the evidence I make the following findings.

12. The Defendant was born in 1954. The Defendant's mother was offered the tenancy of 19 Uffmoor Estate, and it commenced on 24th May 1965.[1] No 19 is a three-bedroom house with two living rooms downstairs, the second of which could be used as a fourth bedroom. It is situated on a corner plot, with a large front, side and rear

[1] At that time local authority tenancies did not have statutory security of tenure as they were excluded from the Rent Acts by Section 33 Housing Repairs and Rent Act 1954. In substance, however, they were treated as having security unless the tenant was deemed to be unsatisfactory. This was recognised by a Green Paper in 1977. Statutory security of tenure was restored for local authority tenants by the Housing Act 1980 in the form of the secure tenancy.

gardens, and sufficient space to park a car. The Property would normally be allocated to a family. It was let Mrs Dorothy Mailley as such in 1965:

"Family 4 Tenant D. Mailley 2 Boys 1 girl"

13. Save for period when she was at university between 1972 and 1975 the Defendant has lived at 19 Uffmoor Estate. It has been her only and principal since 1965. She had two younger brothers Chris and Bill both of whom left home.

14. On 3rd October 1980 the Housing Act 1980 came into force and Mrs Dorothy Mailley became a secure tenant.

15. On 19th August 1998 the Claimant declined Mrs Dorothy Mailley's request that the Defendant be added as a joint tenant. It was stated that she was not eligible to be offered a house in accordance with the Claimant's policy. As the Defendant stated the request was not taken further.

16. The Defendant became involved in the care successively of her maternal uncle Cyril, his estranged wife Joan and then her mother Dorothy. Cyril died in 2002. His belongings are now at No19. Joan died in 2011. Her belongings are also at No 19 which now contains property from three relatives (the Defendant's grandmother, her uncle Cyril and Aunt Joan). The Defendant's nephew Simon and his daughter stayed at the property for a while; some of their belongings also remain in the house.

17. In 2013 Mrs Dorothy Mailley signed a power of attorney in favour of her daughter. After this took place an assignment of the tenancy would have required someone to consider Ms Mailley's best interests. The Defendant could not have signed it over to herself.

18. In 2014 Mrs Dorothy Mailley became seriously ill with a problem with her gall bladder and was admitted to hospital. On being discharged from hospital she required substantial care at home which was provided by the Defendant with carers from the local authority. She suffered from osteoarthritis, her mobility was very limited and she developed vascular dementia which began to deteriorate.

19. In March 2016 Mrs Dorothy Mailley developed a pressure sore on her spine and was taken for respite care at Netherton Care Home.[2]

20. On 19th July 2016 there was a best interests meeting at Netherton Green Nursing Home and it was agreed that Mrs Dorothy Mailley should stay there. As a direct result of this decision the Defendant became very upset. As was reported to the GP on 25th July 2016 (at an appointment for an unrelated issue)

> "mum in care home-tearful
> Problem-is no longer a carer
> Comment -will seek help if becoming depressed"

The reference to no longer being a carer is very important as it was the Defendant explaining to the GP that she had lost the main focus and activity in her life; full time care of her mother.

21. The next GP entry is 22nd August 2016. When the Defendant presented with a history of:

> "struggling with stress of mum being in a home and also concerns over nephew. Feels overwhelmed. Very tearful. Coping OK. Sees mum every day but struggles with care in home. IBS flared up-previously well controlled."

The working diagnosis was a stress related problem and she was offered an open appointment at any time

> "if feels struggling or becoming difficult to cope".

22. Following an assessment carried out by the nursing home and the social worker at a meeting on 17th October 2016, it was decided that Mrs Dorothy Mailley would have to remain at the care home permanently. There were concerns that her dementia may deteriorate more quickly were she to return home, but the primary reason was that to avoid pressure sores she required to be turned every two hours and there was no prospect that a care package in the community would be provided to enable this to take place. This was reluctantly accepted by the Defendant who at the time was on jobseekers' allowance and was in no position to fund the necessary level of care at home privately. In consequence the care home became Mrs Dorothy Mailley's home

[2] It was not in dispute that an admission to hospital or respite even for a lengthy period does not axiomatically prevent a tenancy remaining as an individual's only or principal home; see generally **Foreman-v-Beagley** [1969] 1 WLR 1387

and the Defendant admits that her mother ceased to occupy No 19 as her only or principal home on 17th October 2016. This was confirmed by Renata Kubinski, social worker on 18th October 2016 in an e-mail to Kamlesh Sharma, the Housing Manager. In a handwritten note Ms Sharma records on the e-mail:

> "Speak with Marilyn before termination of tenancy. Can terminate tenancy from 17th October 2016 on social worker's confirmation without NTT."

23. On 25th October 2016 the Claimant wrote to the Defendant arranging an appointment to discuss her occupation of No 19 on 2nd November 2016.

24. On 1st November 2106 the Defendant was informed by letter that a notice to quit would be served due to Mrs Dorothy Mailley no longer living at the property. On 16th November 2016 the Claimant's solicitor served a notice to quit on Mrs Dorothy Mailley at her nursing home and at the property. A copy of it was served on the Defendant. The accompanying letter was silent upon any right to seek a review or appeal the decision to serve the notice to quit or not to allocate the tenancy to the Defendant under the Lettings Policy. The Claimant avers that the notice to quit had the effect of terminating the tenancy on 19th December 2016.

25. On 29th November there was a home visit to the Defendant by Ms Sharma. The house was "in a state" as it was cluttered with wide variety of items. All but one of the bedrooms were inaccessible due to the amount of things stored in them. I shall deal with the detail of the support was offered to the Defendant separately in due course.

26. On 21st December 2016 Defendant completed and signed a housing application in which she did not identify any care or support needs, did not highlight any medical or disability needs, indicated that she wished to live in a flat, maisonette or bungalow in areas which she identified and confirmed she would be interested in information about private rented accommodation. I find that the Defendant filled in the form with honest intent and as accurately as she could.

27. On the 5th January 2017 the Defendant was accepted onto the housing register.

28. On 18th January 2017 the Defendant visited her GP and was diagnosed with major depression (moderately severe episode). The full entry is:

18 Jan 2017 GP Surgery (Halesowen Health Centre HEARN Ruth (Dr)
Comment: Template entry PHQ9 Template
Follow-up 2 weeks
Document: eMED3 (2010) new statement issued, not fit for work Fit Note

Document: (Diagnosis: [X] Major depression, moderately severe; Duration 18-Jan- 2017 – 18-Feb-2017
History: carer most of her adult life, mum is now being moved to a nursing home. Insomnia and poor concentration. PHQ9 testing reveals likely depression. Asking about ESA (currently on JSA).
Medication: Mirtazapine 15mg tablets One To Be Taken at Night 14 tablet.
Problem: [X] Major depression, moderately severe (*First*)
Assessment: PHQ9 score – little interest or pleasure in doing things 3/3 • PHQ9 score – feeling down or depressed or hopeless 3/3 • PHQ9 score – sleep disturbed 3/3. PHQ9 score – feels tired 3/3 • PHQ9 score – poor score – poor appetite or overeating 2/3 • PHQ9 score – feeling bad about yourself 1/3 • PHQ9 score – trouble concentrating on things 2/3 • PHQ9 score – moving or speaking slowly or agitated 2/3 • PHQ9 score – thoughts of suicide or self-harm 0/3. Patient health questionnaire (PHQ-9) score 19/27.

It is unclear what happened on the date for follow up after two weeks; the GP notes say (against a date of 15th February 2017)

did not attend -no reason.

29. On 6th February 2017 Defendant wrote to Mrs Sharma stating that she was

> "a bit distraught that I missed the tipoff about a local property. I've gone through the weekly sheets and see the note on a compliment slip asking me to ring in."

I find that this was an honest reflection of concern which the Defendant had. She was concerned about her options and was thinking about alternative properties. Importantly she appears to have thought herself capable of a move.

30. On 15th February 2017 she again attended the GP. The entry reads

"15 Feb 2017 GP Surgery (Halesowen Health Centre) HEARN Ruth (Dr)
Document: eMED3 (2010) new statement issued, not fit for work. Fit Note Document (Diagnosis: [X] Major depression, moderately severe; Duration 15-Feb-2017 – 15-Mar-2017)

History: Was better once on Mirtazapine but only had a 2 week supply so run out a little while ago. Initially needed to use it every other night whilst getting used to it, find she was ruminating less and sleep improved (although still broken). Discussed long term plans – doing health and social care diploma but does not want to provide bed care. Aware we are unable to provide Med3 long term.
Problem: [X] Major depression, moderately severe (*Review*)
Additional: Depression medication review • Depression interim review"

31. It is significant to note both the context of the entry i.e. the fact that the notice served by the Claimant had expired and also that the Claimant was doing a health and social care diploma. She was signed off as unfit for work until 15th March 2017.

32. On 24th February 2017 the Defendant spoke to the housing options team and indicated that she would be interested in bungalows in Leebank or Bassnage area.

> "She has agreed to call every morning about 9am to check with…..For whom she has direct line to see if there are any suitable properties… Asked how she is progressing with the clearance of the property she said she is clearing out and has put some things into storage and she is contacted Simon (nephew) via girlfriends parents and he is coming in a month/month and half time to remove his belongings which will help."

33. On 2nd March 2017 the Defendant attended a new tenancy workshop

34. Pausing at this stage in Spring 2017 it is my finding that the Defendant was actively considering a move and the Claimant's officers quite reasonably considered that the Defendant was accepting of the fact that she would have to move.

35. On 24th March 2017 the Defendant attended at her GP. The entry reads

"24 Mar 2017 GP Surgery (Halesowen Health Centre) HEARN Ruth (Dr)
History: Patient's condition resolved – feels positive, no depressive 8x. Started a job as a support worker in a couple of months. Will be signing on in the meantime. No taking medn.
Problem: [X] Major depression, moderately severe (*Review*)"

36. In my judgment this is a very important entry. The Defendant was to start work as a support worker (although it is unclear what this role was; potentially care of a man

called Kelvin) and would be signing on as fit for work. Although she was clearly willing and able to attend the GP if she thought that she was needed to do so, she did not do so for a further year and until after her mother had died and, importantly, proceedings had been issued. So on the records she was free of depression for the whole of the rest of 2017.

37. On 15th May 2017 the Defendant stated that we had been on a work trial so had been uncontactable.

38. On 1st June 2017 the Defendant told Caron Parkes of the Claimant that it was her intention to move and that she understood she could not remain as a current address. The note states:

> "Ms Mailley advised that she is happy to consider bungalows and flats but preferred to remain in the local Halesowen area. I advised we had great difficulty in being able to reach her and this was a continued issue."

39. Again I find that this was the Defendant's honest view. She was considering where she could live on leaving No 19 and the prospect was not so awful that she could not contemplate it. This is in marked contrast to her position at trial.

40. The Claimant offered to the Defendant alternative accommodation at:

(a) 75 Leebank, Halesowen (1 bedroom bungalow)
(b) 370 Long Lane Halesowen (1 bedroom bungalow)
(c) 140 Bassange Road, Halesowen (1 bedroom bungalow)

In correspondence the Claimant stated that the Defendant could not be granted the tenancy of No19 and was again entirely silent upon any right to review or appeal. On 29th November 2017 it was stated:

> "You have been advised previously that the council cannot make you an offer of this property and this is still the case."

41. Pausing at this point if the letter had mentioned the right of review and this had been taken up, it very difficult indeed to see what the Defendant could have raised as exceptional circumstances. She was engaging in the hunt for a suitable alternative

property, was not suffering any depressive symptoms (only having had in the region of three months symptoms which had resolved by March 2017) and her mother was still alive. As I shall set out in more detail in due course I am quite satisfied that a review would not have altered the Claimant's decision.

42. On 3rd November 2017 the Defendant telephoned the Claimant to advise that she was in a relationship with someone who was willing to take her in and she had registered to rent privately. She also wrote in November stating that she was to become a carer (for Kelvin) and asked if the person she was caring for could live at the property. That letter concluded:

> "Please don't think I haven't realised all the kindness that led to my being offered Joyce's bungalow or 75 Leebank. If what I ask isn't possible the council won't owe me anything, after all the help thus far and I leave without further bother, if the eviction process is put into motion."

Again it is my finding that this was an honest reflection of the Defendant's thought process.

43. On 4th December 2017 the Defendant rejected the latest offer of a property and said that she and the person she was to care for would seek a property in the private sector. Given what she was to say later this may seem remarkable. However, her mother was still alive and although she was clearly reluctant to move, the Defendant could see a future life away from No 19.

44. On 15th January 2018, as the Defendant had not accepted any offer of alternative accommodation, the Claimant filed possession proceedings.

45. On the 18th January the Defendant was offered a property at 47 Snowden Grove, Halesowen (1 bedroom, low rise ground floor flat).

46. On 18th January 2018 Dorothy Mailley died at Netherton Nursing Home. The Defendant was, very understandably, immensely distressed by her death. It was to have a profound effect upon her.

47. On 19th January 2018, possession proceedings were issued. A hearing was listed for 6th March 2018.

48. The Defendant contacted solicitors CLP; a firm which specialised, amongst other things, in representing those facing possession proceedings. A meeting of some form must have taken place with the Defendant to gain her instructions. Based upon those instruction the defence (dated 6th March 2018) pleaded:

    (a) hoarding issues and possible neglect/self-neglect and alleged a failure to make any enquiry or referral;

    (b) mental health/depression.

    It was signed with a statement of truth. This despite the fact that:

    (a) the Defendant, an obviously intelligent person with full capacity, very well knew that the Claimant had made significant efforts to help her with the issues arising from the state of her house, which was housing her deceased relatives' belongings and other items, including arranging a social worker. She had rejected this assistance. Further despite the fact that she has never accepted that she has "hoarding" issues, the Defendant signed the defence with a statement of truth which claimed that the Claimant had failed to act on the issue. As I indicated during the hearing I am very troubled how this came to pass. The defence was in my view set out in unfortunate and misleading terms. In any event I find as a fact that the Defendant knew that she had been very resistant to any further referral in terms of self neglect. Had the Defendant indicated any willingness to engage with the help offered by the Claimant in respect of the state of her property then it is quite clear (and I am satisfied that the Defendant would not disagree) that Ms Sharma, a very supportive and caring housing officer would have been very happy to liaise and provide it. She did not indicate any willingness and still does not believe she neglects herself. I struggle with what instructions her solicitor received from her such that the matters were pleaded as they were.

    (b) The Claimant had suffered with three months of depressive symptoms in early 2017 which had resolved. The pleaded case that the Claimant should have responded to a comment about being on new tablets was**,** given the history, was an unrealistic assertion. The Defendant, as she well knew, had not seen a Doctor for approaching a year when proceedings were issued and had the Claimant asked about the tablets (the reference having been made in February 2017) before issue the Defendant would have reported that the symptoms had all resolved and that she was taking no tablets. It seems clear that further and separate depressive symptoms arose due to the combination of the death of her mother, the central figure in her life, dying and the service of proceedings. The Claimant could not have known of the

> impending sad death of the Defendant's mother when issuing proceedings. I find as fact that had the Defendant felt any symptoms of depression prior to the death of her mother she would have attended at her GP. In any event it is my view unfortunate that the Defence did not accurately set out what had happened in relation to the depression. If it has been pleaded that the Claimant had begun to suffer symptoms of depression after the death of her mother then it would have to have been recognised that the Claimant could not have had notice of this.

49. On 12 March 2018 claimant was assessed by her GP. The note states:

> "Really tearful. Mood low. Concentration poor. Would like to go back on Mirtazapine as found this very helpful sleep and concentration. Mum died recently and had no analgesia/sedatives to keep her comfortable, so the image of this is very distressing." (Underlining added)

This consultation took place just shy of the year after the previous depressive symptoms had resolved in March 2017. It also took place after defence had been filed and served (so was not the basis of the pleaded case).

50. The next step for the Defendant was the instruction of an expert.

51. Dr Bello, a consultant psychiatrist, saw the Defendant at No 19 on 28th March 2008. He pointed out that

> "It was not possible to get an early appointment with Ms Mailley due to her earlier planned commitments.."

That there were such commitments it not consistent with not being able to function due to symptoms of depression.

52. The instructions to Dr Bello were to assess the Defendant's physical and mental health problems, whether she was a person who disability the purposes of the Equality Act 2010 and also to cover a range of issues if he was of the view that she had disability.

53. Within his report Dr Bello set out that he explored the "clutter in the house" with the Defendant (he was at the house and noted that the hallway and sitting room were free of clutter and were well presented). She explained the clutter noted by the Claimant's witness had reduced but she had not finished and hoped to be more by the end of the month. She admitted that it was not easy but understood that she had to get the house in a clean state. These statements were consistent with the Defendant's comments about her house throughout the history of this matter.

54. Dr Bello assess the Defendant as anxious and her mood as "objectively mildly depressed". He noted that the Defendant had had received short-term treatment for depressive disorder and made a full recovery with

> "a recurrent episode (2018) within the context of bereavement.."

It was his view that the Defendant had symptoms consistent with mixed anxiety and depression with the episode triggered by the recent bereavement and ongoing housing situation. The same factors were perpetuating the disorder but the long-term prognosis of being symptom-free was good. He stated

> "Ms Mailley despite ongoing symptoms and anxious personality, has been able to function optimally and carry out very difficult tasks and functions. She is able to move around in buses, attends a self-care and dietary needs, and manage her finances and relationships well. In the course of my assessment, she still displayed symptoms of mixed anxiety and depressive disorder. She is however not limited in her ability to carry out day-to-day activities. The effects on her of the mixed anxiety depressive order are <u>trivial</u> currently, and in view of her previous excellent response to treatment are not likely to be long-term…..In my opinion Ms Mailley is not a disabled person the purposes of the Equality Act 2010 based on her current presentation." (underling added)

He noted that the Defendant had declined psychological therapy. He also indicated that the loss of the defendant's home would be devastating as she invested emotional energy in it and it was the link to her mother. He was of the view that it could spiral a serious decline in her mental health with increased anxiety and depression of the degree to warrant serious intervention by health professionals.

55. The report did not support elements of the defence case as pleaded. The content was, in effect, challenged in question posed on behalf of the Defendant and Dr Bello replied on 10th May 2018. He stated that the Defendant had a complex grief reaction and it was a significant reason why she had not removed all the excess items at No 19. He also noted that she had said that she had not had the time to do so as she had moved from one caring role into another, but she did not have a need for the items and

had been discarding them without distress, she just wanted more time and support, if available. Dr Bello stated that this was not a classical pattern of hoarding. He added:

> "I agree with you that there is a vicious relationship between the anxiety, depression and the complex grief reaction which when taken together amount to a disability."

56. In another significant step the Claimant, which had now learnt of the medial issues, having previously been unaware of them, made offers to carry out a review in March and May 2018. It is very unfortunate indeed that no response was ever received.

57. The Claimant made further offers of alternative accommodation. On 12th April 2018 Defendant was offered a two bedroomed flat at Shenstone flats, Halesowen and on 16 May a bungalow at 70 Lydate Road.

58. On 4th July 2018 Cheryl Scriven carried out a review of the decision to evict the Defendant despite the proceedings having been commenced in January 2018.

59. On 31st July an offer of an alternative accommodation was made at 10 Worcester house (two-bedroom, lift access, flat). Considerable efforts continued to be made to assist the Defendant find an alternative home and these continued through to trial with a number of other properties suggested, including on 22 September 2020 and offer at 9 Uffmoor estate one bedroomed bungalow near to No 19. The Defendant viewed this property but declined the offer.

60. I shall set out some further factual findings within my review of the evidence.

Oral evidence

61. Ms Sharma was responsible for the Halesowen area as a manager and had dealings with Defendant from 2009 onwards and visited the property for home checks before Mrs Dorothy Mailley went into a care home for the purpose of general housing management issues. Ms Sharma was an honest and helpful witness who made concessions when appropriate. She was, and is, obviously both caring and empathetic and has been very patient with the Defendant throughout the protracted history of this matter.

62. She was asked about the request made in 1998 by Mrs Dorothy Mailley for the tenancy agreement to be put into joint names i.e. for the Defendant to become a joint tenant. She said that the refusal would still apply now if the Defendant was not entitled to a property in her own right.

63. Ms Sharma was not aware of a formal assignment policy or training on assignment issues. In evidence which has some significance in respect of the incompatibility argument raised by the Defendant she said that if someone had asked her about an assignment she would have replied that the tenant would have to approach the Claimant and request it. There were real dangers in dealing with potential assignees rather than the tenant; such as improper pressure or undue influence. Ms Sharma said that she would not raise it as an issue herself as it could risk compromising the tenant. Tenants could be co-erced into assigning and "we are mindful of that". The tenant could be assigning under pressure. If it was raised by a tenant she would have to ask the legal department.

64. She recalled a general discussion with the Defendant in 2009 about assignment. This was, it appears triggered by issues raised by the Defendant concerning her aunt and brother. She told the Defendant that Mrs Dorothy Mailley would have to raise the issue. Ms Sharma believes that she did so in 2009 by a "service request" i.e. a request with the Claimant's "front of house". However it came to nothing due to difficulties with arranging a home check i.e. difficulty with access to No 19. This was to become a persistent problem. This evidence ties in with the Defendant's recollection that her mother asked for her to be added to the tenancy and

> "I think that we got something back from the Council, which I cannot now remember in detail. She (her mother) said that there was absolutely no need to worry and there was no point in pursuing it with the Council."

65. Ms Sharma was aware of the Claimant's policy in relation to succession and transfer of tenancy. The effect of Mrs Mailley becoming a permanent resident in the home was that the Defendant was a lodger left in occupation. She was aware that in certain circumstances a person in such circumstances could request an exception to the policy position.

66. The decision to terminate the tenancy was Ms Sharma's to make. She spoke to Ms Scriven her line manager beforehand but only about the issue of whether it should be a long or short notice period.

67. She accepted that no offer of a review was initially given to the Defendant. She said with hindsight she should have done so, although pointed out that at a later stage the Defendant was offered the ability to request an exception and also that she had a review but did not participate in it.

68. Ms Sharma wrote to the Defendant on 1st November 2016 and asked to speak to the Defendant on the 16th November as it was important to get her views on matters. On the 16th November the Defendant told her that she wanted to stay in the property. She stated that we would have told the Defendant that "if you feel that there is an exception tell us". She did not specifically mention the letting policy. It seems clear that her view at this stage based on what she knew of the Defendant (there being no apparent health issue) was that there was very little prospect of an exceptional case being made out.

69. Ms Sharma was asked about the state of the property at the time of a visit on 29th November 2016. The issue had been "kick started" by a neighbour raising the issue with the Claimant in September 2016. The house was "in a state" as shown in photographs which she took during the visit. All but one of the bedrooms were inaccessible due to the amount of things stored in them. She believed help was needed and made a referral to social services access team (care is assessed /obtained through first asking the access team).

70. She stated (and I accept) that she had no concerns about the Defendant's mental health at the time. Rather she considered the Defendant an intelligent and polite lady who was often engaged in helping others. Ms Sharma saw no issue other than "oh dear I think that you need some help with the clutter in the house". Some concerns about the Defendant's mental health had been raised by a social worker in July 2016 but these were in the context of the Defendant wanting her mother home without a reason why (so not concerned with depression or hoarding). In February 2017 the Defendant set out in a letter, amongst other things that she was on tablets to help "boost morale" but Ms Sharma did not see this as equating to a health problem. Ms Sharma said was unaware of any health issues until they were raised within these proceedings. I accept this evidence.

71. She had not seen the property is as bad a state as it was before 29th November 2016 before. Significantly, this at a time when the Defendant was not suffering from depression.

72. By a follow up letter dated the 1st December 2016 Ms Sharma noted that the Defendant had agreed to complete a housing application. She also stated that she was concerned about the Defendant's well being and safety due to the property condition.

She stated that she had made a referral to Lorraine Mc Nulty a social worker and explained in her evidence that Ms Mc Nulty had made considerable efforts to contact the Defendant but to no avail. In my Judgment this was part of a pattern of the Defendant not taking up any offers of assistance. This evidence underpins my concerns about the contents of the defence as regards alleged failure to offer assistance.

73. By 22nd December 2016 Ms Sharma had spoken to Ms Scriven again. This was because the Defendant had told her that she wanted to stay in the property. Ms Sharma believed that the Defendant had no health issues so could not envisage how she might have exceptional reasons to enable her to keep the property (and she also believed that she was struggling as regards the state of property). She stated that would have said to the Defendant

> "I can't see you having the property but I can speak to my senior and see what she thinks."

74. Nearly a year later in a letter written in November 2017 the Defendant asked again if she could stay in the property (with someone else moving in). Ms Sharma's response of 29th November 2017 set out that the Defendant had been advised that she could not be offered a property. She agreed that she did not refer the request on, or advise the Defendant that she had a right to seek a review of the refusal. Again it is important to recognise that, save for the short lived episode which had resolved by March 2017, the Defendant had no ongoing depression.

75. In my view Ms Sharma was at all stages of the relevant history of this matter, sympathetic to the Defendant's issues. She referred to the problem of the Defendant not engaging with her or others. When I clarified what this meant she replied, "she was absolutely avoiding us". It was put to her by Mr Stark that in early 2018 the Defendant had "gone to ground", but Ms Sharma responded that this state of affairs was not confined to 2018; it was just a continuation of the previous behaviour;

> "I have tried to engage with her and offer support and she was not taking it up".

I accept this as an accurate overview. To have portrayed the Claimant (in effect Ms Sharma) as uncaring and having failed to offer assistance as the Defence did was grossly inaccurate and unfair. Any District Judge reading the Defence would be misled.

76. Ms Sharma was asked in detail about her views as to the state of the property at various stages. As I have set out she recalled that the interior of the house was in a poor state in in November 2016. She was able to recall that during a visit in 2020 it was still cluttered but the Defendant had cleared living room and kitchen was clean and tidy whereas it had previously been "in a state". As was apparent at the time of Dr Bello's visit the Defendant is capable of tiding up areas of the property.

77. During a visit on the 9th March 2022 she noted that the property was more cluttered that previously. It was in a similar condition upstairs but one bedroom was more untidy, as was the downstairs, save for the kitchen which remained tidy. The Defendant said that she was in the process of packing some things away (again she always had some form of excuse or expressed intention to address the issue).

Ms Scriven

78. Ms Scriven was and is Ms Sharma's line manager. She is a team manager responsible for eight patches in Halesowen each typically with around 800 properties.

79. Ms Scriven explained that the decision in relation to determination of the tenancy rested with Ms Sharma. However if the decision was contested it was her responsibility to ensure that the decision remained a proportionate one. Ms Sharma would not have had the right to offer a renewed tenancy as this would have needed senior officer approval. When taken to Ms Sharma's correspondence with the Defendant and her comments that her senior officer was not supporting of a new tenancy, she stated that she did not recall any specific conversation but that would be unsurprising and it is very likely that a conversation happened. This would be by way of a general supervision discussion and the probability was that references were made to the fact that as the tenant had no disability there would be no realistic prospect of an exceptional reason being established.

80. Ms Scrivens conceded that there was a responsibility to tell the tenant of the right of review and that the procedure had now been changed to make sure that every tenant is told about the right of review. She was asked about the review that she undertook into the Defendant's case. She stated that her background was homelessness and she specifically considered whether her involvement in the history to date meant that she could not properly be the reviewing officer. She stated that there were protocols and if she had considered that she had detailed knowledge to prevent her from undertaking the review in a balanced way she would not have done so. She described it as an "internal debate" that she had with herself and there was no formal record of it. I accept this evidence. I also accept that she was not aware of Ms Sharma's letter to the Defendant stating that her supervising officer was not supportive and had she have

known she would have probably considered her involvement more carefully and documented her views.

81. As for the allocation policy she recognised that the categories set out in paragraph 9.8 were not exhaustive and there could be wider consideration as with the ability to grant a tenancy where there are exceptional circumstances. She agreed that the Defendant's request in 2017 was in effect a request to grant a new tenancy and for an exception to be made. She did not agree that the Claimant did not want people to remain in properties in the circumstances in which the Defendant found herself. She said it was important that the Defendant was led down a realistic and not an unrealistic path. When asked to give an example of exceptional reasons she referred to two older men (in their 80s) who were allowed to stay in one property after there had already been one succession and also a blind man who was allowed to stay in a property because it was unlikely that he would be unable to easily learn the layout of a new street. She could think of no other example that was successful that did not include exceptional health reasons.

82. Ms Scrivens was asked about the letter of the 9th July 2018 which set out the result of her review and which followed on from her letter dated 21 June 2018, to the Defendant's solicitor in light of the psychiatric report which had been served upon the Claimant. Within the review she stated that as a single lady of over 60 years the Defendant would not be eligible for a three-bedroom house save for when there were exceptional circumstances. She pointed out that the Council has a huge demand for three-bedroom family accommodation, and it is therefore only in exceptional circumstances that the Council can allow such accommodation to be let outside the Council letting policy.

83. As the Defendant had not attended the appointment offered by Ms Scriven and had provided no written representations for her to consider, she had to consider the housing record of the Defendant and the report of Dr Bello, dated 2 April 2018 and the response to questions dated 10th May 2018.

84. Ms Scriven set out that her decision was that;

> "I am unable to consider emotional attachment to the property as this is something that affects most households in your position and therefore is not exceptional. You have made a housing application and the Council will support you in a move and endeavour to ensure that you can remain in the area where you have friends and access to services."

The application was a reference to living with a vulnerable friend but the matter was not pursued by the Defendant. Ms Scriven continued:

> "I have considered the report of Dr Bello and I appreciate the caring role you have undertaken over many years. I note that you have historically been successfully treated for periods of depression and at the time of the report you were medicated and the report identified your bereavement and uncertainty with your housing situation as triggers for your recent depressive episode. Dr Bello does not consider that you are disabled and your long-term prognoses of being symptom free is good. I noted that you have recovered well from previous depressive episodes. Dr Bello questions whether leaving the property could result in a deterioration in your mental health and raises the possibility. However the issues identified, such as access to your GP and connection to the area and support, can be taken into account in the allocation for seeking alternative accommodation together with appropriate housing support. The impact upon mood from emotional attachment to a property and link to a departed relative or partner affects many people who have lived in a property for many years and are therefore not exceptional but the Council will assist in helping you to secure suitable alternative housing and assist you in the transition."

Ms Scriven then referred to the fact that the Council expected to offer suitable accommodation and therefore homelessness should not be an issue. She continued:

> "The report identified no physical or mental disability, identified no issues with hoarding and that you have had no contact with the psychiatric services. I note from the file that the property is in a poor condition and the size of property and the garden would make ongoing future maintenance a challenge for you."

Mr Stark challenged the content of this assessment pointing out that the addendum report of Mr Bello stated that a combination of depression, anxiety and grief reaction amounted to a disability. However Ms Scriven stated that if you looked at the content of the reports as a whole, noting that he had changed his view to a degree, he appeared to be of the overall view that the mental health issues would resolve in time. She stated that she tried to keep the letters to tenants simple they were not meant to be letters to solicitors. As a result she did not set out matters in greater detail.

The Defendant

85. The Defendant is clearly a very intelligent and well educated woman who has devoted her life to caring for others of all ages; from older relatives through local people such as Kelvin, to children.

86. She did not appear to find giving evidence stressful or difficult until the subject of her mother's death was broached at which point became distressed. She was able to recover her composure and continue.

87. She accepted that Ms Sharma "had been great" and that she cares. She recognised that she had not wanted help from anyone other than Ms Sharma as "I felt better without" and that the Claimant had tried to reach out to her about the state of the property. She stated that she would now be readier to accept help, but I was unconvinced by this evidence. She said "oh they have really tried". It was very difficult to reconcile her evidence with the pleaded defence which she had signed with a statement of truth.

88. She set out the details of her daily life, including that she enjoyed walking in the evenings to undertake shopping. She could also travel to see people such as Mr Round (it was a three-hour journey to his residential home). She was asked about the various activities she undertaken including the fact that she was a member of a local history group and due to attend a meeting after her evidence.

89. She was asked about the state of the property and taken to a photograph that showed she had an old door in the garden. She explained the door had been dumped nearby a couple of years ago she thought it had a potential use. So this was not an item with any sentimental value. She agreed that the property was not in a good tidy state but had an explanation most items which she was taken to within the photographs e.g. a toy in the bath it was used by as a child by her grand niece, some years previously but may be of use to other children (the Defendant had a wholly unrealistic plan children could and would attend at her property to play). The Defendant explained that she now had fainting/falling episodes as a result was sleeping downstairs. She stated that but for these episodes she would be keeping the house clear. I find that this reflects her true view i.e. that she can manage to tidy the property and has no significant hoarding problem.

90. As regards alternative property she indicated that she was tentatively considering buying 1 Upmoor as it was "utterly lovely". I think that she was taken by this property, but that ultimately the pull of No 19 was too much.

91. She also indicated that a friend had told that she had not filled in any form for alternative accommodation and been allowed to stay in her two bedroomed property.

92. In relation to the numerous properties that she was offered she stated

> "I thought I must keep on all open mind, always ideally I felt I would stay (at No 19)."

93. When she was taken to the individual properties which had been offered to her the practical concerns or objections she raised were, objectively, trivial. I find as a fact that after he mother death she approached each alternative property searching for a reason to turn it down. It was telling when she was asked about why she did not accept 9 Uffmoor, which appeared to have been ideal for her (if this was not suitable it is difficult to see where else would have been) she stated that she would have had to have seen her previous home at No 19 with all the memories that this would bring. Eventually she said that she was "riding two horses" i.e. trying to stay at No 19 whilst having an interest in other properties (as indicated in the form signed in December 2016). However as I pointed out to the Defendant, the problem is that you cannot properly ride two horses. Eventually she accepted that it was her view that she could not voluntarily give up where she wanted to be i.e. No 19. She stated that she did not think she would ever get over her mother's death and that:

> "anywhere else (i.e. any other property) I will lose her to a greater degree. I would lose the continuity with her. It's losing all that."

So from January 2018 the Defendant was only riding one horse; she just tried to keep the other running alongside. As Dr Waheed recorded in March 2019

> "Ms Mailley stated that even if she was offered Hagley Hall or Windsor Castle she would even then prefer to remain at the current property. She described the current property as the one place where she wants to be.. "

In my judgment this evidence reveals the central issue in the case; the Defendant's ability to get over the death of her mother and the impact that a move would have upon her mental health given that she has a profound emotional attachment to the property.

94. I find as a fact that after her mother's death, no property, either offered by the Claimant as an alternative property, rented in the private sector or purchased, would ever have trumped staying at No 19.

95. The Defendant recognised the issues before the court and that it was a question of balance; how much it would damage a family not to be in the property as opposed to how much damage it would cause to her if she moved.

Further findings of fact

96. I make the following further findings of fact.

Demand for property

97. The Claimant is trying to cope with an extremely high demand for three bedroom properties and there is a dire shortage of family accommodation available. As at 16th March 2022, 866 families were in need of three bedroom accommodation with 512 of those families on the waiting list/homeless. This represented a significant increase in demand from January 2020 (583 families in need of three bedroom properties). Over the last 12 months, 464 three bedroom properties became available to let in Dudley. Each property attracted an average of 65 bids. Those applicants had been waiting an average of 16.2 months. In Halesowen, only 20 three bedroom properties became available to let in the last 12 months. Each attracted an average of 71 bids. On the Uffmoor Estate, the last three bedroom property to become available was on 13 February 2017. The top applicant in band 1 had been on the waiting list since April 2014.

Assistance

98. Given the pleaded defence it is necessary to expand upon matters which I have already touched upon.

99. For many years the Defendant has mainly used three bedrooms and front living room to store belongings that have been accumulated over an extended period of time. Contrary to paragraph 10(1) of the Defence the Claimant has been offered a significant amount of support.

100. Mrs Sharma made a referral to the Early Access Team of Social Services to see what support could be provided to the Defendant. This led to a Social Worker, Lorraine Nalty, being allocated to the Defendant's case. On 23rd September 2016, Mrs

Sharma hand delivered a letter to the Defendant stating that herself and Ms Nalty would visit her on 27th September 2016. The Defendant was not in when they visited. On 30 September 2016, Mrs Sharma wrote to the Defendant to notify her of a new appointment to visit her on 3rd October 2016. Once again, the Defendant was not in when Mrs Sharma and Ms Nalty visited. I am quite satisfied that this was part of a pattern of the Defendant deliberately avoiding engagement.

101. On 3rd October 2016, Mrs Mailley's Social Worker, Renata Kubinski, emailed Mrs Sharma regarding a review at the Nursing Home on 17th October 2016. This email indicated that the Access Team (Ms Nalty) had contacted her as she was having problems speaking to the Defendant. Mrs Sharma responded to say that she was continuing to work with Ms Nalty. On 25th October 2016, Mrs Sharma hand delivered a further letter to the Property with a third appointment for 2 November 2016. Again, the Defendant was not at the Property when they visited. Ms Sharma visited the Nursing Home on 16 November 2016 to deliver a copy of the Notice to Quit. The Defendant was present and agreed to meet with Ms Nalty. Ms Sharma therefore made a further appointment for her and Ms Nalty to jointly visit on 28 November 2016. In her letter confirming the appointment dated 17 November 2016, Mrs Sharma advised the Defendant that:

> "We agreed an appointment at your home on Monday 28 November 2016 jointly with Social worker Lorraine Nalty as a response to reports **regarding your safety at your home**. We wish to assess the situation for ourselves and ensure you have the opportunity to access support that you may require for this and your current circumstances. You agreed that this will also give you an opportunity to talk about any further questions you might have after our conversation today and so prevent unnecessary worry." (Emphasis added)

102. Although she had agreed to meet Ms Nalty, the Defendant then wrote to Mrs Sharma on 24 November 2016 asking for Ms Nalty not to visit with Mrs Sharma as arranged, suggesting she attend the following week. As requested, Mrs Sharma attended alone on 29 November 2016. Mrs Sharma discussed the benefit of help from Social Services and the Defendant agreed to see Ms Nalty on 2 December 2016.On 1 December 2016, Mrs Sharma wrote to the Defendant confirming their discussions and recording that:

> "We agreed that you will benefit from support with your current situation and not be able to attend to clearance as this is a big job. You agreed to accept support via Lorraine Nalty Social worker. You said that the best day to catch you at home was Friday between 2-3pm."

103. Mrs Sharma duly arranged the visit with Social Services for Friday 2nd December 2016 between 2-3pm but the Defendant failed to keep that appointment. Stopping at this point the Claimant had wasted a considerable amount to time trying to provide assistance to the Defendant who was clearly reluctant to accept it. She is an intelligent and well educated and knew exactly what the situation was.

104. Lorraine Nalty advised Mrs Sharma that she had repeatedly tried to contact the Defendant but the phone rang out and as she was not at the Property to meet with them, Social Services could do no more to assist the Defendant unless she made contact to seek support.

105. On 21st December 2016, Mrs Sharma visited the Property with Charlotte Fisher (Housing Options) and Atika Mulla (Housing Support Worker). Support was discussed and a leaflet provided explaining the services on offer. The Defendant agreed to contact Mrs Sharma or Ms Nalty if she wanted a referral for assistance with clearing the Property. As the Defendant accepted in her oral evidence, she did not contact Social Services to seek support or contact the Claimant to follow up the referral.

106. In my judgment there has to be an element of practical realism taken into account before criticism is levelled (and maintained) at a housing provider in respect of a lack of support for a tenant. The Defendant who was, and is, mature and otherwise capable, appeared to have long-standing difficulties keeping her property free from clutter; much of it being property she inherited from deceased relatives. Apart from this issue was no hint of mental health difficulty in 2016 or the majority of 2017. The Defendant had a short lived period of depression which resolved with medication. She was repeatedly offered assistance but refused it. Although she will acknowledge that some of the rooms are cluttered. As I will set out in due course I find the Defendant would still not, even now, class herself as someone with a hoarding disorder and strongly believes (as she has indicated at various times e.g. to Dr Bello who went to her house) that she is capable of clearing up the property. There was, and is, a limit to what can be expected of a body such as the claimant in the circumstances. To follow the equine metaphor in relation to available assistance you can take a horse to water but you cannot make it drink. The Defendant has failed to co-operate with the Claimant. She has made communication difficult, avoided meetings/appointments and engaged only when necessary /unavoidable and largely on her terms.

107. The Defence pleaded (and remained pleaded trial) that:

> "The Claimant has failed to take into account or make any enquiry into the defendant's mental health. The defendant has advised them that she was on new tablets that had been affecting her and that had seen from their inspection of the property that there appeared to be hoarded belongings such that there was substantial clutter throughout the house and two of the bedrooms were inaccessible. The claimant has failed to make any enquiry or referral in respect of this apparent hoarding issue despite the fact that section 11 Care Act 2014 provides that it must carry out an assessment of the needs of the person who appears to be suffering from neglect including self neglect and that section 42 of that Act requires them to make a safeguarding enquiry in those circumstances are that current support guidelines issued under that Act defines hoarding as falling within self-neglect. The Defendant has been placed on medication for depression. The claimant accordingly failed to make enquiries it was required to do as the defendant's mental health and as to the effects upon her mental health of her eviction."

108. The following matters were known at the time that this pleading was signed on 6 March 2018:

(a) Apart from short lived period in 2017 the Defendant has not suffered from depression. She had not attended her general practitioner in relation to depressive symptoms for the last year. The phrase "The defendant has been placed on medication for depression" does not give a full and accurate picture.

(b) The Claimant, with the assistance of social services, had repeatedly offered assistance in relation to the state of the property which the defendant had refused.

109. In my judgment there was a failure to give a fair and comprehensive history in the pleaded defence and unreasonable criticism. For obvious reasons there was a limit to how far this issue could be explored during the trial. The Defendant could give no real explanation for the pleaded case. She is intelligent and well educated and was well aware of the relevant history yet she signed the statement of truth.

The current state of the property

110. As I indicated during the evidence and submissions given the Defendant's age and recent health issues, specifically a fall in October 2021, blackouts and dizziness[3],

[3] See the report of Dr Series on 23rd March 2022 paragraph 2.1.3. There were some health concerns at the start of the trial about heart issues

there has to be very great concern that it is no longer safe for her to remain in the property in its current state. I am quite satisfied that unless the Defendant is effectively forced to remove belongings from the property, including items that she considers to have sentimental value, a process that she will find very difficult (and not to acquire items; such as discarded doors and other items which had been thrown away by others) she will not do so in any adequate or sustained fashion. There will be periods when certain rooms are tidier but overall the problem will remain. Photographs show numerous tripping hazards (including on the stairs).

111. Despite Mr Stark's submissions that the Defendant is not reluctant to undergo, nor has she declined, treatment by way of targeted psychological therapy to address her hoarding, I am satisfied that, regardless of what she has recently said, if she remains in the property, so the claim fails, the Defendant will not avail herself of any cognitive behavioural therapy focused on the state of the property (hoarding) or further assistance from the Claimant.[4] She rejected all the assistance preciously offered by the Claimant. Dr Bello referred to the fact that in 2017 when depressed

> "Ms Mailley was not keen on psychological therapy when offered".

112. Dr Waheed reported in 2019:

> "she doesn't want any help and doesn't believe that a community care assessment would be helpful."[5]

He also advised that the Defendant may benefit from psychological counselling to help her come to terms with the death of her mother. In his report of 21st January 2020 he noted that:

> "She said that the council had written to her offering bereavement counselling. She stated that she is quite a private person, she is not sure how she will cope with bereavement counselling. She stated she feels that she must undertake bereavement counselling but said that she is very anxious to undertake it."

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[4] The Claimant, including its housing department has set up a Multi-Agency Hoarding Framework and issued a detailed document in which it accepts the existence of hoarding disorder and sets out guidance for how it should be addressed in a multi-agency manner by the adoption of a Hoarding Pathway set out in the document.

[5] When the Defendant did ultimately agree to a community care assessment it noted that: "she is able to complete activities of daily living independently…..does not require any support for now" The assessor concluded: "she does not currently require any formal support. Therefore no further action is currently required"

In a report of 18 February 2020 Dr Waheed again advised that the Defendant was likely to benefit from psychological therapy for her depressive illness and complicated grief and recommended cognitive behavioural therapy. However he noted that there was no indication of how "psychologically minded" the Defendant was or her motivation to engage in such therapy. On 5th February 2021 Virginia Bozier of Stourside medical practice wrote to the Defendant's solicitors confirming that the Defendant had been referred to psychological therapy on 10th December 2020 and subsequently did not attend appointment for this and is now been discharged (but could self refer online if she wished).

113. The Defendant did eventually undertake talking therapy for her grief with Dudley Talking Therapy[6] (a phone call each week; 16 calls in total). She has been told that she can go back for more "and thought she might do depending on the outcome of the case[7]" although she has been dubious about its benefits "..I'm not sure it's helping". When Dr Series discussed cognitive behaviour therapy you thought it was possible but it could be useful and described it as "a bit outre".

114. The Defendant has shown a firm resolve against assistance or psychological therapy such as CBT. Eventually she has undertaken some limited grief counselling by telephone, but is dubious as to its benefits. Importantly the Defendant understands and accepts that she has an issue with grief. This is not the case with hoarding. I am satisfied that she remains of the view that she has no hoarding problem that requires therapy. If she is left in the property she will believe that she will manage the issue and I do not believe that she will attend cognitive behavioural therapy addressed at hoarding. As a result of this analysis I find that if she stay at No 19 the property will remain cluttered and she is at risk of injury.

The expert evidence.

115. As I have set out Dr Bello produced a report and addendum report having been instructed on behalf of the defendant. Eventually the Defendant applied to instruct a second and alternative expert and permission was granted by Mrs Justice Griffiths in November 2019.

116. I heard from Dr Series and old age psychiatrist on behalf of the Claimant and Dr Waheed, also a psychiatrist on behalf of the Defendant. The number, extent/content and associated costs of reports they produced was in my view wholly disproportionate to the issues in this case. Apart from the report and addendum reports of Dr Bello, Dr Waheed produced seven reports and addendum reports. Dr Series produced two

[6] See report of Dr Series of 17th May 2021paragarph 7.1.11
[7] See the report of Dr Series on 23rd March 2022 paragraph 2.1.19

reports and a response to questions. There were two joint statements. It is a lesson of what parties will do if unrestrained by directions limiting the extent of expert evidence. It constituted a failure by the legal representatives to keep the evidence within appropriate limits.

117. There remained a conflict between the experts as to:

(a) Whether the Defendant suffers/ed from mild or moderate depression;

(b) Whether the Defendant is disabled under the Equality Act 2010; and

(c) The potential impact of an eviction.

118. It was clear to me that Dr Waheed had not considered the relevant chronology in sufficient detail before arriving at an opinion about restrictions on the Defendant's daily activities. It was also my view that he was overly pessimistic about her future.

119. Much of Dr Series' expert evidence on the issues was balanced and compelling and ought to be preferred to that of Dr Waheed. However, as I have previously said in other cases, proper analysis of expert evidence will only very rarely consist of merely preferring the whole of the evidence of one expert to that of another expert. Matters must be considered issue by issue. Sometimes an expert is correct on most, but not all, things. In my judgment Dr Series was too influenced by (and not correct about) the lack of formal adoption of hoarding disorder within international classifications (ICD10).

120. Dr Waheed was, and is, of the view that the Defendant's depressive illness is moderately severe. Dr Series found it difficult to categorise her as mild or moderately depressed. He was of the view that, other than her inability to keep the house in an uncluttered condition, there is little evidence of the impact of her condition on her ability to look after herself and manage her life suggesting it is better characterized as having a mild depression. In the joint statement it is noted that there is a disconnect between the Defendant's subjective report of her state of mind and her objective level of functioning.

121. When reaching the opinion that the Defendant's depression had, and has, a substantial adverse effect on her day-to-date acitivites, Dr Waheed relied upon the following activities:

> "undertaking employment, interacting with others, undertaking household chores and maintaining her property."

122. However this restricted analysis failed to take into account the full history of the Defendant's activities (including her history of searching for work, visiting friends such as Dick who live in Stourbridge and care for others such as Kelvin and Enid and her social activities). This significantly undermined the conclusion reached by Dr Waheed. The Defendant has continued to function relatively normally (for her). When pressed the only activity which Dr Waheed could rely on as affected by her depressive symptoms was her ability to maintain the property. However she could not maintain the property before she was depressed. In contrast the Defendant's original expert, Dr Bello, opined that the Defendant was (at that time) able to function optimally and carry out very difficult tasks and functions despite her depression and anxious personality. This an overview was reached after an examination at the Defendant's home and in my judgment due regard must be paid to his examination and conclusions as at Spring 2018.

123. Like Dr Bello, Dr Series was of the opinion that the Defendant is capable of carrying out normal day to day activities, notwithstanding her mental health problems. As his report detailed:

> "During the interview she told me that she is able to visit friends and relatives either walking or using public transport, she is able to go shopping to buy food, she can cook and prepare food, she is able to feed and dress herself, and she can manage her own finances and medication. She is able to use the telephone and was able to leave me a message on my phone In response to my message to her. She is able to maintain her own weight. She is able to care for other people, and devotes much time to doing so."

124. As Dr Series explained an individual with a moderately severe depressive episode will usually have considerable difficulty in continuing with social, work or domestic activities.[8] He noted that the Defendant had the ability to deal with many hours of cross examination. She was able to understand the questions, took time to put her thoughts in order, and gave answers which were fluent and made sense. As he reflected, that does not sit well with someone who has moderate depression as that affects speed of thought and quality of thought. The only time she had any real difficulty was when discussing her mother. Her continuing grief was clear; it was in sharp contrast to the rest of her evidence.

[8] Per ICD 10

125. Mr Stark submitted that Dr Series' view the Defendant is only mildly depressed as she can carry out daily activities was "a simplistic approach to the question of whether a mental impairment has a substantial adverse effect on one's ability to carry out day to day activities". He argued that the Defendant she may be able to do activities, but it does not mean that she does not find it difficult to do so as "she puts on a brave face". I reject that submission. Dr Series is a very experienced practitioner in the field of the care of the elderly and has considerable knowledge of the spectrum of depression. He gave a measured analysis and in my judgment is correct to assess the depression as mild and not having a substantial adverse effect on the Defendant's ability to carry out day to day activities. I much prefer his view on this issue to that of Dr Waheed.

126. Dr Series and Dr Waheed agreed that the Defendant suffers from prolonged grief including separation distress, difficulty accepting the loss, preoccupation with the circumstances of her mother's death and intense emotional pain and that she exhibits clinically significant distress related to the death of her mother. Frankly any informed lay person would arrive at this view.

127. Having carefully considered all the evidence, including the detail of what Defendant has been able to do on a daily basis (which in my judgment Dr Waheed failed to adequately assess) I accept the opinion of Dr Series that:

> "She has a mental impairment, namely a prolonged grief reaction giving rise to a depressive disorder. However this impairment does not have a substantial or long-term adverse effect on her ability to carry out normal day-to-day activities."[9]

and as a result the Defendant does not have a disability within the meaning of section 6 of the Equality Act 2010 by virtue of these conditions

128. Dr Series and Dr Waheed agree that the Defendant's hoarding behaviour is at a relatively severe level. They agreed that a diagnosis of hoarding disorder (whether under DSM-5 of ICD10) should not be made, but for different reasons;

(i) Dr Waheed was of the view that the DSM 5 rubric requires that hoarding should not be due to identifiable mental disorder and here it was likely to be due to her depression,

(ii) Dr Series was unwilling to make a diagnosis of hoarding disorder as it is not universally accepted. It does not appear in ICD 10.[10]

[9] Joint Statement paragraph 3.1.5and second joint statement paragraph 19.
[10] In examination in chief Dr Series accepted he was wrong about this . It was added to ICD 10 in 2017.

129. I was not impressed with either rationale. The fatal flaw in Dr Waheed's analysis is that the Defendant has been, from a lay understanding of the term, "hoarding" items for many years and when not suffering from depression e.g. in the autumn of 2016 when concerns were raised about the state of her property by a neighbour.

130. In my judgment the hoarding is not linked to depression and the grief reaction plays only a minor part. I hold this view because it has been a problem for many years. I much prefer the view of Dr Series view that her hoarding behaviour is multifactorial and is probably partly due to personality traits which predate the loss of her mother. She retains items for different reasons. Some are family items (which she was storing long before her mother was ill) and some are items which she has accumulated and which have nothing to do with her direct family (e.g. the discarded door, CDs, a pram and plastic slide in the back garden a paddling pool in the bath), which is keeping in the misguided view that they may have some future utility (e.g. " a woman she met on a local bus might be able to use them[11]). In her view she has not been warehousing items[12], is unbothered by an untidiness[13] and, despite having read articles is unsure whether she is a hoarder.[14]

131. Mr Stark submitted that the Defendants hoarding could not be addressed by eviction. He relied on Dr Waheed's view that it would be likely that hoarding will be a significant problem if she were to move to another property. He also submitted that a move to smaller premises could lead to more pronounced and more dangerous hoarding. Whilst I accept that the Defendant's hoarding will continue, given its multifactorial causation and the likely refusal of the defendant to engage with any as assistance or therapy I do not accept the argument that the hoarding would be worse in a smaller property. The Defendant would be forced by the sheer lack of physical space to undertake a sifting exercise and/or to gain storage elsewhere[15]. She would have no option. When a skip was arranged and placed outside No19 it was to no avail. If she has to move she will have to fill such a skip (and she has recognised this in the past). Further, as she is likely to continue to hoard to a degree (as she will reject any form of therapy or assistance) a smaller property without stairs is likely to be safer given her health issues.

132. Dr Waheed is of the view that moving the Defendant from No19 will make her mental state worse. He would concede of no potential upside.

> "Dr Waheed … does not believe that eviction is likely to have any beneficial effects on Ms Mailley and considered eviction

[11] Report of Dr Waheed 21st January 2020 paragraph 40.
[12] See first report of Dr Waheed paragraph 71.
[13] Report of Dr Series paragraph 7.1.18.
[14] Report of Dr Waheed 21st January 2020 paragraph 41.
[15] She has previously considered this on a temporary basis; see e.g report of Dr Waheed 21st January 2020 paragraph 36.

> would lead to distress, worsening of her depressive symptoms, a significant decline in functioning from her current level and a worsening of prognosis."

133. Dr Series agreed in respect of the short term worsening and was of the view that the process of moving is likely to make the Defendant extremely anxious for at least a limited period of time. This would need to be carefully managed. However he was of the view that it was possible that she would adjust to new accommodation. In his report he stated:

> "Dr Series does not agree that the effects of eviction would be a devastating. He considers that there is a reasonable likelihood that a change of accommodation may even have beneficial effects on her in the sense that it may enable her to move on from the sense of grief which is now constantly reinforced by being surrounded by memories of her mother at her present accommodation, and may enable her to form new relationships and interests. He is unable to predict how long after move Ms Mailley would continue to feel distressed before she begins to adapt to new circumstances"[16]

134. Having carefully considered the view of both experts and also the evidence of the Defendant I prefer the view of Dr Series. I accept that the process of moving property will be extremely difficult, will cause extreme anxiety and will need to be carefully managed. However at times in the past she envisaged moving and made some plans (between the notice of eviction and her mother's death). Faced with having no other option it is my view Defendant will be likely get on with life in her new surroundings and without constant reminders of the past reinforcing her grief[17]. Relationships with local people wherever she will be will mean a lot to her[18] and she is likely to gain some new opportunities to assist people e.g. by providing care. As Dr Waheed and Dr Series agreed if she became involved in local activities such as volunteering and local groups her prognosis would be better[19]. In my judgment the Claimant well understands that painting a picture of a very dark future if she has to leave No 19 assists her with the prospects of staying in the property. Although she has always preferred the option of remaining in her current home the history of consideration of other options, including moving elsewhere to care for someone (Kelvin) shows that she has not always seen moving as a devastating prospect. I believe the likely longer-term impact is being overstated.

135. In summary it is my opinion that;

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[16] Joint statement 18th July 2021.
[17] In the living room, the Christmas decorations have never been taken down as the Defendant's mother liked to see them twinkle in the light and this reminds her of her mother
[18] See e.g. first report of Dr Waheed para 52
[19] First joint statement paragraph 2.1.3

(i) The Defendant suffers from

(a) Prolonged grief (I do not think the difference in classification between an abnormal bereavement reaction or prolonged grief disorder is of significance[20]) including separation distress, difficulty accepting the loss, preoccupation with the circumstances of her mother's death and intense emotional pain and she exhibits clinically significant distress related to the death of her mother.

(b) Mild depression.

(ii) the Defendant does not have a disability within the meaning of section 6 of the Equality Act 2010 by reason of her mild depression and the prolonged grief reaction as these conditions do not have substantial long-term adverse effect on her ability to carry out normal day-to-day activities,

(iii) The causation of her hoarding is multifactorial; but is not linked to depression or, to a significant degree, the grief condition and is of longstanding. The Defendant does not perceive herself has having a hoarding disorder.

(iv) Moving from No 19 will cause significant distress and anxiety.

(v) There is a reasonable likelihood that a change of accommodation may have beneficial effects on her in the sense that it may enable her to move on from the sense of grief which is now constantly reinforced by being surrounded by memories.

Defences

136. I now turn to the specific defences raised.

137. The Defence has evolved since it was initially filed on 6 March 2018 (in a form which I have already stated failed to give a fair and comprehensive history and levelled unreasonable criticism).

PSED

138. On further consideration the Defendant does not pursue her defence based on breach of the public sector equality duty.

[20] See first joint statement paragraph 2.1.1. If

Public law challenge.

139. It is the Defendant's case that the Claimant was in breach of its lettings policy in that fair and proper consideration was not given to a grant of the tenancy to the Defendant under para 9.8 of the relevant policy.

140. Mr Stark submitted that it is clear that the Defendant, despite not being aware of her rights under the policy, did ask for the tenancy to be granted to her and had asked to stay as early as 16th November 2016 when the meeting took place at Netherton Care Home.

141. He also argued that the review carried out by Ms Scriven in July 2019 was flawed, including that she took a selective approach to the evidence and failed to consider the precise wording of the policy.

142. It was accepted by both Mrs Sharma and Mrs Scriven that the Defendant was not offered a review under the Lettings Policy prior to the claim being issued. However, when the Defendant was subsequently offered a review she did not take up the option. The relevant history is as follows:

(i) On 14th March 2018, the Claimant wrote to the Defendant's solicitors asking if she intended to apply for an exception to remain at the Property.

(ii) Following receipt of the report of Dr Bello and the Defendant's Part 18 replies, the Claimant wrote to the Defendant's solicitors again on 21st May 2018 asking them to confirm whether the Defendant intended to apply to the Council for an exception pursuant to the Lettings Policy.

(iii) At no point did the Defendant apply for an exception.

(iv) The Claimant wrote to the Defendant's solicitors on 21st May 2018 advising them that a review would be carried out by a Team Manager on 4th July 2018. The Defendant was given the opportunity to make written representations and/or attend the council offices to make representations. No representations were made.

(v) The Claimant duly carried out a review on 4 July 2018 and concluded it was not appropriate to allow an exception to the Lettings Policy to allow the Defendant to be granted a tenancy of the Property. The Defendant was notified of the decision by letter dated 9 July 2018 which concluded:

> "If you think there is information that I have failed to consider or that I have not properly considered any information, you can contact our Quality and Complaints Team who will treat it as a second stage complaint and will go to my line manager, the Head of Service for consideration."

(vi) The Defendant did not provide information or appeal the decision.

143. In his submissions Mr Stark was critical of a review which , despite express and repeated invitation, the Defendant took no part in and did not complain about at the time. In public law terms such criticism is very difficult to legitimately maintain.

144. In any event I reject the substance of the criticism. In respect of the assertion that Mrs Scriven was involved in the earlier decision and therefore not independent, it was clear from both her evidence and that of Mrs Sharma, that it was Mrs Sharma's decision to serve the Notice to Quit. Mrs Scriven presented as a careful and honest witness who had evidently considered whether she could carry out the review herself. As she stated she had a background in homelessness and was aware of the need for independence. Her decision letter further shows that she weighed up the competing factors within the evidence and reached a decision which was open to her on the information then available.

145. Importantly had there been a review in November or December 2016 (by Ms Scriven or any another manager) as Mr Stark contends there should have been, it is very highly likely indeed that the same decision would have been reached. There was no suggestion of depression (she did not attend her GP until 2017 and even then the depression was short lived) let alone that she had a severe and enduring mental health issue. On 21st December 2016 Defendant completed and signed a housing application in which she did not identify any care or support needs, did not highlight any medical or disability needs, indicated that she wished to live in a flat, maisonette or bungalow in areas which she identified and confirmed she would be interested in information about private rented accommodation.

146. As emphasised in cases such as **Doran v Liverpool City Council** [2009] 1 WLR 2365 and **Leicester City Council v Shearer** [2014] HLR 8, a public law defence presents a high hurdle. On the facts of this case the defence does not come close to clearing it.

Article 8

147. Paragraph 11 of the Defence pleads that the eviction of the Defendant would constitute a violation of her Article 8 rights incapable of justification.

148. Article 8 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

149. In **Manchester City Council -v-Pinnock** [2010] UKSC 45 the Supreme Court held that a person at risk of being evicted from his/her home by a public authority has the right to challenge the proportionality of that eviction before an independent tribunal even if the right of occupation under domestic law has come to an end.

150. Three discrete points are relied upon:

(a) Defendant's mental health;
(b) Length of occupation;
(c) Potential impact of eviction.

151. The question for the court to consider is whether (as at the date of trial) the eviction of the Defendant (the most extreme interference there can be with a person's home) is proportionate to the Claimant's legitimate aim in seeking to recover possession of the property for the purpose of its housing management functions. It is not a question of exceptional circumstances rather of proportionality.

152. The Defendant does not dispute that the Claimant has established legitimate aims for bringing this claim for possession namely the management of its housing stock such as to allocate its property to those in need of it. As I have set out demand for a property such as No 19 is exceptionally high and it significantly under occupied. The Defendant's case is that her personal circumstances are such that the loss of her home

would have such a grave effect upon her mental health that it is disproportionate to evict her from her home of so many years.

153. As the authorities dealing with Article 8 confirm, the threshold for raising even an arguable case on proportionality is a high one which will be reached in only a small number of cases. Also deference should be given to housing management decisions by a local authority in respect of its scarce housing stock (**Thurrock Borough Council v West** [2013] HLR 5) and the court should not let understandable sympathy for an occupier lower the high threshold (see **Powell (Corby Borough Council v Scott** [2012] HLR 23).

154. The consideration of Article 8 defences in housing matters is highly fact specific. I have had the benefit of (overly) extensive expert evidence concerning the nature and extent of the Defendant's mental health conditions and of the effect upon them of her being evicted from her home. I have set out my findings at length. I do not for a moment underestimate the anxiety the loss of No 19 will cause to the Defendant who has a prolonged grief condition and mild depression but I do not accept the bleak picture painted on behalf of the Claimant. I also do not accept the submission that a move to a smaller property would be likely to make the Defendant's hoarding issues worse. Rather I see potential benefits in terms of safety and the necessary slimming down of her range of possessions.

155. It is a central consideration that the Defendant has lived in her home at No 19 for 57 years and it has been the "warm centre" of her world. In **Holley-v-Hillingdon LBC [2017] HLR 3** the Court of Appeal (see Briggs LJ at paragraph 16) held that long residence may form part of an overall proportionality assessment, in the sense that all the circumstances of the case may need to be reviewed, and their effect considered in the aggregate. I also accept that this is not the case of a second succession where Parliament clearly intended the occupier not to have a right to succeed; rather a person whose succession rights were lost due to her mother having to reside permanently in residential care. The Defendant had an ability to succeed to the tenancy.

156. I have carefully considered all the relevant factors and weighed the legitimate aim of seeking to recover the property against the effect of the eviction.

157. As the evidence established there is a dire shortage for family accommodation in the relevant area. The property has 3 or 4 bedrooms and front, side and rear gardens together with a car parking space it would be ideal for a family including, importantly a person with disabilities. Twenty, three bedroom properties became available to let in Halesowen in the last twelve months. Each attracted an average of 71 bids. The Defendant is in significant under occupation of the property. Given the amount of

clutter she only uses a limited part of it and this would be unlikely to change in the future.

158. As Ms Carey confirms if the Defendant is evicted, the Claimant continues to be willing to provide suitable accommodation and she will not be made homeless. The Claimant has also offered to provide support package in relation to assistance with removals and decorating any new property. Considerable patience and kindness has been shown to the Defendant and I have no doubt this will continue to be the case

159. The central plank of Mr Stark; submissions is the likely effect of eviction on the Defendant's mental health (depression, grief condition and hoarding disorder). However I have not accepted much of his submissions in respect of the nature, extent and prognosis of the Defendant's mental health conditions. I did not accept significant elements of Dr Waheed's analysis.

160. The Defendant would have been entitled to remain in the property but lost that entitlement. I feel some sympathy for her in this regard. I also bear in mind this has provided something of a windfall to the Claimant in terms of the availability of a large property as had the Defendant and her mother taken advice in the past it is highly likely that she would have become the tenant. I have weighed into the assessment the length of time the Defendant has lived number 19 and that it has been, and continues to be, the centre of the world.

161. After consideration of all the competing factors, including the likely benefit for a family and impact on the Defendant I conclude that evection is proportionate and justified under Article 8. The Defendant does not want to move and the process will cause some anxiety. However if she remains in the property it will be significantly underoccupied, she will remain in the grip of grief and she will be at risk of injury due to its cluttered state (as she will reject help as she does not perceive she is a hoarder). If she moves a family will get suitable accommodation, as will the Defendant. She will be safer and there is a reasonable likelihood that a change of accommodation may have beneficial effects on her in the sense that it may enable her to move on from the sense of grief which is now constantly reinforced by being surrounded by memories.

Article 14; **Incompatibility Defence**

162. It is the Defendant's case when section 87 of the Housing Act 1985 is properly interpreted in accordance with section 3 of the Human Rights Act 1988, she should be entitled to succeed to her mother's secure tenancy.

163. For secure tenancies granted before April 2012, section 87 of the Housing Act 1985 provides:

> "*Persons qualified to succeed tenant*
>
> A person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling-house as his only or principal home at the time of the tenant's death and either—
> (a) he is the tenant's spouse or civil partner, or
> (b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death;
>
> unless, in either case, the tenant was himself a successor, as defined in section 88."

164. A person is therefore qualified to succeed under a secure tenancy granted before 1 April 2012[21] if they occupy the property as their only or principal home at the time of the tenant's death and, in the case of a family member, have resided with the tenant throughout the period of 12 months ending with the tenant's death. If the tenancy has ended prior to death, no right of succession will apply.

165. It is the Defendant's case that if Section 87 Housing Act 1985 cannot be read down so as to include within those entitled to succeed to a tenancy,

> "the members of the family of those removed by reason of their ill health who due to mental incapacity cannot assign their secure tenancies under Section 91(3) Housing Act 1985";

then it is incompatible with and 14 ECHR (as Article 8 is engaged).[22] Article 14 provide:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or *other status*." (Emphasis added)

[21] In England, secure tenancies granted after 1 April 2012 are now governed by s.86A of the 1985 Act. The effect of section 86A(1) is to limit the statutory right of succession to spouses and civil partners only. Other family members no longer have a statutory right of succession.
[22] Article 14 of the ECHR is not a freestanding right but requires another article to be engaged.

166. Mr Stark submitted that there is no rational connection with a legitimate aim for a qualifying successor whose parent has been required to cease to occupy the property due to ill-health and who had become incapable of assigning the tenancy under Section 91(3) Housing Act 1985 to be treated any differently from a qualifying successor whose parent died at home and a declaration to that effect should be made under Section 4 of the Human Rights Act 1998. His argument can be summarised as follows:

a) A property is a person's home and therefore Article 8 is engaged.
b) To deny succession to a member of the tenant's family who resided with them in the property for at least 12 months before they became so ill that they have no choice but to reside at the property as distinct from someone who resided with them until death, is to treat persons in analogous situations differently.
c) Such treatment is discrimination under Article 14. The person denied succession is discriminated against on the ground of his/her 'status' as a member of the family of a tenant family who had permanently ceased to reside at the property due to mental health and did not have mental capacity to enable them to assign their tenancy to a potential successor under section 91(3) of the Housing Act 1985.
d) Such discrimination is not capable of justification.

167. The right to succeed as the member of a family of the tenant with whom you had been residing for a period before their death was introduced in respect of secure tenancies over forty years ago by Section 30 Housing Act 1980 which provided:

> "(1) Where a secure tenancy is a periodic tenancy and, on the death of the tenant, there is a person qualified to succeed him, the tenancy vests by virtue of this section in that person or, if there is more than one such person, in the one who is to be preferred in accordance with subsection (3) below, unless the tenant was a successor.
>
> (2) A person is qualified to succeed the tenant under a secure tenancy if he occupied the dwelling-house as his only or principal home at the time of the tenant's death and either—
>
> (a) he is the tenant's spouse; or
> (b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death.
>
> (3) Where there is more than one person qualified to succeed the tenant—
> (a) the tenant's spouse is to be preferred to another member of the tenant's family; and
> (b) of two or more other members of the tenant's family such of them is to be preferred as may be agreed between them or as may, where there is no such agreement, be selected by the landlord."

.

168. I accept Mr Stark's submission that, generally speaking, since 1980 advances in medical care have allowed people to live longer and also to live longer with significant ill-health requiring an increasing number to go into a nursing home[23]. I also accept the submission that statistics from the National Office of Statistics for the last 10-year period evidence that there has been a significant rise in both sexes in people dying in care rather than at home or in hospital.

Incompatibility

169. Where an incompatibility argument is raised, four questions arise (see **R (Stott) v Secretary of State for Justice** [2018] 3 WLR 1831

(1) Does the treatment complained of fall within the ambit of one of the Convention rights?
(2) Is that treatment on the ground of some 'status'?
(3) Is the situation analogous to that of some other person who has been treated differently?
(4) Is the difference justified: is it a proportionate means of achieving a legitimate aim?

170. In **R (SC) v Secretary of State for Work and Pensions** [2022] AC 223, Lord Reed broke down the general approach articulated in **Carson v United Kingdom** (2010) 51 EHRR 13 into four propositions

(1) Only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of article 14.

(2) In order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.

(3) Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(4) The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.

[23] The modern concept of care began with the National Assistance Act 1948 which abolished the remaining poor laws and by Section 21(1) provides; (*1)It shall be the duty of every local authority, subject to and in accordance with the provisions of this Part of this Act, to provide— (a) residential accommodation for persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them.* So the concept of residential care has been around for nearly 75 years.

Analysis

171. I turn to the four questions raised in **Stott.**

172. The answer to the first question is not in issue. It is accepted that Article 8 is engaged for the purpose of question (1).

173. The second question is whether is that treatment on the ground of some 'status'.

174. Recent jurisprudence in Strasbourg and the Supreme Court has shown a significant shift to towards taking a broad view of status under Article 14 and as result the concept must be generously interpreted. In **Mathieson-v-Secretary of State for Work and Pensions [2015] 1 WLR 3250**, Lord Wilson stated at paragraph 22:

> "It is clear that, if the alleged discrimination falls within the scope of a Convention right, the Court of Human Rights is reluctant to conclude that nevertheless the applicant has no relevant status, with the result that the enquiry into discrimination cannot proceed."

175. The court held that the question whether there is a difference of treatment based on a personal or identifiable characteristic is to be assessed taking into consideration all of the circumstances of the case and bearing in mind that the aim of the Convention is to guarantee not rights that are theoretical or illusory but rights that are practical and effective.

176. In **R (SC) v Secretary of State for Work and Pensions** [2022] AC 223, Lord Reed stated (at paragraph 71)

> "….I would add that the issue of "status" is one which rarely troubles the European court. In the context of Article 14, "status" merely refers to the ground of the difference in treatment between one person and another. Since the court adopts a stricter approach to some grounds of differential treatment than others when considering the issue of justification, as explained below, it refers specifically in its judgments to certain grounds, such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. But in cases which are not concerned with so-called "suspect" grounds, it often makes no reference to status, but proceeds directly to a consideration of whether

> the persons in question are in relevantly similar situations, and whether the difference in treatment is justified. As it stated in Clift v United Kingdom , para 60, "the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified". Consistently with that purpose, it added at para 61 that "while … there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by article 14 of the Convention should be narrowly construed". Accordingly, cases where the court has found the "status" requirement not to be satisfied are few and far between."

177. However in **R (A) v Criminal Injuries Compensation Authority** [2021] UKSC 27 the Supreme Court made it clear that issue of "status" was not wholly redundant. Lord Lloyd-Jones JSC stated at paragraph 61 that notwithstanding the judgment of the ECtHR in **Clift-v-United Kingdom** the position before the domestic Courts remains far from clear. Having cited the judgment of Lord Reed PSC in **SC**, Lord Lloyd-Jones stated as follows:

> "Article 14 draws a distinction between relevant status and difference in treatment and the former cannot be defined solely by the latter. There must be a ground for the difference in treatment in terms of the characteristic which is something more than a mere description of the difference in treatment. …However, I agree with Lord Reed PSC that there is no requirement that the status should have legal or social significance for other purposes or in contexts other than the difference in treatment of which complaint is made."

178. In **MOC (by his litigation friend, MG)-v-Secretary of State [2022] EWCA** an Upper Tribunal Judge found that capacity was unsuitable as a key element in identifying a "status" for Article 14 as too "potentially evanescent". The Judge also observed that, if lack of capacity was a trigger for a finding that there had been a breach of a claimant's human rights, there was a risk of people moving in and out of being the subject of a breach on a "virtually daily basis" .The Appellant argued that the Judge had erred in finding that "a severely disabled adult in need of lengthy in-patient hospital treatment who for the time being is being treated as unable to make decisions as to care or medical treatment" could not be a status for the purposes of Article 14. Lord Justice Singh stated at paragraph 65

> "I have reached the conclusion that the Judge cannot be criticised for reaching the conclusion which he did on the

> question of status. He was right to observe that the question of capacity as such is not a status. First, the scheme of the 2005 Act was designed to move away from a status-based approach to a functional approach, in other words to focus on particular decisions at a particular time. Secondly, there needs to be reasonable certainty: a person's capacity may change from time to time and may do so quickly. That is not a sound foundation for the "status" required by Article 14."

> Lord Justice Peter Jackson stated at paragraph 76:
>
> "More fundamentally, I agree with Singh LJ (see para. 65) that there are good reasons of principle and practicality why decision-making capacity does not provide a sound foundation for an Article 14 status. In my view, status is likely to be found in the disability itself, and not in the separate matter of capacity and that is the conclusion to be reached in the present case."

179. Mr Stark submitted that the Defendant is the potential successor of a tenant who was permanently removed from her home as a result of her ill-health and who did not have capacity to assign her tenancy to her potential successor. He argued it is not capacity alone that defines status but being the daughter of a tenant with both of those particular characteristics. As a result of that status she was treated differently than two comparators in analogous situations (a) the potential successor of a tenant who dies at home and (b) the potential successor of a tenant who is permanently removed from her home as a result of her ill-health but is capable of assigning her tenancy i.e. retains capacity to assign her tenancy to a qualifying successor

180. Ms Caney submitted that the contention must be that the Defendant is discriminated against on the ground of her 'status' as a member of the family of a tenant who had ceased to have mental capacity to be able to assign their tenancy. Otherwise there would be no difficulty in succession. So the Defendant's argument relies upon the capacity of a third party as the essential defining characteristic.

181. Section 1(2) of the Mental Capacity Act 2005 provides that a person must be assumed to have capacity unless it is established that he/she lacks it. Section 2(1) provides that:

> "For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain." (Underlining added)

182. Section 2(2) provides that it does not matter whether the impairment or disturbance is permanent or temporary. People do lose and regain issue specific capacity.

183. Assuming status can be identifiable solely through the circumstances of others a characteristic is still required, which must be something more than being identified through the discrimination. As held in **MOC** an individual's own capacity is not a sufficient status for the purposes of Article 14. Status requires a characteristic which has the quality of reasonable certainty a fortiori when considering discrimination which concerns an ability to make a permanent change i.e. assign a tenancy. The main determinant of impaired capacity is cognition and any condition affecting cognition can affect capacity. For example, capacity can be impaired in head injury, psychiatric diseases, delirium, depression, and dementia. All can have varying impact on the functioning of, the mind or brain and mental capacity can change over the short and long term. I cannot accept Mr Stark's submission as it would mean that status for can rest on shifting sands. Whereas death is a certainty both in terms of inevitability and timing (i.e. when it occurred), capacity may be lost and gained and the material time may be down to a chance occurrence e.g. a temporary deterioration in symptoms, or manipulated, for instance by a relative who wished to delay the assessment until they had lived in the property with the tenant for the qualifying period of 12 months.

184. Mr Stark argued that there need not be uncertainty as the assessment of capacity could be at an identifiable point in time; the point at which a person permanently ceased to reside at the property. However this ignores the ability to regain capacity and in any event itself begs a question and introduces yet further uncertainty. It is in no way an answer to say that the issue could be determined ex post facto.

185. The lack of certainty also has practical significance. Mr Stark could not adequately address the obvious problem of what happens if a person does regain capacity and does not wish to assign and/or decides to return to the property. Unless a notice to quit had been served, and the relevant time period expired, the tenant could resume occupation even if the relevant property had for a period of time ceased to be their principal place of residence. There could be direct conflict with a relative who wishes to succeed to the tenancy (who may not want/agree with the tenant's return to the property). Given the advances in old age care and increased number of people who have temporary or respite care the potential for problems would be very real.

186. In my judgment identification through the incapacity of a third party cannot be sufficiently certain to provide status for an Article 14 claim.

Analagous position

187. The third question is whether the relevant person's situation is analogous to that of some other person who has been treated differently. In my judgment if the Article 14 argument had not failed on the ground of status it would have failed given this question. The two comparators relied upon by Mr Stark were (a) the potential successor of a tenant who dies at home and (b) the potential successor of a tenant who is permanently removed from her home as a result of her ill-health but is capable of assigning her tenancy i.e. retains capacity.

188. In my judgment these situations are not analogous. As I have set out if, as Mr Stark submits, a family member should succeed as the date the tenant ceased to occupy the dwelling house as their only or principal home by reason of not being able to continue residing there by reason of their ill health and also being incapable of assigning their tenancy, the original tenant would lose their rights even if they subsequently regained capacity. They could therefore be in direct conflict with their family member/s. This could not happen if the tenant died or voluntarily (and with capacity) assigned the tenancy. A right to succeed on a certain and permanent occurrence is not analogous to a right to succeed on an uncertain and possibly temporary basis.

Justification

189. The fourth question is whether the difference in issue is justified: is it a proportionate means of achieving a legitimate aim?

190. Mr Stark submitted that the difference in treatment arises solely as a result of the nature of the illness of the tenant. It is entirely unlike second succession cases where the person has never qualified to succeed or where the potential successor was unable to show a permanent relationship which is why 12 months was required to deal with transitory occupants not succeeding. Applying the test whether there is a reasonable relationship of proportionality to any legitimate aim, he submitted there is no legitimate aim met by such difference in treatment.

191. Mr Stark also referred to the failure of The Secretary of State to intervene to put forward a legitimate aim. He relied on the comments of Baroness Hale stated in **Gilman -v-Ministry of Justice** [2019] UKSC 44 when addressing the other status case of judicial officeholders and employees:

> "..But the second problem is that in this case there is no evidence at all that either the executive or Parliament addressed their minds to the exclusion of the judiciary from the protection

> of Part IVA . While there is evidence of consideration given to whether certain excluded groups should be included (such as police officers), there is no evidence that the position of judges has ever been considered. There is no "considered opinion" to which to defer.
>
> 36. That leads on to the third problem, which is that no legitimate aim has been put forward for this exclusion. It has not been explained, for example, how denying the judiciary this protection could enhance judicial independence…….
>
> 37. As no legitimate aim has been put forward, it is not possible to judge whether the exclusion is a proportionate means of achieving that aim.."

192. Mr Stark argued that there is no evidence at all that Parliament considered potential successors in the position of the Defendant. Moreover, there is no good reason for the difference in treatment. Had Mrs Dororthy Mailley gone into care simply because of physical issues she could have assigned her tenancy to the Defendant. The difference in treatment appears to be solely because no consideration to the issue of loss of capacity.

193. Given my decision on questions two and three (and the wholly understandable limits to the submissions in response on this issue) I do not intend to deal with this question in great detail. I note that at the time the Housing Act 1985 was being considered by Parliament the law in relation to capacity was covered (in part) by the Mental Health Act 1983 (the common law assumed capacity unless the contrary was proved). There were lacunae and legal uncertainties as identified in the Law Commission Report No.231 on Mental Incapacity, which was published in February 1995. It was ten years later before the Mental Incapacity Bill received Royal Assent; so the complex issue of capacity has been a long running concern.

194. Given the revised and refined approach to the assessment of capacity (which may be issue specific) and the increasing number of people spending time in care homes there is far greater likelihood of the complaint the Defendant raises in this case being an issue now than forty years ago. So the absence of debate on the issue of capacity in the context of tenancy succession in the early 1980's is unsurprising and in my view takes matters no further.

195. In my judgment as the law in relation to capacity has become clarified and there has been an increase in the number of people residing temporarily or permanently in care homes, the legitimate aim of protecting a tenant from a premature loss of tenancy

through succession arising from incapacity and /or undue influence or pressure has come more sharply into focus.

196. The section as drafted has the legitimate aim of certainty which it achieves by proportionate means. It is a bright line rule and a tenant, the landlord and any potentially qualifying co-habitee know where they stand. Potential injustice (if capacity were regained) and conflicts of interest between tenant and co-habitee (and between co-habitees) are avoided. That on occasion it may produce what appears on one view to be an unfortunate result is no justification for seeking to engineer an exception a fortiori one based on what can be a changing state of affairs such as capacity.

197. I say on one view as it is also unarguable the case that Parliament has been incrementally working towards reducing the rights of succession to a secure tenancy having regard to the extreme pressure which is placed upon local housing authority social housing stock and the legitimate and pressing need to ensure that social housing is allocated to those who are most in need of it. This is also a legitimate aim. A wide margin of appreciation is allowed to national authorities in relation to general measures of economic or social strategy, such that the European Court of Human Rights will usually respect the legislature's policy choice unless it is manifestly without reasonable foundation (see **R (DA) v Secretary of State for Work and Pensions** [2019] 1 WLR 3289).

198. In my judgment, section 87 of the 1985 Act achieves the legitimate aim of striking a balance between those who are entitled to succeed and those who are not which enables tenants, local authorities and others to identify with certainty those who are entitled and eligible to succeed to a secure tenancy and when. It also ensures that social housing is fairly and appropriately distributed in line with the incremental reduction in succession rights. It achieves these aims by proportionate means.

199. If I had accepted Mr Stark's submission, I would not have accepted his further submission that section 3 Human Rights Act 1998 allowed words to be read into statute to remedy the failure to comply with a convention right. As Lord Nicholls pointed out in **Ghaidan-v-Godin-Mendoza** [2004] 2 AC 557

> "All legislation must be read and given effect to in a way which is compatible with the Convention rights "so far as it is possible to do so". This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention."

200. Mr Stark proposed that the following can be read into Section 87B Housing Act 1985;

> "he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death *or the date at which the tenant permanently had to cease to reside at the dwelling-house due to ill-health and was incapable of assigning the tenancy to the member of the family at that date*."

201. In my judgment these words would not be sufficient to allow the section to be easily understood and interpreted as it must be, given that it is unarguably the case that capacity can be lost and regained. It would be crossing the constitutional boundary for the Court to determine what should happen given this issue and it would also be wrong for words to be read into a section which leave such an issue unresolved. If the words to be read in does not produce a clear and certain result then it if not properly possible to read them in.

Conclusion

202. For the reasons set out above the claim succeeds and an order for possession must be made. I leave it to Counsel to agree appropriate wording in an order that covers all consequential matters.

203. Finally, two points. Firstly, I am very grateful indeed to both Counsel for their written and oral submissions which were advocacy at its best. Focused, concise and extremely helpful.

204. Secondly, I wish Ms Mailley well for the future. I appreciate that my decision will come as a blow, but I truly do believe she can move forward in her life and has much to offer to others.