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Case No: QA-2022-BHM-000015

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ON APPEAL FROM NORTHAMPTON COUNTY COURT**
**HIS HONOUR JUDGE MURDOCH**
**(Claim No. F00NN562)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2024

**Before** :

**MR JUSTICE KERR**

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**Between :**

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| **(1) MR KEVIN NIGHTINGALE**<br>**(2) MRS CAROLINE NIGHTINGALE** | **Appellants / Defendants** |
| **- and –** | |
| **BROMFORD HOUSING ASSOCIATION LIMITED** | **Respondent / Claimant** |

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**Ms Marina Sergides** (instructed by **Shelter Legal Services**) for the **Appellants**
**Mr Michael Singleton** (instructed by **Bromford Housing Association Limited**) for the **Respondent**

Hearing date: 17 January 2024

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# Judgment

This judgment was handed down remotely at 10am on Wednesday, 31 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**Mr Justice Kerr :**

## Introduction

1. These appellants (**the Nightingales**) were the subject of a possession order made by His Honour Judge Murdoch on 21 March 2022 at Northampton County Court, following his judgment on 18 March 2022 allowing the possession claim of the respondent housing association (**Bromford**) against the Nightingales. They appeal with leave of Freedman J granted (on the basis of amended grounds of appeal) at an oral hearing at Birmingham Civil Justice Centre on 25 November 2022, after refusal on the papers by Ritchie J (based on the original grounds) on 29 June 2022.

2. The Nightingales were tenants of one of Bromford's properties, 9 Harpers Brook, Towcester, Northamptonshire. They have lived there with their children since 2013. After numerous incidents of anti-social behaviour and complaints of criminal behaviour from neighbours and others, Bromford decided in late 2018 not to offer renewal of their five year fixed term tenancy, which expired in September 2018. In April 2019, Bromford served a notice under section 21 of the Housing Act 1988, requiring possession to be given up in June 2019.

3. That led to the proceedings below, which were delayed by the Covid pandemic, such that judgment was not given until March 2022. The judge rejected the defence that (among other defences not now relevant) evicting the Nightingales would breach section 15 of the Equality Act 2020 (**the Act**) (discrimination arising from disability) because it would unlawfully discriminate against their son Calum[1] by treating him unfavourably because of something arising in consequence of his disability; Calum being disabled with Attention Deficit Hyperactivity Disorder (**ADHD**) causing him to behave anti-socially.

4. The amended grounds of appeal are: first, the judge misapplied the causation tests in section 15 when considering whether Calum's disability and consequent anti-social conduct materially influenced Bromford's decision to seek possession; second, that in considering whether Bromford could raise a proportionality defence, the judge wrongly took account of Calum's behaviour; and third, that the judge failed to assess proportionality based on the factual position at the date of trial; or, alternatively, decided irrationally that the proportionality defence succeeded.

## Facts and judgment below

5. The facts are mainly those found by the judge below, together with some matters not in dispute. The Nightingales have five children born from February 1994 to February 2008. Their five year fixed term tenancy began on 9 September 2013. The two eldest children moved out before any possession proceedings had started. Of the three youngest, Kaitlin, born in November 2002, and Calum, born in June

[1] I will use spellings of names as in documents from the respective parties, rather than as in the judgment below.

2006 (and therefore now about 17½), caused difficulty by behaving anti-socially. There were numerous allegations starting as early as September 2013, including against the two eldest children until they moved out.

6. It is (and was below) agreed that Calum's ADHD is a disability within the Act and thus he has that protected characteristic. However, it was not diagnosed until later, as I will explain. In October 2014, a year into the five year term, the Nightingales signed an "acceptable behaviour contract". After that, the judge noted, the frequency of complaints decreased but was not eliminated. He recorded from police evidence that about 46 historic allegations of anti-social behaviour had been made over the years, against the wider family but specifically and especially against Mr Nightingale and Calum.

7. In March 2017, Calum was referred to the local authority's Child and Adolescent Mental Health Services (**CAMHS**). In May 2017, there were complaints against Kaitlin which came to the notice of Bromford. In July 2017, Mrs Claire Brindley Taylor became Bromford's housing officer responsible for the Nightingales' tenancy. She gave detailed evidence below on complaints by three other residents of extreme seriousness about the behaviour of Calum and the wider family. For example, a resident had told Mrs Brindley Taylor that it was:

> "a nightmare living near to the defendants and there had been many occasions when the first defendant especially had threatened all the people living nearby that he was going to knock on everyone's door and find out who had complained and 'kick their heads in' … there was no doubt the first defendant would carry out these threats if he did find out who had complained."

8. Mrs Brindley Taylor met the family on 11 January 2018. There were no "tenancy issues" apart from Calum having been in trouble with the police recently. A multi-agency meeting was being arranged following Calum's referral to CAMHS. Mrs Brindley Taylor would be invited. She did indeed attend a multi-agency meeting about Calum, on 10 May 2018. The discussion also touched on Kaitlin and the wider family. Those reporting incidents do not always want police action taken, she was told.

9. After some follow up, Mrs Brindley Taylor met the Nightingales on 25 May 2018. Mr Nightingale identified Calum as the "troublemaker", referred to his "autism" and ADHD and said the family did not want to move from the property. At a further inter-agency meeting on 26 June 2018 no real progress was recorded. Calum was "throwing stones at other children". His school had requested a special needs assessment. Mrs Brindley Taylor learned soon afterwards that Calum had an appointment with CAMHS on 1 August 2018.

10. Ahead of that planned meeting, on 23 July 2018, Bromford wrote to the Nightingales stating an intention to offer a further five year tenancy on expiry of the current one. Bromford proposed a meeting on 7 September, at which a new tenancy agreement could be signed. However, the offer to renew the tenancy was not firm. The letter also stated, in a passage quoted by the judge:

> "This offer is conditional on you maintaining your tenancy in a satisfactory

> manner. If you fail to do so between now and the date on which you sign your new tenancy this may result in this offer being revoked and legal action being taken to bring your tenancy to an end."

11. After that, over the following four months or so, Bromford received disclosure reports from the local police about the allegations and complaints against Nightingale family members. Most were against Calum though at least one was against Kaitlin. They were serious enough to make Bromford change its mind about offering a renewed tenancy.

12. The judge recorded some of them in his judgment: staring at a resident, mouthing foul language at the resident and trying to intimidate them (in August 2018); loud music, shouting, swearing, dog barking and suspected drug dealing (September 2018); residents having to keep their windows closed to avoid exposure to the noise, disturbance and smell of drugs (September 2018); open cannabis smoking in the street; and the like.

13. The proposed visit to sign the new tenancy did not take place as planned on 7 September 2018. The five year term expired the next day, on 8 September. The Nightingales pleaded that the decision not to renew the tenancy was made on 28 September 2018, as the judge recorded in his judgment (at paragraph 6). Bromford did, indeed, write to the Nightingales that day referring to what it later described (in a letter of 4 December 2018 to which I am coming) as "serious criminal matters".

14. On 26 October 2018, Kaitlin was arrested on suspicion of causing actual bodily harm. On 22 November 2018, the local police asked Calum and Kaitlin to sign further acceptable behaviour contracts. At some point in around November 2018, Bromford changed its mind about offering a new tenancy and explained its position in its letter of 4 December 2018 in the following passage quoted by the judge:

> "… you were told that providing these issues were resolved and there were no further incidents we would be able to offer you a further 5-year fixed term tenancy. We wrote to you on 28th September 2018 informing you we had been made aware of serious criminal matters involving your children in the locality of your property and the offer made on 25th May had been revoked and under consideration.
>
> We are now writing to confirm that you will not be offered a further tenancy and this is due to the following points. Police information revealed confirms that Callum and Caitlin have been involved in 29 incidents of criminal behaviour between 30th September 2017 and 26th October 2018 including assaults, public order, robbery, theft, hate crime, criminal damage and arson; continued reports of anti-social behaviour including footballs being kicked at fences, your elder children when under the influence of alcohol shouting, swearing, throwing stones, playing loud music, intimidating behaviour, drug use, dog barking and rubbish left on the drive.
>
> Despite you being aware on several occasions at both your property and at multi-agency meetings that your children were involved in this behaviour, you have done nothing to prevent further incidents occurring."

15. The letter than concluded by saying Bromford had decided not to offer a renewed tenancy and that the letter "provides you with 6 months' notice that it is our

intention to end your tenancy. Your tenancy will end on 4th June 2019, you will receive a notice confirming this end date in due course."

16. On 2 April 2019, the police informed Bromford that the Nightingales, or one of them, had reported to police that Calum had been diagnosed with ADHD. Two days later, on 4 April, Mrs Brindley Taylor handed to Mr and Mrs Nightingale a notice under section 21 of the Housing Act 1988 saying that possession of the property was required on 4 June 2019, the date the Nightingales had already (back in December 2018) been told was the end date for the tenancy.

17. After that notice had been served, allegations of anti-social behaviour continued. On 1 May 2019, Mrs Brindley Taylor received an email from a resident about drug dealing from the property. There were further complaints on 25 May 2019 and beyond. The notice to quit expired on 4 June and the claim was brought the next day, 5 June 2019. The Nightingales' defence, served on 24 June 2019, was wide ranging but I need only record here that it included an allegation that the notice to quit was invalid because it was discriminatory against Calum, who was disabled by autism and ADHD, causing him to engage in behaviour such as punching, pinching, kicking, spitting, graffiti, throwing objects and using threatening language.

18. In its reply served on 8 July 2019, Bromford (among other contentions I need not set out here) denied that it had acted unlawfully in serving the notice to quit and seeking possession. The decision to evict had been made, it said, in full compliance with its public law duties based on the knowledge and information available to Bromford at the time. Bromford had not known of any disability on Calum's part at the time it made its decision to seek possession. Even if the disability existed, eviction and possession proceedings were and remain "a proportionate means of achieving a legitimate aim in this case".

19. While the claim was proceeding towards trial, there were further reports of anti-social behaviour by Calum, recorded by the judge below: more drug dealing in May 2019, racing a motorbike on the estate in June 2019, use of foul language and the teenage children drinking alcohol in the back garden in July 2019 and falling over in the road outside the properties. And the judge quoted from Mrs Brindley Taylor's statement the following passage:

> "On 13th October, Callum was reported as having stolen a pair of boxing gloves. On 13th November 2019, reported by the first defendant that Callum had gone through the second defendant's handbag and stolen cigarettes … . Returned home intoxicated by alcohol and exposed himself to the defendant while making lewd sexual comments. 15th December, destroying the property, made a hole in the wall and thrown plaster at family members and on 28th December Callum behaved badly during the day, resulting in his X-box being confiscated. Callum reacted by throwing his shirt(?) at the first defendant's face and slapping the second defendant."

20. In the midst of those reported incidents, a report was prepared by a psychologist, Mr Simon Claridge, dated 28 October 2019, striking a more optimistic note. He was instructed on 26 September 2019 and then met Calum and his father, at some point between 26 September and 29 October 2019. He described Calum as being then aged 13 years and 4 months. He confirmed that the symptoms exhibited were

those of ADHD and that Calum had a learning disability. The judge quoted from Mr Claridge's report the following passage:

> "In milestones, that significant steps have been taken and these have systematically reduced the level of inappropriate behaviours undertaken by Callum. He is now significantly more compliant to expected behaviours and is presenting as not now being a nuisance within the community. There are still some difficulties in the home but these are kept within the home nowadays. Medication appears to have significant positive effect, is ongoing and intervention of the Multisystemic Team also helps significantly to the extent the family's case has now been closed and the family have worked openly and honestly with reflection … and the result has been very positive."

21. Mrs Brindley Taylor's witness statements were dated 16 October 2019 and 24 January 2020. She made no further statement after that. Bromford relied at trial on the allegations against the family generally and not specifically on the allegations concerning Calum's behaviour. In an earlier "public sector equality duty" assessment document dated 23 January 2020, Bromford referred to Mr Claridge's diagnoses of ADHD and learning difficulties and stated that in the possession proceedings it would "no longer rely on the allegations against Calum"; rather, the "action brought is in respect of the Defendants and the other children".

22. The Covid emergency then struck before the case could be tried. It was listed several times for a fully contested hearing but could not be heard. As is well known, lockdowns started from March 2020. For a time, there was an automatic stay of possession claims such as this one. When the case eventually did come to trial by video link starting on 31 January 2022, Mrs Brindley Taylor was called by Bromford and produced her notes and evidence dealing with the period up to January 2020. Bromford did not seek to update its evidence beyond January 2020.

23. Counsel for the Nightingales was therefore able to say in a supplementary skeleton argument that there were no further allegations of anti-social behaviour since the last one, alleged to have been done on 28 December 2019. In the same skeleton counsel informed the judge that Kaitlin was pregnant and due to give birth in March 2022, but was still living at the property. Other than that information (which the judge noted in his judgment, at paragraph 53), he had no updated evidence beyond the state of the evidence as it stood in January 2020.

24. In an extempore judgment given on 18 March 2022, the judge allowed the claim and made an order for possession of the property. He set out the facts in some detail. So far as relevant for the purpose of this appeal, he decided as follows. After some discursive passages, he reasoned at paragraph 48 that service of the notice to quit:

> "was not predominantly as a result of Callum's behaviour. [It] incorporated Bromford's analysis of the Nightingale family in a broader sense: the behaviours of Caitlin, Connor and Mr Nightingale. It also incorporated the intimidation felt by neighbours which emanated from Mr Nightingale rather than any of the children and for that reason alone, in my judgment, the Equality Act defence must fail because the service of the Section 21 Notice is not significantly influenced by any discrimination as a result of Callum's protected characteristic. Service of the Section 21 Notice was an holistic approach to solving the difficulty caused by the Nightingales rather than Callum."

25. He did, however, go on to consider Bromford's defence of justification founded on the proposition that service of the notice to quit was a proportionate means of achieving a legitimate aim. At paragraphs 49 through to 60, he considered this issue. The aim was to protect other residents. That was legitimate. Was eviction was a proportionate means of achieving it? That question had to be considered at the date of trial, the judge noted, on the basis of Lady Hale DPSC's observations in *Aster Communities Ltd (formerly Flourish Homes Ltd) v. Akerman-Livingstone* [2015] AC 1399, at [41].

26. The judge concluded at paragraph 60 that no steps short of eviction would serve to achieve Bromford's legitimate aim of protecting other nearby residents:

> "In my judgment at some stage a Housing Association is entitled to say to itself "Enough is enough. We can only offer so much support; we can only try to prevent anti-social behaviour for so long if working with a family and at some stage we have to look at the wider community, our other responsibilities to our other tenants" and this claimant frankly has reached that point and in my judgment they are entitled to reach that point; that in my judgment this would have been a proportionate means of achieving a legitimate aim. There was no more wriggle room, nothing more that the claimants could offer that would have prevented neighbours from feeling intimidated, neighbours being able to go back into their own gardens and the like, so if I had needed to, I would have reached the conclusion that possession was a proportionate means of achieving a legitimate aim."

## The first ground of appeal: misapplying causation tests in section 15 of the Act

27. The first ground is that in deciding whether Bromford sought possession because of allegations of nuisance arising in consequence of Calum's disability, the judge erred in law in applying a test of causation. It is said he asked himself the impermissible question: "but for Calum, would a section 21 notice have been served?" and that this was a misapplication of the provisions of section 15 of the Act.

28. The Act applies to landlord and tenant relationships. By section 35:

> "(1) A person (A) who manages premises must not discriminate against a person (B) who occupies the premises—
> (a) …
> (b) by evicting B (or taking steps for the purpose of securing B's eviction);
> (c) … ."

29. I remind myself of the operative words of section 15(1)(a): a person, A, discriminates against a disabled person, B, if "A treats B unfavourably because of something arising in consequence of B's disability … ." To decide whether that happened in this case, I start with two matters not disputed below nor in this appeal: first, that Calum was at the material times disabled within the meaning of the Act because of his ADHD and learning difficulties; and second, that his acts of anti-social behaviour were "something arising in consequence of his disability".

30. Next, by section 15(2), section 15(1) "does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the

disability." There was evidence and argument below about when Bromford could reasonably have been expected to know that Calum had his disability. The judge's finding was that Bromford "could reasonably have been expected to know that Callum had a disability by 25th May 2018" (judgment, paragraph 30). There is no cross-appeal against that finding which therefore stands.

31. The issue for the judge was then whether by bringing the eviction proceedings Bromford treated Calum unfavourably because of his anti-social behaviour. The judge addressed that issue in some detail at various points in his judgment, from paragraph 33 to paragraph 48. He opened the discussion at paragraph 33:

> "Was the decision to serve the Section 21 Notice and/or commence proceedings done solely or predominantly as a result of Callum's disability or, as the defendants put it that the service of the Section 21 Notice was based upon a background of anti-social behaviour, the major cause of which was a disability of Callum, and the defendants contend that that is fatal. And that the Section 21 Notice was unlawful from the start and cannot be rectified by seeking possession on a different basis to that on which the Section 21 Notice was served. I was referred to Lord Nicholls in *Nagarajan v London Regional Transport* who said: 'If protected acts have a significant influence on the outcome, discrimination is made out.'"

32. He then went on to say in the next paragraph that he would put the matter "slightly differently" by asking himself: "But for Callum, would a Section 21 Notice have been served?" The Nightingales criticise this formulation of the question to be asked. After going through some of the factual history, the judge observed that Bromford changed its mind about offering a new tenancy during the period of about 4½ months. He asked himself (paragraph 38), what changed Bromford's mind?

33. His answer was that it was "police disclosure" including of "serious reports in respect of Callum's behaviour" and of some allegations against Kaitlin; but, he noted at paragraph 40, "the majority of the allegations were against Callum". He then recited further reports of anti-social behaviour which were not just about Calum, but about the conduct of "the wider family" (paragraph 45).

34. At paragraph 47, the judge stated, with my italics:

> "… the decision to serve the Section 21 Notice *arose from the existing history, coupled together with the ongoing behaviours*. I accept, and *it is clear, that some of the most obvious anti-social behaviour was connected to Callum and that that is therefore connected to his behaviours, which is connected to his ADHD*, but that was not the only issue. The issue facing the claimant was that the wider family were potentially dealing with drugs, certainly there were claims of drug use happening at the property, and there was this history of intimidation and continuing ongoing intimidation of neighbours, such that some neighbours were unable to use their own gardens and felt intimidated if they did."

35. In the italicised words the judge finds that Calum's anti-social behaviour, arising from his disability, was a factor that contributed to the decision of Bromford to seek possession of the property instead of granting a new tenancy. However, in the next paragraph (again, with my italics) he said that service of the notice to quit was "not *predominantly* as a result of Callum's behaviour"; it also incorporated the wider

analysis of the family and the intimidation felt by neighbours "rather than any of the children"; and "for that reason alone … the Equality Act defence must fail because the service of the … notice is *not significantly influenced by* any discrimination as a result of Callum's protected characteristic".

36. The judge's own findings demonstrate that Calum's behaviour and disability, in Lord Nicholls' words in *Nagarajan* [2000] 1 AC 501, at 513B, "had a significant influence on the outcome". Where that is so, Lord Nicholls added, "discrimination is made out". The judge's ensuing contrary conclusion is, then, untenable. After finding that Calum's disability and the behaviour that resulted from it was a factor contributing to the decision to seek possession, the judge then found, inconsistently, that service of the notice seeking possession was not significantly influenced by the behaviour that, everyone agreed, resulted from Calum's disability.

37. To state the obvious, it does not follow that because the decision to seek possession was made for broader reasons than just Calum's anti-social behaviour, his anti-social behaviour played no significant role in the decision. Bromford's attempt *ex post facto* to excise Calum and his behaviour from the grounds of decision was as unreal as was the judge's acceptance of Bromford's argument that it did so.

38. The first ground of appeal is therefore made out, but that only helps the Nightingales if they can also succeed in impugning the judge's finding that Bromford's defence of justification succeeded. The defence of justification is shorthand for the discriminator being able to show, under section 15(1)(b) of the Act, that "the treatment is a proportionate means of achieving a legitimate aim". The judge, rightly, went on to consider that issue which he needed to do in case his reasoning was (as I have found) wrong in relation to the first issue.

**The second ground of appeal: wrongly taking account of Calum's conduct when assessing proportionality**

39. Whereas in the first ground of appeal, the Nightingales criticised the judge for wrongly *excluding* the impact of Calum's behaviour when assessing Bromford's reasons for seeking possession, in the second ground of appeal, they criticise the judge for wrongly *including* the impact of Calum's behaviour in assessing Bromford's justification defence, i.e. in assessing whether Bromford's unfavourable treatment of Calum was a proportionate means of achieving a legitimate aim.

40. The Nightingales submit, through Ms Sergides, that since the judge was bound to assess the justification defence as at the date of trial; and that since by then Bromford had disavowed Calum's conduct as a causative factor in the decision to seek possession, the judge should have taken Bromford at its word and disregarded Calum's behaviour when carrying out his assessment of justification, i.e. proportionality.

41. The Nightingales point out that by the time of the trial, Bromford had declared in its public sector equality duty assessment document of 23 January 2020, that it would "no longer rely on the allegations against Calum"; rather, the "action brought is in respect of the Defendants and the other children". That, say the Nightingales,

meant that the judge was bound to exclude the effect of Calum's behaviour when assessing the effect of it on neighbours.

42. They submit that many of the problems caused by Calum's behaviour in the latter part of 2019, after the decision to seek possession had been taken, were internal to the family, largely contained within the home and reported by Calum's own parents and not neighbouring members of the public. The judge ought to have accepted, as Bromford accepted in January 2020, that the intimidation of neighbours and damage to their wellbeing no longer came from Calum by the end of 2019.

43. I think this ground of appeal is misplaced. Calum's behaviour was relevant to the decision to seek possession and (as I have said) the judge was wrong to decide otherwise when applying section 15(1)(a) of the Act. And since Calum's behaviour (contrary to the judge's conclusion) materially influenced the decision to seek possession, the judge was right to take his behaviour into account when assessing proportionality; and in that context was right, implicitly, to reject Bromford's late and *ex post facto* disavowal of Calum's conduct as a factor in its decision.

44. In short, the judge was right to include Calum's behaviour in the assessment of proportionality but wrong to exclude it in the assessment of causation. It was undeniably relevant to both issues. The second ground of appeal is therefore not made out and I come to the third and final ground, which was permitted by amendment at the hearing before Freedman J.

**The third ground of appeal: failing to assess proportionality based on factual position at the date of trial; or irrationally deciding the proportionality defence succeeded**

45. The third ground is that the judge failed to assess Bromford's justification defence on the basis of the factual position at the date of the trial. Alternatively, it is said that the judge's decision that the defence succeeded was irrational and cannot stand.

46. I reiterate that if A has treated B unfavourably because of something arising in consequence of B's disability, discrimination is made out if (per section 15(1)(b)) "A cannot show that the treatment is a proportionate means of achieving a legitimate aim.". The burden of proof is thus squarely on B, the alleged discriminator. The real question in this appeal is whether the judge's decision that Bromford had discharged that burden is defensible.

47. The judge was referred to the Supreme Court's decision in the in *Aster Communities Ltd* case and, as I have said, referred to it in his judgment as authority for the proposition that the court should make its assessment of proportionality on the basis of the factual position as at the date of trial. I too was referred to that case (among others I need not cite here) and to the discussion of it in the later judgment of Sir Colin Rimer (with which Simon and Asplin LJJ agreed) in *Paragon Asra Housing Ltd. v. Neville* [2018] EWCA Civ 1712, [2019] PTSR 34, where the possession order at issue had been suspended.

48. Neither party contended below that the judge would be wrong to conduct his proportionality assessment based on the factual position as at the date of trial. Both

agreed that it would be wrong to confine the assessment to an examination of the facts as they stood at the time of the housing authority's decision. Bromford stated in its pleaded case that as a public authority it would continue to be mindful of its duty to keep the decision to seek possession under review. Both parties relied on events up to the end of 2019, after the decision to seek possession had been made in later 2018, as relevant to the proportionality assessment.

49. The trial was, however, significantly delayed. It did not start until 31 January 2022. As the judge noted at the start of his judgment (paragraph 2):

> "This case has a slightly unfortunate procedural history in that proceedings were issued as long ago as June 2019 and the matter has been listed for a trial on a number of occasions. Covid and the coronavirus regulations of course intervened but in itself the fact that a hearing has had to be adjourned on a number of occasions has caused further delay … ."

50. The judge further commented a little later in his judgment (paragraph 16):

> "In the particular circumstances of this case, effectively the fact that it has been listed for a fully contested four-day trial on a number of occasions, in which both counsel have very helpfully provided not only the court but each other with detailed submissions setting out fully within those submissions the law and their analysis of the factual matrix to that law, the defendant's case has been obvious for a very long period of time. Indeed, I note that one of the detailed skeletons that I have got in front of me goes back to February 2020, so some two years prior to the trial in front of me. …"

51. There was no reference in the judgment to facts of potential relevance to the proportionality assessment occurring later than late December 2019, with one exception. The exception was that (as the Nightingales' counsel, Ms Sergides, informed the court in a supplementary skeleton argument) Kaitlin had become pregnant and was due to give birth in March 2022. The judge mentioned that point in his judgment. At paragraphs 52 and 53 he said this:

> "52. In other words, and it is put by those on behalf of the defendant that what the Supreme Court was saying was you've got to deal with matters at the time of the hearing rather than at an earlier time, and I agree that makes sense. For example, if Callum had now reached 18 and had been re-housed, that would have to be a factor that would be relevant to consider what the right order would be at a trial when some of the issues are pertinent to behaviours of someone who isn't any longer in the property. So it must be right that you consider facts as they are at trial.
>
> 53. So what are the facts at trial? The defendants' wider family have continued to engage in anti-social behaviour between the decision to grant a new fixed term tenancy and the service of the Section 21 Notice. Caitlin is now pregnant and has made an application under the Homelessness Provisions in the Housing Act but is still, at trial, within the family home. The claimant's records show that the following incidents took place even after the Section 21 Notice was served, and again I turn to Mrs Brynley Taylor's statement and just take some as illustration."

52. And the judge then went back to the position as it stood before and up to the end of 2019. He made no further reference to any developments or other relevant matters occurring during the two year period from January 2020 to January 2022. He

therefore missed the obvious point that the party bearing the burden of proof, Bromford, had not relied on a single incident of anti-social behaviour in the two years leading up to trial.

53. There was no evidence before the court at trial that any member of the Nightingale family had behaved badly in any way during that two year period. On Bromford's evidence at trial, it could not be submitted to the judge that the Nightingales were other than model tenants during that two year period. Mrs Brindley Taylor had herself said back in January 2018 that anti-social behaviour was the only issue; there was no evidence of other problems such as rent arrears or dilapidations.

54. So the judge did not have any evidence before him in respect of the period from January 2020 to January 2022 of threats to other local residents, neighbours feeling intimidated, police disclosure of arrests, criminal investigations or charges, or anything else untoward. If there was evidence that the Nightingales' unacceptable conduct continued during that period, Bromford did not put it before the court. Nor, I am told, did Bromford make any application to adduce further evidence beyond the two statements of Mrs Brindley Taylor dated 24 January 2020.

55. It was not for the Nightingales to demonstrate by further evidence a change of circumstances since the end of 2019. They did not bear the onus of showing that eviction would not be a proportionate means of achieving a legitimate aim. The change of circumstances was the glaring absence of any evidence of misbehaviour after the start of 2020, in contrast to the copious evidence of misbehaviour before the start of 2020.

56. In addition, Mr Claridge, the psychologist, had reported in October 2019 that Calum's behaviour was on a path to improvement with increased support. Bromford did not adduce any evidence of facts occurring after the end of 2019 to show that the hoped for improvement had not materialised. Ms Sergides was therefore able to submit in her supplementary skeleton dated 30 January 2022 that there have been "no recent allegations of [anti-social behaviour]" committed after 28 December 2019.

57. The judge did not address that submission. He focussed on the incidents that occurred up to the end of 2019 which were described in Mrs Brindley Taylor's evidence. Mrs Brindley Taylor was cross-examined at trial by Ms Sergides, but did not in her cross-examination give evidence of any acts of anti-social behaviour committed after the end of 2019. Hence, the judge makes no reference in his judgment to any such incidents.

58. I am driven inescapably to the conclusion that the judge did not, contrary to his own self-direction, conduct his proportionality assessment based on the factual position as at the date of trial. That factual position included the absence of any evidence supporting the proportionality defence during the two years leading up to trial. The judge did not take that absence of evidence into account. He should have done. Instead, he conducted his proportionality assessment based on the position as at January 2020, when Mrs Brindley Taylor's narrative ceased.

59. I therefore find that the third (amended) ground of appeal is well founded. To determine whether the notice to seek possession remains lawful, i.e. proportionate within section 15(1)(b) of the Act, the court needs to consider the up to date evidential position. There will have to be a further hearing at which the defence of justification, if still pursued, can be considered on up to date evidence, i.e. evidence of the position in 2024 when the remitted hearing takes place.

## Conclusion

60. For those reasons, I will set aside the judge's possession order and remit the matter back to him (or to another judge of the same court if he is not available) for further consideration of the proportionality defence in the light of this judgment and in the light of the up to date evidential position as at the date of trial – by which I mean, as at the date of the hearing on remission. The parties are directed to ask the county court for a date for the further hearing, with a time estimate of one day, unless otherwise agreed or directed by the county court.

61. I would expect the parties to file up to date written evidence. Rather than have an unnecessary case management conference, I will direct that written evidence limited to updating evidence relevant to the proportionality defence and covering only the period from January 2020 onwards, shall be exchanged and filed at Northampton County Court not later than two weeks before the date fixed for the remitted hearing. The parties should have the authors of their witness statements available for cross-examination at the hearing, if the other party so requires.