HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 43

on appeal from: [2007]EWCA Civ 763

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Mayor and Burgesses of the London Borough of Lewisham (Appellants) v Malcolm (Respondent)

Appellate Committee

Lord Bingham of Cornhill
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Neuberger of Abbotsbury

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LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Scott of Foscote and Baroness Hale of Richmond. I gratefully adopt their summaries of the background and issues in this appeal. I can state my own conclusions relatively briefly.

2. The conduct of Mr Malcolm in subletting and ceasing to live in the flat let to him by the London Borough of Lewisham ("Lewisham") had the effect of destroying the security of tenure he had previously enjoyed and breaching the terms of his tenancy so as to give Lewisham what was, in terms of housing law, an unanswerable claim to possession. To defeat that claim Mr Malcolm relied, unsuccessfully before Her Honour Judge Hallon but successfully before the Court of Appeal (Arden, Longmore and Toulson LJJ: [2007] EWCA Civ 763, [2008] Ch 129), on the terms of sections 22 and 24 in Part III of the Disability Discrimination Act 1995. The question is whether, on the facts and a correct understanding of the law, he was entitled to do so.

3. By section 22(3)(c) of the 1995 Act, "It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises - ... by evicting the disabled person, or subjecting him to any other detriment". Section 24(1) provides that, for the purposes of section 22, a person discriminates against a disabled person if "(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and (b) he

cannot show that the treatment in question is justified". The permissible grounds of justification are specified in the section and none of them, it is agreed, is applicable in this case. By section 1, a person has a disability for the purposes of [the] Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities."

4. These are the key provisions on which this appeal turns. They must be read purposively and in the context of the Act as a whole. It was an ambitious and complex Act, seeking (as I understand) to prevent disabled people being treated disadvantageously because of their disability. It sought to do this in a primarily negative way, by proscribing as unlawful certain acts of discrimination in several fields. As has been pointed out (*Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, ed Schiek, Waddington and Bell, 2007, p 132) the Act adopted a medical and not a social model of disability.

5. There are dangers in formulating lists of questions to be asked in situations such as this, since questions which are apposite in one case may be inapposite in another, and a jurisprudence may grow up around the terms of the questions when attention should be concentrated on the meaning and effect of the legislative text in question. But I think there are certain questions which call for an answer in this case, not all of which feature expressly among the issues framed by the parties.

(1) Was Mr Malcolm at the relevant time a disabled person?

6. The relevant time can only be the time of the action complained of. The judge, in a finely balanced decision (paras 32-42 of her judgment), concluded that Mr Malcolm was not at the relevant time a disabled person. The Court of Appeal took a different view ([2008] Ch 129, paras 69-94, 123-131, 149) for reasons which I would for my part accept. Mr Malcolm suffered, as he had for some years, from a well-known form of mental illness which had led to a number of hospital admissions, some of them involuntary. His illness was not disabling when controlled by appropriate medication, but when such medication was not being given his ability to carry out normal day-to-day activities was substantially impaired, as evidenced by his inability to do his job and his consequent dismissal. The reasoning of the Court of Appeal is to my mind persuasive, and I need not repeat it.

(2) To what treatment was Mr Malcolm subjected?

7. In the Court of Appeal it was common ground that the treatment alleged to constitute discrimination was Lewisham's claim to possession, although there was some argument about whether the notice to quit would also constitute unlawful discrimination (para 35). As Toulson LJ pointed out (para 144) the eviction process involves a number of steps (the service of the notice to quit, the issue of a claim form, the obtaining of an order for possession and, perhaps, the enforcement of a warrant for possession). It seems to me, however, as to him, to be artificial to break the process down into different stages. The treatment complained of was Lewisham's conduct in seeking possession of the flat.

(3) What was the reason for this treatment?

8. In the Court of Appeal it was common ground that the reason for that treatment was the subletting of the flat by Mr Malcolm (para 35). As a result he was no longer living there. On discovering that Mr Malcolm's sub-tenants were living in the flat and he was not, Lewisham took immediate steps to obtain possession.

9. It seems to me, as held in a very different context in *Sivakumar v Secretary of State for the Home Department* [2001] EWCA Civ 1196, [2002] INLR 310, para 23, adopted in *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856, para 22, that the task of the court is to ascertain the real reason for the treatment, the reason which operates on the mind of the alleged discriminator. This may not be the reason given, and may not be the only reason, but the test is an objective one. Here, it seems to me inescapable that Lewisham, as a social landlord with a limited stock of housing and a heavy demand from those on its waiting list, acted as it did because it was not prepared to allow tenancies to continue where the tenant was not living in the premises demised. That, I think, was the real reason for the treatment, a reason in no way inconsistent with that which the parties agreed. Lewisham could have been the subject of reasonable criticism, and might even have been judicially reviewed, had it acted otherwise than it did in any ordinary case.

(4) Did that reason relate to Mr Malcolm's disability?

10. As well explained by Lindsay J in *H J Heinz Co Ltd v Kenrick* [2000] ICR 491, para 27, and *Rowden v Dutton Gregory* [2002] ICR 971, para 5, with reference to section 5 of the Act (which uses similar language) it seems clear that the draftsman of section 24(1)(a) deliberately eschewed the conventional language of causation in favour of the broader and less precise expression "relates to". In this context I take the expression to denote some connection, not necessarily close, between the reason and the disability. Judged by this yardstick, most of the decided cases and frequently-discussed examples fall into place. Thus, for example, the reason for the dismissal of the claimant in *Taylor v OCS Group Ltd* [2006] EWCA Civ 702, [2006] ICR 1602, namely the violation of the confidentiality of a colleague's computer files, had nothing whatever to do with his disability, which was deafness. By contrast, the dismissal of the absent claimant in *Clark v Novacold* [1999] ICR 951, the refusal of entry to a blind person with a dog or the refusal of service to a customer with eating difficulties (hypothetical examples considered in that case and elsewhere), or the dismissal for slowness of a one-legged postman (a hypothetical example discussed by Lindsay J in *Heinz v Kenrick*, above), would all, in my opinion, disclose a connection between the reason for dismissal and the disability in question. But in borderline cases it will be hard to decide whether there is or is not an adequate connection.

11. I would accept that, but for his mental illness, Mr Malcolm would probably not have behaved so irresponsibly as to sublet his flat and moved elsewhere. He had, after all, worked in Lewisham's housing department for a time, and must have been well aware of the ground rules. But Lewisham's reason for seeking possession – that Mr Malcolm had sublet the flat and gone to live elsewhere – was a pure housing management decision which had nothing whatever to do with his mental disability. With some hesitation I would resolve this issue against Mr Malcolm.

(5) With the treatment of what comparators should the treatment of Mr Malcolm be compared?

12. In *Williams v Richmond Court (Swansea) Ltd* [2006] EWCA Civ 1719, para 41, Richards LJ suggested that section 24(1) of the 1995 Act required the court " ... (iv) to identify the comparators, namely persons to whom the reason does not or would not apply ...". This formulation was quoted with apparent approval in the present case by Longmore LJ (para 132) and Toulson LJ (para 143), although somewhat discounted by Arden LJ (paras 35-36). It seems to me that Richards LJ's formulation

exactly reflects the statutory language and focuses accurately on the comparison which section 24(1)(a) requires.

13. The problem of identifying the correct comparator is one which Mummery LJ examined with care and in detail in *Clark v Novacold*. The problem can be re-stated on the facts of the present case, assuming (contrary to the conclusion I have expressed in answer to question (4) above) that Lewisham's treatment of Mr Malcolm was for a reason which related to Mr Malcolm's disability. Are "the others" with whose treatment the treatment of Mr Malcolm is to be compared (a) persons without a mental disability who have sublet a Lewisham flat and gone to live elsewhere, or (b) tenants of Lewisham flats who have not sublet or gone to live elsewhere, or (c) some other comparator group, and if so what?

14. As I understand the judgment in *Clark v Novacold*, the correct comparison is said to be with group (b). But that, I think, is difficult to accept for the reason succinctly given by Toulson LJ (para 155):

> "the complainant is logically bound to be able to satisfy the requirement of showing that his treatment is less favourable than would be accorded to others to whom the reason for his treatment did not apply. For without the reason there would not be the treatment."

The truth of that observation is vividly illustrated by the present case: if a tenant had not sublet and gone to live elsewhere Lewisham would not, in the absence of other grounds, have contemplated seeking possession (or, probably, been entitled to do so), and thus no question of discrimination could ever have arisen.

15. A more natural comparison, as it seems to me, is with group (a). On this analysis the comparison would fall to be made on the bases rejected in *Clark v Novacold*: with a person who had a dog but no disability or a diner who was a very untidy eater but had no disability-related reason for eating in that way. This, as I have said, seems to me a much more natural comparison, in no way inconsistent with the statutory language. In this case it would defeat Mr Malcolm's complaint of discrimination, since it is clear that Lewisham would have claimed possession against any non-disabled tenant who had sublet and gone to live elsewhere. The same result would be likely to follow in many cases, with the consequence that the reach of the statute would be reduced. That would

make it attractive, if possible, to identify an intermediate comparator group (c) which would avoid absurdity and give fair effect to the statute. But I do not think that any such intermediate comparator group has been suggested, and none is identified by the statutory language. I find it hard to accept that *Novacold* was rightly decided. I am in any event satisfied that a different principle must be applied in the present context.

16. I would accordingly, not without misgiving, hold the correct comparison in this case (on the assumption indicated) to be with persons without a mental disability who have sublet a Lewisham flat and gone to live elsewhere. Mr Malcolm has not been treated less favourably than such persons. He has been treated in exactly the same way.

(6) Is it relevant whether Lewisham knew of Mr Malcolm's disability?

17. It has been held that the alleged discriminator's knowledge of a complainant's disability is irrelevant (*London Borough of Hammersmith and Fulham v Farnsworth* [2000] IRLR 691, para 36), although some doubt about this conclusion has been expressed by the Employment Appeal Tribunal (*Heinz v Kenrick*, above, paras 44-48) and the Court of Appeal (*Manchester City Council v Romano (Disability Rights Commission intervening)* [2004] EWCA Civ 834, [2005] 1 WLR 2775, paras 121-123).

18. Section 25(1) provides that a claim based on unlawful discrimination on grounds of disability may be made the subject of civil proceedings in the same way as any other claim in tort, damages being recoverable (section 25(2)) for injury to feelings in addition to other relevant heads of damage. This points, in my opinion, towards a requirement of knowledge. Otherwise, an actionable tort would arise on the following facts. A telephones restaurant B to book a table. He asks if he may bring a dog. B says that dogs are not allowed in its restaurant. A does not say, and B does not know, that A is blind. It seems to me contrary to principle to hold that on such facts B has committed an actionable tort sounding in damages. Like Toulson LJ in the Court of Appeal, para 161,

> "I do not believe that Parliament would have intended to make a person liable in tort for disability discrimination if that person had no awareness or grounds for awareness at the relevant time that the complainant was suffering from

> a disability or that his disability might have any connection with the matters giving rise to the treatment said to constitute unlawful discrimination."

The grounds of justification specified in section 24(3) of the 1995 Act assume, I think, that the landlord has knowledge of the tenant's disability, as Arden LJ was tentatively willing to accept (para 119), although reaching a different conclusion (paras 112-118). This seems to me to reinforce the conclusion that knowledge, or at least imputed knowledge, is necessary. It would be anomalous if a landlord needs to know of the tenant's disability if he is to justify but not otherwise.

(7) Has Mr Malcolm a defence to Lewisham's claim for possession?

19. It follows from what I have said that Mr Malcolm has not been the subject of unlawful discrimination because Lewisham's reason for claiming possession did not relate to his disability and he was not treated less favourably than someone without that disability. It would also seem that Lewisham were unaware of Mr Malcolm's disability, at any rate when the process of claiming possession was initiated. Thus Mr Malcolm has no defence to Lewisham's claim. I would expect this result to follow in almost all cases in which a landlord, public or private, claims possession from a tenant who has committed a gross breach of the terms of the tenancy, as it did in *S v Floyd (The Equality and Human Rights Commission intervening)* [2008] EWCA Civ 201, para 48, where Mummery LJ, giving the judgment of the Court of Appeal, said:

> "It is not immediately obvious ... (b) how a landlord would be unlawfully discriminating against a disabled tenant by taking steps to enforce his statutory right to a possession order for admitted non-payment of rent for 132 weeks ... The legislation is not about disability per se: it is about unlawful acts of discrimination on a prohibited ground, ie, unjustified less favourable treatment for a reason which relates to the disabled person's disability."

I would not, however, accede to Lewisham's contention, accepted by the judge but rejected by the Court of Appeal, that a claim for possession to which there is no defence under housing legislation can never be defeated even where the claim is shown to be discriminatory. Parliament has enacted that discriminatory acts proscribed by the 1995 Act are unlawful. The courts cannot be required to give legal effect to

acts proscribed as unlawful. But I would not expect such a defence, in this field, to be made out very often.

20. For these reasons and in broad agreement with all my noble and learned friends save in answering question (5), I would allow the appeal and reinstate the judge's order.

LORD SCOTT OF FOSCOTE

My Lords,

21. This appeal raises difficult questions which have not previously come before the House as to the correct construction, or perhaps application, of provisions of the Disability Discrimination Act 1995. A number of Court of Appeal decisions have addressed the questions, but they are not entirely consistent with one another. It is convenient to refer at once to the provisions in question. Section 1 of the Act defines what is meant by "disability" and "discrimination":

> "(1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day to day activities
>
> (2) In this Act 'disabled person' means a person who has a disability"

22. Mr Malcolm, the respondent to this appeal, suffers from schizophrenia. One of the issues in the appeal is whether his illness had a substantial and longterm adverse effect on his ability to carry out normal day to day activities. The trial judge, Judge Hallon, thought it did not but the Court of Appeal disagreed. This is a fact dependent issue, assisted by sections 4 and 6 of the Act and paragraph 2 of Schedule 1, but is not an issue of general public importance.

23. The issue that arises under sections 22(3) and 24(1) of the Act is, on the other hand, unquestionably an issue of general public importance.

The sections are in Part III of the Act and deal with discrimination in relation to "Premises". Section 22(3) provides that -

> "It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises –
>
> …
>
> (c) by evicting the disabled person, or subjecting him to any other detriment."

And section 24(1) defines "discrimination" -

> "For the purposes of section 22, a person ('A') discriminates against a disabled person if –
>
> (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and
>
> (b) he cannot show that the treatment is justified."

Section 24(2) says that, for the purposes of the section, treatment is justified if, and only if -

> "(a) in A's opinion one or more of the conditions mentioned in subsection (3) are satisfied; and
>
> (b) it is reasonable, in all the circumstances of the case, for him to hold that opinion"

There were four original subsection (3) conditions which have, subsequent to the events giving rise to this litigation, been added to by amendment. But none has any relevance to this case and it is not necessary to refer to them further. The important issue of law which arises in this case is how section 24(1)(a) should be construed and applied.

The Facts

24. It is convenient at this point to refer to the facts of the case. I can do so quite briefly, for I have had the great advantage of reading in draft the opinion of my noble and learned friend, Baroness Hale of Richmond. She has in her opinion described fully the relevant facts and I gratefully adopt her account. In brief, therefore, Mr Malcolm's schizophrenia is a condition from which he has suffered for some time and for which he has received and needs to continue to receive medication. For a fairly short but, in the event, critical time he omitted to take his prescribed medication. It was during that time that he sub-let the flat that he occupied under a secure tenancy from the appellant Council. The effect of the sub-letting, and his consequent relinquishing of his occupation of the flat, was that his secure tenancy became, pursuant to provisions in the Housing Act 1985, an ordinary contractual tenancy without any security of tenure. It was a term of his tenancy that sub-letting was prohibited (see para.5 of Section B of the Tenancy Agreement). At the time of the sub-letting Mr Malcolm had been actively engaged in pursuing the Right to Buy to which he was entitled under the relevant provisions of the Housing Act 1985. But this statutory right, along with the security of tenure that accompanies a secure tenancy, was lost by the sub-letting and on 6 July 2004 the Council served on him a four weeks notice determining the contractual tenancy. It is not in dispute that, subject to any invalidating effect that the 1995 Act may have had, this was a valid notice. Mr Malcolm did not deliver up possession of the flat and on 25 November 2004 the Council commenced possession proceedings against him and the sub-tenants who were then in occupation. The sub-tenants subsequently vacated the flat, Mr Malcolm moved back into occupation and the possession proceedings have continued against Mr Malcolm alone.

25. The Council's claim form pleaded the sub-letting, by virtue of which Mr Malcolm's tenancy had ceased to be a secure tenancy, and the notice to quit. Mr Malcolm's defence pleaded that any breach of the terms of the tenancy had been caused by his schizophrenic condition (para.2(3)), that his schizophrenic illness constituted a disability for the purposes of the 1995 Act (para.9), that "the reason why the claimant is seeking possession is because of the … disability" and that the Court was precluded by the 1995 Act from making any order for possession against him. It is important to notice that it was neither pleaded nor submitted in either of the lower courts, nor was any evidence led that tended to suggest, that the Council knew of Mr Malcolm's schizophrenia or knew of facts from which that knowledge should be inferred.

The main issue

26. The statutory words to be construed and applied are those in section 24(1)(a). There is, as I have explained, a factual issue as to whether Mr Malcolm was a disabled person suffering from a disability as defined in section 1 of the Act. Let it be assumed for the moment that he was. It is accepted that the Council's reason for serving the notice to quit and following that up with possession proceedings was that Mr Malcolm had sub-let his flat and moved out. There is a factual issue as to whether the sub-letting was causally connected with Mr Malcolm's disability, i.e. his schizophrenia. There was medical evidence to that effect but in the county court Judge Hallon concluded that the causal relationship between the schizophrenia and the sub-letting was insufficiently established. Let it be for the moment assumed that she was wrong and that the sub-letting was causally connected with the schizophrenia. Given those two assumptions two questions, in my opinion, arise. First, in order for the alleged discriminator's "reason" to "relate to" the disability for section 24(1)(a) purposes, is it necessary for the fact of the disability to have played at least some motivating part in the mind of the alleged discriminator in leading him to subject the disabled person to the treatment complained of? And second, who are to be taken to be the comparators, the "others", referred to in section 24(1)(a) and what characteristics should be attributed to them?

27. As to the first question, there was no evidence that the Council was aware that Mr Malcolm suffered from schizophrenia. The Council did become aware that he had sub-let his flat and their reason for serving the notice to quit was the sub-letting. The fact of Mr Malcolm's disability played no part at all in the Council's decision-making process, and, since the Council was unaware of it, could not have done so. However Mr Malcolm had sub-let his flat at a time when his schizophrenia was not being controlled by medication and his mental condition at that time may have led him to take imprudent decisions in the management of his affairs (this is the basis of the second of the factual assumptions). Objectively speaking, therefore, there may have been a causal connection, unknown to the Council, between the sub-letting and his 1995 Act disability. The sub-letting may have been a symptom of the unknown disability. So, where an alleged discriminator has subjected a person to unfavourable treatment on account of conduct of the person which, unknown to the alleged discriminator, is a symptom of a physical or mental condition that constitutes a 1995 Act disability but of which the alleged discriminator is not aware or has not taken into account, can the alleged discriminator's reason for doing so

"relate to" the disability for section 24(1)(a) purposes? There is a certain amount of Court of Appeal authority on this question to which I want to refer. But I want first to consider the question and its implications untrammelled by authority.

28. The 1995 Act, in making disability discrimination in relation to premises unlawful, made the discrimination also tortious (see section 25(1)). Section 25(2) says that

> "… damages in respect of discrimination in a way which is unlawful under [Part III] may include compensation for injury to feelings whether or not they include compensation under any other head."

There are, of course, in our civil law torts of strict liability. Trespass is one. If a person goes without permission on to land that belongs to someone else, it is no defence for the trespasser to say, and prove, that he thought that he was the owner of the land. Another example is the obligation of an employer to provide a safe system of work for his employees. This obligation is an absolute one and if an employee is injured by a latent defect in the machinery with which he is working it is no defence for the employer to say, and prove, that the defect was not foreseeable. The concept, therefore, of tortious liability without fault is by no means unknown. But in the two examples I have given, the social purpose and justice underlying the imposition of strict liability is understandable. As between employer and employee it should be for the employer to ensure that the premises in which and the machinery with which his employees work are safe. The risk that there are unforeseeable dangers must be accepted by the employer. And as between the true owner of land and the mistaken trespasser the law must surely favour the true owner whose title has been called into question. But nominal damages may be all that the successful landowner can recover against an innocent trespasser. In the field of employment, or of the provision of goods, facilities and services, or of the disposal or management of premises (see the long title to the 1995 Act) the protection of disabled persons against being subjected to unfavourable treatment on account of their disability was plainly the primary purpose of the Act. But could it really have been intended by Parliament that all employers vis-à-vis their employees, all providers of goods, facilities and services vis-à-vis their customers and all managers of premises vis-à-vis the occupiers of the premises were to be subjected to the risk of becoming statutory tortfeasors and liable to substantial damages claims on account of normal actions taken in understandable pursuit of their respective interests against persons of whose disabilities they were

totally unaware? I find it very difficult to accept that that could have been intended by Parliament. In my opinion, a "reason" does not "relate to" a disability for section 24(1)(a) purposes unless the fact of the physical or mental condition in question has played some causative part in the decision-making process of the alleged discriminator. A "reason" could not, in my opinion, "relate to" a physical or mental condition of the person in question of which the alleged discriminator was unaware.

29. Mr Luba QC, counsel for Mr Malcolm, submitted that the inquiry into the requisite connection between the reason and the disability was an objective one and need have nothing to do with what was in the mind of or known to the alleged discriminator. He took this submission to its logical conclusion in contending that in a "premises" case, where the tenant had sub-let in breach of a tenancy agreement but where the sub-letting was attributable to some mental condition constituting a 1995 Act disability, it would be unlawful for the landlord to taken any adverse action against the tenant on account of that sub-letting. He submitted further, again with unanswerable logic, that if a tenant were to fall into arrears of rent on account of such a mental condition, it would be unlawful under the 1995 Act for the landlord to take any adverse action against the tenant, whether for recovery of the unpaid rent or for possession of the premises. The unacceptability of these logical conclusions, which would apply to private landlords as well as to local authorities, suggests, or perhaps shows, that the conclusions must be based on some erroneous premise. The erroneous premise, in my opinion, is that the requisite connection, the relationship, between the landlord's reason for taking the adverse action, e.g. serving a notice to quit, and the tenant's mental condition would not, in order to "relate to" the mental condition, require the mental condition to have played any motivating part in the landlord's decision to take the adverse action. So whether the mental condition of the tenant were or were not known to the landlord and whether it did or did not play any part in bringing the landlord to the decision to take the adverse action in question, the adverse action would "relate to" the disability for section 24(1)(a) purposes if it were causally connected with the conduct of the tenant that had prompted the landlord's action. I am unable to accept that this can be right. My answer to the first question, therefore, would be that if the physical or mental condition that constitutes the disability has played no motivating part in the decision of the alleged discriminator to inflict on the disabled person the treatment complained of, the alleged discriminator's reason for that treatment cannot, for section 24(1)(a) purposes, relate to the disability.

30. As to the second question, it is not enough for the disabled person to show that the alleged discriminator's reason for the treatment related to his disability, he must also show that he has been treated less favourably than the alleged discriminator "treats or would treat others to whom that reason does not or would not apply". Who are the comparators, the "others"? The common sense answer in the present case would be that the comparators are tenants of the appellant Council who have sub-let but whose sub-letting had no connection with schizophrenia or, perhaps, with any mental condition causally responsible for the sub-letting. It is plain that any local authority tenant who, in breach of the terms of his tenancy, sub-lets and gives up occupation of the premises to his sub-tenants could expect to receive notice from his landlord terminating the tenancy. If that commonsense answer is the correct one, there has been no discrimination in the present case. Mr Malcolm has not been treated less favourably than the "others".

31. In *Clark v Novacold Ltd* [1999] ICR 951, Mummery LJ considered the comparator question. The case was one in which an employee had suffered serious injuries likely to keep him from work for about a year. He was dismissed from his employment for that reason and complained to an industrial tribunal of unlawful discrimination contrary to sections 4(2) and 5(1) of the 1995 Act. These are sections in Part II of the Act which relate to discrimination by employers. Section 5(1)(a), save that it refers to employers, is in the same terms as section 24(1)(a). The industrial tribunal held that the comparators for the purposes of section 5(1)(a) would be employees likely to be absent from work for about a year but for a reason other than disablement and that any such person would have been treated no differently from Mr Clark. The case reached the Court of Appeal and the question of the correct comparators was dealt with by Mummery LJ at pages 962 to 965 of his judgment. He concentrated on what the words "that reason" in the statutory language meant. The employers argued for what I have described in the last foregoing paragraph as the commonsense answer. The person to whom "that reason" would not apply would be someone who, like the disabled person, was incapable of performing the main functions of his job but for a reason which did not relate to disability (see 962C). The alternative interpretation, contended for by the dismissed employee, was described by Mummery LJ in the following passage, at p 962:

> "A contrary interpretation is submitted on behalf of the applicant. His argument is that '*that* reason' refers only to the first three words of paragraph *(a)* – 'for a reason'. The

> causal link between the reason for the treatment and the disability is not the reason for the treatment. It is not included in the reason for the treatment. The expression 'which relates to the disability' are words added not to identify or amplify the reason, but to specify a link between the reason for the treatment and his disability which enables the disabled person (as opposed to an able-bodied person) to complain of his treatment. That link is irrelevant to the question whether the treatment of the disabled person is for a reason which does not or would not apply to others. On this interpretation the others to whom '*that* reason' would not apply are persons who would be capable of carrying out the main functions of their job. Those are the 'others' proposed as the proper comparators. This comparison leads to the conclusion that the applicant has been treated less favourably: he was dismissed for the reason that he could not perform the main functions of his job, whereas a person capable of performing the main functions of his job would not be dismissed."

Translated for the purposes of the present case, this interpretation would treat the sub-letting as "that reason" and the "others" as tenants who had not sub-let. This was the interpretation that the Lord Justice preferred (see at 963 B to H). He summarised the effect of his conclusion at E to H -

> "The result of this approach is that the reason would not apply to others even if their circumstances are different from those of the disabled person. The persons who are performing the main functions of their jobs are 'others' to whom the reason for dismissal of the disabled person (that is inability to perform those functions) would not apply"

32. My Lords, I must respectfully disagree. The Lord Justice's conclusion emasculates the statutory comparison. What is the point of asking whether a person has been treated "less favourably than others" if the "others" are those to whom the reason why the disabled person was subjected to the complained of treatment cannot apply? If a person has been dismissed because he is incapable of doing his job, what is the point of making the lawfulness of his dismissal depend on whether those who are capable of doing their job would have been dismissed? If a person has been dismissed because he will be absent from work for a year, what is the point of making the lawfulness of his dismissal

dependant on whether those who will not be absent from work will be dismissed? If a tenant has been given notice terminating his tenancy because he has sub-let in breach of the tenancy agreement, what is the point of making the lawfulness of the action taken by his landlord dependant on whether notice to quit would have been served on tenants who had not sub-let? Parliament must surely have intended the comparison directed by section 5(1)(a), or by section 24(1)(a), or, for that matter, by section 20(1)(a) where the directed comparison is in identical terms, to be a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not.

33. The pointlessness of the comparison if the *Clark v Novacold* interpretation of the comparison directed by the statute is adopted not only suggests very strongly, in my opinion, that the interpretation cannot be right, but also provides support for the view I have expressed on the first question. If it is right, as I think it is, that "a reason which relates to the disabled person's disability" requires that the infirmity of the person in question should be at least part of the alleged discriminator's reason for subjecting him to the treatment complained of, the problem that vexed Mummery LJ melts away. The words "that reason" naturally then refers to the reason that relates to the disability. But many decisions are made for a multitude of reasons, some consequential on others, and the decision maker would often be hard put to identify a single determinative reason for the act or omission in question. If the physical or mental condition of the complainant is the only reason for the treatment complained of then the statutory comparison will demonstrate that there has been unlawful discrimination. But if, as will often be the case, there are other reasons as well, the statutory comparison would require the disability reason to be left out of account and the question to be asked would be whether in the absence of that reason, the "reason that relates to the … disability", the complained of treatment would have happened. The statutory comparison, so interpreted, enables a distinction to be drawn between cases where there has been "less favourable" treatment, i.e. discrimination, and cases where there has not.

34. I have already referred to *Clark v Novacold* . The case was, in my opinion, wrongly decided. The employers would have dismissed any employee who proposed to be absent from work for up to a year, whatever the cause of the absence. The employers' reason for the dismissal was that the employee's injury was going to keep him off work for a year or so. This was plainly a reason that had been caused by, and, in that sense, related to the employee's disability. The "others", the statutory comparators, "to whom that reason … would not apply" would, in my opinion, be employees who would be absent from work

for some similar period for a reason unconnected with physical disability. If these others would have been dismissed as Mr Clark was, he would not have been treated less favourably than they. If they, or a significant number of the comparators, would not have been dismissed, discrimination unlawful under the 1995 Act would be shown to have taken place.

35. Mummery LJ referred (p.964) to the hypothetical case of the blind man with a guide dog who wished to enter a restaurant which did not permit the entry of dogs. The blind man with his dog is refused entry. Would that refusal be unlawful discrimination for the purposes of section 20(1)(a)? The problem with most hypothetical cases is that the facts are incomplete. Would the blind man without his dog have been refused entry? Almost certainly not. The problem was the dog. The dog was the reason for the refusal of entry. That reason was causally connected to the disability, but the disability would have played no part in the mind of the restaurant manager in refusing entry to the dog. The problem, I repeat, was the dog. The restaurant manager's reason for refusing entry to the dog would not, in my opinion, have related to the blind man's disability for section 24(1)(a) purposes. If that be wrong, and the manager's reason for refusal of entry would have related for section 24(1)(a) purposes to the disability, would "others" to whom that reason would not have applied have been refused entry? The "others" would, in my opinion, have been persons, whether blind or sighted would not matter, unaccompanied by dogs. They would not have been refused entry; the blind man with his guide dog would have been treated less favourably. Discrimination would have been established. Confusion regarding the blind man and his guide dog example has, I think, crept in because of the over-concentration on the refusal to admit entry to the dog. The dog is not a potential beneficiary of the 1995 Act. It is the blind man who is. If he is refused entry it is not because he is blind but because he is accompanied by a dog and is not prepared to leave his dog outside. Anyone, whether sighted or blind, who was accompanied by a dog would have been treated in the same way. The reason for the treatment would not have related to the blindness; it would have related to the dog.

36. It is, perhaps, worth adding that, if the alleged discriminator did not know that the would-be entrant into the restaurant was blind, an announcement that no dogs would be allowed in could not, in my opinion, constitute unlawful discrimination. Suppose a case where a blind man, dependent on his guide-dog, telephoned a restaurant to book a table, asked whether he could bring his dog but did not add that he was blind and that the dog was his guide-dog. Suppose the answer, given

over the telephone, was that dogs were not allowed into the restaurant. The blind man then cancels the reservation and sues for unlawful disability discrimination. Mr Luba contended that the action should succeed. I regard the contention as demonstrating the fallacy underlying the proposition that the physical or mental condition of the disabled person need play no part in the alleged discriminator's mind in deciding to subject the disabled person to the treatment complained of.

37. In a subsequent case, *S v Floyd and The Equality and Human Rights Commission* [2008] EWCA Civ 201, as yet unreported and judgment in which was handed down on 18 March 2008, Mummery LJ, giving the judgment of the court, said, at para 57, that the 1995 Act's reference to "a reason" for treatment

> "… would normally require the existence of something in and consciously or subconsciously affecting the mind of the discriminator".

As will have appeared, I am in complete agreement with that proposition. The *Floyd* case, like the present case, was a "premises" case involving a tenancy. Mrs Floyd was the landlord. Her tenant had fallen into arrears with the rent and she instituted possession proceedings. One of the submissions made by Mr Luba, counsel for the tenant in that case as in this, was that the tenant's lack of mental capacity was the cause of his falling into arrears in payment of rent, that his lack of mental capacity constituted a disability for the purposes of the 1995 Act and that the "reason" for the claim for possession was a reason that related, for section 24(1)(a) purposes, to the tenant's disability. The argument was that the landlord's claim was, therefore, an unlawful act. The Court of Appeal rejected that submission. Mummery LJ said, at para 48:

> "The second difficulty is on the law. It is not immediately obvious (a) how the 1995 Act could provide a basis for resisting a claim for possession on a statutory mandatory ground or (b) how a landlord would be unlawfully discriminating against a disabled tenant by taking steps to enforce his statutory right to a possession order for admitted non-payment of rent for 132 weeks. *The 1995 Act was enacted to provide remedies for disabled people at the receiving end of unlawful discrimination*. It was not aimed at protecting them from lawful litigation or at

> supplying them with a defence to breach of a civil law obligation. Like other anti-discrimination legislation, the 1995 Act created statutory causes of action for unlawful discrimination in many areas, such as employment, the provision of goods, facilities and services and the disposal or management of premises, but it did not create any special disability defence to the lawful claims of others, such as a landlord's claim for possession of premises for arrears of rent. The legislation is not about disability per se: it is about unlawful acts of discrimination on a prohibited ground, i.e., unjustified less favourable treatment for a reason which relates to the disabled person's disability" (emphasis added).

I respectfully agree with everything in that paragraph but the passage I have emphasised is not, in my opinion, consistent with *Clark v Novacold*.

38. An earlier case in the Court of Appeal that concerned premises was *Manchester City Council v Romano* [2005] 1 WLR 2775. This was a case in which a local authority landlord sought possession of the let premises on the ground that the tenants had been causing a nuisance to their neighbours. Each of the tenants was suffering from a recognised mental illness. The Court of Appeal dismissed the tenants' appeal against possession orders that had been made against them holding that the eviction proceedings did constitute section 24(1)(a) discrimination but that the proceedings were justifiable under section 24(2) because the tenants' conduct was putting the neighbours health at risk. The Court, in reaching its conclusion on section 24(1)(a), followed but did not add anything of significance to what had been said in *Clark v Novacold*.

39. *Taylor v OCS Group Ltd* [2006] ICR 1602 was an employment case. The claimant was profoundly deaf and, after a disciplinary hearing, had been dismissed for misconduct. One of the questions that arose was whether the dismissal had been for a disability-related reason. It was submitted on behalf of the employee that it was not necessary, in order to establish a disability related reason for the dismissal, to show that the disability had been present in the employer's mind when dismissing the employee. The Court of Appeal rejected that submission. The judgment of the court, delivered by Smith LJ, said this at para 72:

> " In our view, the argument accepted by the Employment Appeal Tribunal and advanced before us by Ms Gill is fallacious. These provisions of the 1995 Act are

> concerned with discrimination by an employer. Discrimination requires that the employer should have a certain state of mind. In the context of the 1995 Act, an employer cannot discriminate against the employee unless he treats the disabled employee differently for a reason (present in his, the employer's, mind) which is related to the employee's disability. It may be that in some cases an employer might have more than one reason for dismissing an employee; one reason might be misconduct and there might also be present in the employer's mind another reason which does relate to his disability such as the fact that the employee took a lot of time off work or had a lower productivity than other employees. The employer might decide to dismiss the employee for those combined reasons. In such a case, we would say that, if the disability-related reason had a significant influence on the employer's decision, that would be enough to found the conclusion that the dismissal was for a reason related to the employee's disability. We would add that it would be open to an employment tribunal to find that the employer's decision had been affected by the disability-related reason even though the employer had not consciously allowed that reason to affect his thinking. We would certainly accept than an employer could have an innate prejudice against disabled people just as some are prejudiced on the grounds of race or gender. What is important is that the disability-related reason must affect the employer's mind, whether consciously or subconsciously. Unless that reason has affected his mind, he cannot discriminate."

I am in respectful agreement with all of this.

40. My Lords, I would decide this main issue against Mr Malcolm. His schizophrenia was not in the mind of the Council when deciding to serve notice to quit and take possession proceedings against him. It was not enough for him to show that, objectively viewed, there was a connection between his schizophrenia and his sub-letting. He needed to show, also, that his mental condition played some motivating part in the Council's decision to terminate his tenancy and recover possession of the premises. That he has not done. The fact of the matter is that the Council's reason was that he had sub-let and moved out. His mental condition formed no part of their reason. And even if the Council had known about the schizophrenia and had known that there might be a link between his schizophrenia and his imprudent or reckless behaviour in putting his secure tenancy at risk by sub-letting, there is no evidence that

those matters played any part in the Council's decision to take action to recover possession of the flat. Moreover, the statutory comparator, in my opinion, would be a secure tenant with no mental illness who had sub-let. Such a tenant would have received no different treatment from the Council than Mr Malcolm received. There was no "less favourable" treatment meted out to Mr Malcolm and, therefore, no discrimination. I would on this ground allow the appeal.

The other issues

41. As to the two factual issues, it is not necessary in view of my conclusion on the main issue to spend time on them. I will simply say that, on the first of the factual issues, I would not have disagreed with the conclusions Arden LJ expressed. The medical evidence was not challenged and did indicate that Mr Malcolm suffered from a disability as defined in section 1 of the Act. As to the second factual issue, however, I find myself in agreement with the learned trial judge's conclusion that Mr Malcolm had shown insufficient connection between his schizophrenia and the sub-letting to justify a finding that the sub-letting was causally connected with the schizophrenia or, to put the point another way, that the schizophrenia was causally responsible for the sub-letting. I would allow this appeal and restore the order of Judge Hallon.

BARONESS HALE OF RICHMOND

My Lords

42. The issue before us is whether and in what circumstances a disabled tenant can rely upon sections 22 and 24 of the Disability Discrimination Act 1995 (the DDA) to resist what would otherwise be an unanswerable claim to possession by his landlord. The primary case advanced on behalf of the appellant local authority landlord (the Council) is that the DDA affords no defence to the possession claim. The secondary case is that there was no breach of the DDA in any event. This raises questions about the fundamental principles underlying disability discrimination law. Is it intended simply to secure that disabled people are treated in the same way as other people who do not have their disability? Or is it intended to secure that they are treated

differently from other people in order that they can play as full as possible a part in society whatever their disabilities?

The facts

43. In February 2002, the Council let a flat to the respondent, Courtney Malcolm, who had applied under the homelessness provisions of the Housing Act 1996. The tenancy was a secure tenancy for the purpose of section 79 of the Housing Act 1995. Because Mr Malcolm had previously been a tenant of the Council, he was entitled to exercise a right to buy the flat. He applied to do so in March 2002. The purchase had still not been completed in 2004 when the material events took place, but by then Mr Malcolm had accepted the Council's offer to purchase at the price indicated and had arranged a mortgage. When he applied for the mortgage he was employed by a housing association. Having secured the mortgage offer, his solicitors sent the signed transfer document to the Council on 22 June 2004 saying that he wished to complete the transaction on 26 July 2004.

44. Also on 22 June 2004, Mr Malcolm sublet the flat on an assured shorthold tenancy for a period of six months. This was a breach of the express terms of his tenancy agreement, clause B3 of which provided:

> "You must live in the property as your only or principal home. You must not sublet. You must not be absent (except in cases of emergency) for a continuous period of more than two months without first obtaining the written permission of the Council."

Clause B5 of the agreement warned secure tenants that subletting also had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one.

45. By section 79(1) of the Housing Act 1985, a tenancy is only a secure tenancy at a time when both the "landlord condition" and the "tenant condition" are satisfied. By section 81, the "tenant condition" is only satisfied when the tenant is an individual and occupies the dwelling as his only or principal home. Furthermore, by section 93(2):

> "If the tenant under a secure tenancy parts with the possession of the dwelling-house or sublets the whole of it (or sublets first part of it and then the remainder), the tenancy ceases to be a secure tenancy and cannot subsequently become a secure tenancy."

The reasons for these provisions are obvious. There is a very limited stock of social housing in this country. It is intended for the people who are most in need of it because they less able than others to acquire their own housing, whether by renting or buying, in the open market. Local authorities are obliged to follow statutory criteria in allocating council housing. They also have statutory duties to house homeless people who have particularly pressing needs. It is unfair to the people who have a good claim to social housing to allow people who have so little need of it that they can sublet it and live elsewhere to retain their security. Nor should council tenants be allowed to make money out of their council housing by treating it as an investment.

46. In early July 2004, the Council discovered that Mr Malcolm had sublet the flat. An occupancy check had revealed the sub-tenants in occupation. On 6 July 2004, therefore, the Council gave him Notice to Quit requiring him to vacate the flat on 9 August 2004. They also declined to proceed with the right to buy transaction. In November 2004, they completed the claim form and particulars of claim for possession, and the claim was issued by the county court on 2 December 2004. The reasons given for making the claim were these:

> "The claimant as a council is statutorily bound to observe the allocation scheme and the scheme for helping homeless people with accommodation as set out in the Housing Act 1996 with respect to allocating council tenancies. It would be unfair to applicants for council housing and homelessness applicants under those schemes to allow the [subtenants] to stay in the property as a result of [Mr Malcolm] having wrongfully sublet it to them. The Council has a serious shortage of properties to let to applicants and [Mr Malcolm] is in breach of the terms of his tenancy agreement and therefore the Council requires possession of this property."

47. In his defence, filed on 8 March 2005, Mr Malcolm claimed that he suffered from a disability for the purposes of the DDA, that the reason why the Council was seeking possession was because of his

disability, and that unless the Council could show justification the Court was precluded from making a possession order against him.

48. Mr Malcolm was born in 1964. He was diagnosed with schizophrenia in 1985. This necessitated a total of ten admissions to hospital between 1985 and 1990, two of which were compulsory admissions under the Mental Health Act 1983. His condition was then stabilised on drugs. From 1989 he was consistently in employment. He was managed as an out-patient and responded well to depot anti-psychotic medication. According to a report from his psychiatrist, Dr Sivathasan, dated 16 February 2005, he periodically requested that it should be discontinued or he defaulted and his mental state invariably deteriorated within weeks or months.

49. This last information must have been culled from medical records, because Dr Sivathasan first saw Mr Malcolm at his "care programme approach" meeting in October 2003. The patient requested a change from depot to oral medication and this was agreed. But when Dr Sivathasan saw him again in April 2004, he had not been complying with his oral medication, "and he became dysfunctional at work, eventually, simply sitting at his desk. He was losing weight, not sleeping or eating". This may simply have been what the patient said, but Dr Sivathasan also reported that "he demonstrated marked psychomotor retardation, associated with impoverished concrete thinking". Mr Malcolm agreed to restart the oral medication but there were still compliance problems and so in July 2004 they reverted to the depot medication which he continued to take.

50. Mr Malcolm's employment with the housing association ended in May 2004. There is no independent evidence of why this happened, but Mr Clifford, his social worker, and Dr Sivathasan felt that it was because he had become unwell. Two days after the Notice to Quit, they wrote to the Council, asking them to reconsider the decision because of Mr Malcolm's severe mental health problems. They realised that the situation had been brought about because of his own actions but were concerned that it might result in another mental breakdown. Each wrote again in February 2005, after the possession proceedings had begun, pointing out that the decision to sublet was during the period when Mr Malcolm was unwell and (in Mr Clifford's words) "as a result unlikely to make decisions that were in his best interests or with full capacity to understand the consequences", and strongly opposing the action against him.

51. Nevertheless, the action eventually proceeded to trial in the county court in March 2006. The judge heard oral evidence from two council officers, from Mr Malcolm, his brother, his mother and his sister. She also had the written report of Dr Steadman, an independent psychiatrist jointly instructed by both sides. That report confirmed Dr Sivathasan's opinion that Mr Malcolm's non-compliance with oral medication was almost certainly the cause of his mental deterioration. Dr Steadman's view was that "on the balance of probabilities, this gentleman may well have had the mental capacity to enter into a contract but I feel that he would not have had the mental capacity to properly understand the issues concerning such or the potential ramifications of such".

52. The judge granted the possession order. Her principal reason for doing so was that the 1995 Act was not brought into play at all where security was lost by operation of law. There was no discretion for the court to exercise. But in case she was wrong on that, she also made findings of fact: first, that Mr Malcolm was not disabled for the purpose of the Act because she was unable to say that his illness had a substantial effect upon his ability to carry out day to day activities; and secondly, that the subletting was a planned decision, closely linked to his proposed purchase on mortgage, and not an irrational act caused by his illness.

53. The Court of Appeal allowed Mr Malcolm's appeal, dismissed the possession proceedings, and declared that the notice to quit and possession action constituted unlawful discrimination contrary to Part III of the 1995 Act: [2008] Ch 129. They found that Mr Malcolm was disabled within the meaning of the Act; that there was "an appropriate relationship" between the reason for the Council's actions and the illness; that his treatment had been less favourable than that of others to whom that reason did not apply; and (by a majority) that the fact that the landlord did not know of the disability did not preclude a finding of discrimination.

The legislation

54. Sections 79(1), 81, and 93 of the Housing Act 1985, which meant that Mr Malcolm's tenancy ceased by operation of law to be a secure tenancy within the meaning of that Act and could never subsequently become one, have already been quoted. In consequence, section 84 of the 1985 Act, which prohibits the making of an order for the possession

of a dwelling let on a secure tenancy except on one or more of the grounds set out in Schedule 2 , did not apply. Mr Malcolm was left with his contractual weekly tenancy, terminable on four weeks' notice. Unless he went voluntarily, of course, a court order would be required to evict him, but the court had no discretion to refuse the Council the possession order to which they were entitled if they applied for it.

55. Since the events with which we are concerned, the Disability Discrimination Act 1995 has been amended by the Disability Discrimination Act 1995 (Amendment) Regulations 2003 SI 2003/1673 and by the Disability Discrimination Act 2005. Our task, however, is to construe the DDA as it stood when these events took place. Reference will therefore be made in the present tense to provisions which have since changed.

56. The definition of disability which applies throughout the Act is given in section 1(1):

> "Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long–term adverse effect on his ability to carry out normal day–to–day activities."

Schedule 1 further defines or explains the various elements of this definition. Paragraph 4 provides that an impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of a list of capacities; the relevant capacities here are "(g) memory or ability to concentrate, learn or understand" and "(h) perception of the risk of physical danger". Paragraph 6 provides that an impairment which would be likely to have a substantial adverse effect were it not for corrective measures, including medical treatment, is to be treated as having that effect. Paragraph 2(2) provides that where an impairment ceases to have a substantial adverse effect upon on a person's ability to carry out normal day–to–day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

57. Part II of the Act then deals with the meaning of discrimination and the prohibited acts of discrimination in the employment field. Section 5(1) provides that "an employer discriminates against a disabled person if (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat

others to whom that reason does not or would not apply; and (b) he cannot show that the treatment in question is justified." Section 5(2) provides that failing to comply with a duty to make reasonable adjustments in order to cater for a disability is also discrimination. The duty to make those adjustments is dealt with in section 6. By section 5(3) and 5(4), each kind of discrimination can be justified if the reason "is both material to the circumstances of the particular case and substantial".

58. Part III deals with discrimination in other areas. Sections 19 and 20 deal with the prohibited acts of discrimination and the meaning of discrimination in relation to goods, facilities and services. Section 20(1) and (2) define discrimination in the same way as in section 5(1) and (2) above. The duty of service providers to make reasonable adjustments is dealt with in section 21. Justification, however, is dealt with differently from section 5. Instead of the broad but objective criteria laid down in section 5(3) and (4), section 20(3) provides that treatment can be justified only if (a) in the opinion of the provider one or more of the conditions listed in section 20(4) applies and (b) it is in all the circumstances reasonable for him to hold that opinion. Thus there is a focus on what the provider believed, provided that it was reasonable for him to do so. But the list of justifying conditions in section 20(4) is short and precisely defined.

59. Sections 22 and 24 deal with the prohibited acts of discrimination and the meaning of discrimination in relation to premises. The relevant act for our purposes is in section 22(3), which makes it "unlawful for a person managing any premises to discriminate against a disabled person occupying those premises - . . . (c) by evicting the disabled person, or subjecting him to any other detriment". Section 24(1) deals with the meaning of discrimination for the purpose of section 22. It is in the same terms as sections 5(1) and 20(1):

> ". . . a person ('A') discriminates against a disabled person if – (a) for a reason which relates to the disabled person's disability, he treats him less favourably then he treats or would treat others to whom that reason does not or would not apply; and (b) he cannot show that the treatment in question is justified".

Before the 2005 Act amendments, there was no duty to make reasonable adjustments in relation to premises.

60. Section 24(2) deals with justification in the same way as does section 20(3) in relation to services. Treatment is justified only if A is of the opinion that one or more of the conditions listed in section 24(3) are satisfied and it is reasonable for him to hold that opinion. The conditions listed in section 24(3) are also narrowly defined and it is common ground that none of them applies in this case. There is nothing, for example, to cover the situation of a landlord or other landowner who is entitled to recover possession of his property where in all the circumstances of the case it is reasonable for him to do so.

The issues

61. There is little doubt what the sensible answer to the issues in this case would be. It would be to enable, in the first place the Council, and in the second place the court to balance the competing interests. On the one hand, there is the public interest in the proper use of social housing, which means that local authorities should not be required to continue to supply a home to a person who no longer needs it and merely wishes to make a profit out of it, or indeed to a person who will never be able to comply with the conditions of the tenancy. On the other hand, there is the right of people with disabilities to be treated as equal citizens, entitled to have due allowance made for the consequences of their disability. This, in essence, is the result which the Equality and Human Rights Commission would like us to be able to achieve.

62. The problem is that the legislation does not readily enable that to be done. There are three essential issues in this case. First, was Mr Malcolm disabled at all at the material time? This is not the most important issue in the case, being essentially a question of fact, but logically it comes before all the others. Secondly, was he, for a reason which relates to his disability, treated less favourably than a person to whom that reason did not apply? The interpretation of those words is the central issue in the case. Thirdly, if the Council did treat Mr Malcolm in a manner made unlawful by the DDA, what effect if any does this have on their right to claim possession of their property?

(1) Was Mr Malcolm a disabled person at the relevant time?

63. The judge concluded that he was not. She directed herself that he needed to show that "his illness is a well-recognised clinical illness; that it has a substantial long-term effect on his ability to carry out day–to–

day activities; that if there is no present substantial adverse effect but it is likely to recur then the court will treat it as continuing, and if there is no present substantial adverse effect because of treatment then the court will treat the condition as existing. The day–to–day activities which are adversely affected are . . . the memory or ability to concentrate, learn or understand and the perception of risk of physical danger". That is an impeccable direction as far as it goes.

64. Her main problem was that the psychiatrists had not been asked to express an opinion as to the effect of the illness on Mr Malcolm's ability to carry out those normal day–to–day activities. There was some evidence from members of his family that he had lost weight, looked dishevelled, had mood swings and was unpredictable. She had in mind that this was during the period when he was at his worst, having come off the depot medication. She concluded from that and what the psychiatrists had said that the illness had some adverse effect on his ability to carry out day–to–day activities; but in the light of the actual activities undertaken during the period, she was unable to say that this was a substantial effect.

65. The Court of Appeal disagreed. It has been common ground at all stages in the case that in this context "substantial" means "more than minor or trivial": see *Goodwin v Patent Office* [1999] ICR 302, EAT, Morison J, p 310C; cited with apparent approval in *Manchester City Council v Romano (Disability Rights Commission intervening)* [2004] EWCA Civ 834; [2005] 1 WLR 2775, para 33. Had the judge expressly so directed herself, in the view of the Court of Appeal, she could not have reached the conclusion that a person with chronic schizophrenia, who if not under regular anti-psychotic medication deteriorated so far that he could not do his job, was not disabled.

66. Mr James Goudie QC, for the Council, complains that the judge cannot have been unaware of the meaning of "substantial", as it was common ground in the arguments before her. She did not have much help from the psychiatric evidence and she was entitled to rely on the oral evidence which she did have. In particular, during the period in question Mr Malcolm had filled in several complex forms and conducted correspondence for the purposes of exercising his right to buy, applying for a mortgage, applying for benefits after he lost his job, looking for work, and instructing agents to let the flat. This did not suggest that the effect upon his memory, concentration or ability to learn or understand was more than minor or trivial even during the period when he was at his worst.

67. This is not an issue on which I would wish to resolve this case. At first blush, it would seem very surprising if a person with chronic schizophrenia, who needed regular anti-psychotic medication if he was to live a normal life in society, did not fall within the definition of disabled in the Act. Schizophrenia comes in many shapes and forms but it is a major mental illness and the drugs which are used to treat it have major mind-altering effects. On the other hand, the judge did correctly direct herself on what the Act required, and did the best she could with the "fragmentary" evidence available to her. Even supposing for the sake of argument, for the matter has not been argued before us, that the "more than minor or trivial" test is correct, I am not convinced that she applied the wrong test, or that no judge who applied the right test could have reached the conclusion she did.

(2) Less favourable treatment

68. The central issue is what is meant by the crucial words "if for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply". This contains a series of questions for the fact-finder. There are, as my noble and learned friend Lord Bingham of Cornhill has pointed out, dangers in formulating lists of questions to be answered in cases like this. They are no substitute for applying the words of the statute to the facts of the case in hand. But those words suggest that at least the following four questions will need to be answered in most cases. What is the treatment complained of? What was the reason for the treatment? Did that reason relate to the disabled person's disability? And was it less favourable than the treatment of others to whom that reason did not apply?

69. However, before answering those four factual questions, there are two questions of law to be answered. (i) What is meant by a "reason related to" the disability? (ii) What is meant by "others to whom that reason does not or would not apply? It is convenient to deal with the second question first because it is fundamental to the concept of discrimination which underlies the whole of the DDA.

"Others to whom that reason does not or would not apply"

70. Are the "others", with whose treatment the treatment of the disabled person is to be compared, people to whom "the reason which relates to his disability" does not apply, in other words, non-disabled people in the same situation as the disabled person? Or are they people to whom "that reason" does not apply, in other words, people who have not supplied the employer, the provider or the landlord with the same reason for acting as they did? In our case, is the Council's treatment of Mr Malcolm to be compared with how they would treat a non-disabled person who had sub-let? Or is it to be compared with how they would treat some-one, whether or not disabled, who had not sub-let at all?

71. The leading case on this issue in the employment context is *Clark v Novacold Ltd* [1999] ICR 951. As Mummery LJ observed, at p 962, "Linguistically section 5(1)(a) is ambiguous. The expression 'that reason' is, as a matter of ordinary language, capable of bearing either of the suggested meanings". The Court of Appeal decided that it meant the latter. *Prima facie*, this may appear surprising. It does not fit with our normal assumptions about discrimination. In effect, as Toulson LJ pointed out in the Court of Appeal, it reduces the comparison test to one which will always be met. My noble and learned friend, Lord Neuberger of Abbotsbury, has rehearsed all the inconveniences of such an approach in this particular context.

72. On closer examination, however, the decision in *Clark v Novacold* makes sense. There is also good reason to conclude that it reflects the actual intention of Parliament. The object of the earlier race and sex discrimination legislation was to secure that like cases were treated alike regardless of race or sex. The treatment given to a woman was to be compared with the treatment given to a man whose circumstances were alike in every material respect except their sex. The treatment given to a black person was to be compared with the treatment given to a white person whose circumstances were alike in every material respect except their race. The DDA undoubtedly intended that a disabled person should be treated in the same way as a non-disabled person whose circumstances were alike in every other material respect. The formulation readily covers direct discrimination of that sort. If the employer, provider or landlord refuses a job, a haircut or a flat to a disabled person who is just as capable as anyone else of doing the job, sitting in the barber's chair, or paying the rent and observing the covenants in the tenancy agreement, simply because he is disabled, then "that reason" is the disability itself and would not apply to other people.

73. But this might not be enough. The race and sex legislation recognise both direct discrimination of that sort, when race or sex or disability is the reason why the landlord behaves as he does, and indirect discrimination, where the landlord imposes some requirement which is ostensibly neutral but has a disproportionate effect on one sex, or one race, and which cannot be justified. The DDA undoubtedly aimed to cover this sort of discrimination too. An obvious example is a ban on dogs in restaurants, which has a disproportionate effect upon blind people who rely upon guide dogs to get about. The White Paper, *Ending discrimination against disabled people*, 1995, Cm 2729, which preceded the 1995 Act, made it clear in para 4.5 that the intention was to cover such cases.

74. One way of dealing with this would have been to provide for both direct and indirect discrimination in the same way that the race and sex discrimination legislation does. But this was not done. One reason may be that it would not have gone far enough. Restaurant owners may have very good reasons for a general rule banning dogs in their establishments. This would not have helped the blind person who had a very good reason for wanting them to make an exception in his case. The race and sex legislation could simply require that race and sex be ignored when employers and service providers made their decisions. The premise was the race and sex were irrelevant (save in some very narrowly defined circumstances). No special consideration was needed (save in some very narrowly defined circumstances) for a particular sex or a particular race. But if the object of the disability discrimination legislation is to "level the playing field", to enable disabled people to do things that they otherwise would not be able to do, then simply ignoring their disability and asking that they be treated in exactly the same way as non-disabled people will not do. A reasonable adjustment has to be made for the special difficulties which their disabilities present.

75. The question in essence is whether the definition of discrimination in sections 5(1), 20(1) and 24(1) was intended to require employers and suppliers or goods, facilities, services and accommodation to be kinder to disabled people than they would be to others. It could be said that any duty to make reasonable adjustments to cater for the special needs of disabled people is covered, in the employment field by section 6, and in the goods, facilities and services field by section 21. Section 21(1), for example, is apt to cover the guide dog example: it would require the restaurant owner to make an exception for the blind person with a guide dog, without requiring the restaurant owner to let everyone take dogs into his restaurant. Thus, it could be said, sections 5(1), 20(1) and 24(1) were designed only to

ensure that disabled people were treated in the same way as non-disabled people in the same situation.

76. One problem with this construction in our context is that there is (or rather was at the material time) no express duty on landlords and others with the power to dispose of premises to make any adjustments to cater for disabled people. To take the narrower construction of section 24(1)(a) would mean that only direct discrimination against disabled people, or against people with a particular disability, would clearly be covered. Indirect discrimination might be included in the concept of treating someone "less favourably" but it would not be clear how far that went. There would be no duty to give special consideration to the needs of disabled people.

77. The more serious problem with this construction is that Parliament could have chosen a form of words which made it entirely plain that it intended the comparison to be made with people who did not have the disability in question but Parliament deliberately chose a different formulation. The Parliamentary history of what became sections 5(1)(a), 20(1)(a) and 24(1)(a) is very instructive. In view of the acknowledged ambiguity of their wording, and the way in which those provisions reached the statute book, this appears to me to be a case in which the criteria laid down in *Pepper v Hart* [1993] AC 593, as explained by Lord Bingham in *R v Secretary of State for the Environment, Transport and the Regions* [2001] 2 AC 349, 391-2, are not.

78. The Bill as introduced provided that an employer discriminated against a disabled person if for a reason related to the disability, "he treats him less favourably than he treats or would treat others who do not have that disability" (clause 4(1)(a)). A service provider discriminated if "he treats him less favourably than he treats or would treat other members of the public" (clause 13(1)(a)). The original Bill did not contain anything about premises. These clauses were moved in standing committee in the House of Commons, and the Bill as amended adopted the formula that a person discriminated if "he treats him less favourably than he treats or would treat others who do not have that disability" (clause 18(a)). There matters stood until Report stage in the House of Lords. Then the Minister of State, Department for Education and Employment, Lord Henley, moved a series of amendments to substitute the words "to whom that reason does not or would not apply" for the words "who do not have that disability" in what became section 5(1)(a) and section 24(1)(a), and "others to whom that reason does not

or would not apply" for the words "other members of the public" in what became section 20(1)(a).

79. The history alone is enough to indicate that Parliament did not intend the comparison to be with someone who did not have the disability. For what it may additionally be worth, it is clear from Lord Henley's speech in the House that a change of substance and not just of wording was intended (*Hansard (HL)*, 18 July 1995, col 120):

> "Currently the comparison is with the treatment of a person who does not have the disability in question. For example, there may be two employees who cannot type – one because of arthritis and one (who is not disabled) because he has never been taught. Both would argue that he is not treating the disabled person less favourably than someone without that disability. He is treating all people who cannot type in the same way. That argument may well succeed and the person with arthritis would have no ground for complaint, even though the employment was refused for a reason relating to disability.
>
> Amendment No. 21 would ensure that the comparison is made with people to whom the reason in question does not apply. It correctly reflects the need to show that the treatment was for a reason relating to the disability and not necessarily the mere fact of disability. Thus if the employer is rejecting people who cannot type he will be treating more favourably those who can. The person with arthritis who did not get the job can show that he or she was treated less favourably than the person with typing abilities who did. The employer may well be able to justify that treatment . . . But at least the disabled person would have to be given the consideration due under the Bill."

These amendments were welcomed in the House of Lords. A similar explanation was given in the House of Commons when it was invited to agree to the Lords' amendments: *Hansard (HC)* 31 October 1995, cols 118-9. This was Parliament's final and considered response to questions raised during the passage of the Bill.

80. This confirms that the construction chosen by the Court of Appeal in *Clark v Novacold Ltd* was indeed the construction which Parliament intended. There is nothing to suggest that, when Parliament changed all three provisions at the same time, so that they had all the same wording, it was intended that they should have different meanings. The fact that they were all changed at the same time (and that one of

them had previously been different from the other two) suggests that they were all intended to have the same meaning. The history also explains why there are three different provisions defining discrimination in exactly the same way. It may well be that Parliament had not understood that the narrow scope for justification in relation to services and premises would give rise to the problems we face in this case. But in the light of the Parliamentary history, I do not think that it is possible, either to hold that *Clark v Novacold Ltd* was wrongly decided or to distinguish it on the ground that the same words mean something different in the context of employment. They must mean the same throughout, however inconvenient the result may now appear to be.

81. In reaching this conclusion I believe that I am faithfully following the intention of Parliament. I am sorry to be disagreeing with your Lordships, but even more sorry that the settled understanding of employment lawyers and tribunals is to be disturbed as a result of your Lordships' disapproval of *Clark v Novacold*. That decision has stood unchallenged for nine years and has not, so far as we are aware, caused difficulty in practice. Furthermore, Parliament has since legislated on the basis that it is correct. The definition of discrimination for employment purposes is now contained in section 3A of the DDA (inserted by the 2003 Amendment Regulations). Section 3A(1) is in the same terms as the old section 5(1). A new section 3A(5) provides:

> "A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person."

Direct discrimination of this sort cannot be justified. If the old section 5(1) (now section 3A(1)) had had the narrow scope which your Lordships' interpretation would give it, it is difficult to see why Parliament needed to introduce section 3A(5). It could simply have repealed the justification provision in section 5(1)(b).

"A reason related to his disability"

82. I appreciate that, as Lord Neuberger explains, on your Lordships' interpretation of the comparison required by section 24(1), the closeness of the connection between the person's disability and the reason for the

landlord's treatment of him becomes less critical. On my interpretation of the comparison, it becomes more important. There is a remarkably percipient comment forecasting the problem in *Disability Discrimination: The Law and Practice* (1996, FT Law and Tax, p 162) by Declan O'Dempsey and Andrew Short (incidentally also anticipating *Clark v Novacold*):

> "The absence of a duty to adjust and the limited circumstances in which less favourable treatment can be justified . . . make it particularly important to establish how closely connected the reason must be to the disability in order to come within s 24(1)(a). For example, if a person has been excluded from employment because of his disability, the fact that he has little or no money and is unable to pay a deposit and a month's rent in advance is, to an extent, related to his disability. As the comparison is to be made with someone 'to whom that reason does not apply' rather than someone without that (or any) disability, it is to be made with someone who is able to pay a deposit and a month's rent. Presumably the DDA does not require landlords to let premises to those unable to pay sums that would be required of any tenant. . . . In such a case the link between the disability and the reason for the treatment is likely to be too remote to satisfy the first part of the definition. Other cases may be less straightforward . . . "

How close, therefore, does the connection have to be between the reason for the landlord's behaviour and the complainant's disability?

83. The focus is on the reason why the landlord acted as he did. In a direct discrimination case, the reason may be the disability itself. In other cases, the reason may not be the disability, but the disability may have been the cause of the reason. But that is not necessarily enough. The connection between the disability and the reason must not be too remote. It is not easy to lay down a simple test by which the judge that remoteness. The number of links in the chain may be a pointer.

84. Another pointer, it seems to me, is whether or not the landlord knew or ought to have known of the disability and of its connection with the reason for the landlord's decision. Again, in a direct discrimination case, this is obvious. The landlord has failed to let the flat to the disabled person because of the disability. The example given in Standing Committee E was a landlord who refused to let a flat to a disabled

woman who was perfectly capable of looking after herself because he feared that in due course she might become a burden (*Official Report, Standing Committee E, Disability Discrimination Bill*, 28 February 1995, col 453).

85. In an indirect discrimination case, it may be less obvious. The landlord may not know that a particular policy has a disproportionate effect upon disabled people. When he decides on the policy, he is not treating any particular disabled person less favourably for a reason relating to his disability. But if he is told of the effect of that policy, and still applies it to the particular disabled person, then his reason may now be related to the disability in a way which it was not before. Thus, if the landlord has a "no animals" policy, it may not have occurred to him that this will have a disproportionate effect on blind people with guide dogs. If he is simply asked whether a prospective tenant may keep a dog, his refusal has nothing to do with the disability. It has to do with his policy and the reasons for the policy. But if he is told that the prospective tenant is blind, the position alters. He has to think about it. His reason for acting may still be the policy and the reasons for the policy. This was, for example, the position in *Williams v Richmond Court (Swansea) Ltd* [2006] EWCA Civ 1719, where the landlord refused to allow a stair-lift to be installed for the benefit of (and at the expense of) a disabled tenant. There were several reasons why the claim had to fail, but among them was the fact that the landlord's reasons for not wanting a stair-lift had nothing to do with the disability.

86. I agree with Lord Bingham that to establish liability for the statutory tort of discrimination against a disabled person, it is necessary to show that the alleged discriminator either knew or ought to have known of the disability (not, of course, that in law it amounted to disability within the meaning of the Act). This not only accords with principle. It also accords with the language of the Act in two ways. First, the alleged discriminator is liable if he cannot show that the treatment in question is justified: section 24(1)(b). Justification depends upon his having formed an opinion that one of the specified justifications exists: section 24(2). He could not do that without knowing of the disability. Secondly, although the DDA does not adopt the language of the sex and race discrimination legislation, which talks of less favourable treatment "on grounds of" race or sex, it does require a relationship between the treatment and the disability. This suggests that the person doing the treating must have at least the means of knowing about that relationship.

87. This view is not inconsistent with such previous authority as there is. In *Taylor v OCS Group Ltd* [2006] EWCA Civ 702, [2006] ICR 1602, a profoundly deaf employee was dismissed for emailing to himself files which he had no authority to see. The Court of Appeal held that to be guilty of unlawful discrimination, the employer had to have a disability-related reason "present to his mind" when dismissing the disabled person. There was no evidence that this employer did; indeed it had never been suggested. Emailing the files had nothing to do with the employee's deafness. Nor, of course, had it ever been suggested that the employer did not know that the employee was profoundly deaf. More directly in point is *H J Heinz Co Ltd v Kenrick* [2000] ICR 491, in which the Employment Appeal Tribunal held that an employee had been dismissed "for a reason which relates to [his] disability" when the employer knew about the symptoms which had led to his prolonged absence through sickness although it did not know the precise diagnosis until afterwards. Lindsay J said this at pp 499-500:

> "As we see it, the expression may include a reason deriving from how the disability manifests itself even where there is no knowledge of the disability as such . . . it does require employers to pause to consider whether the reason for some dismissal that they have in mind *might* relate to disability and, if it might, to reflect upon the Act and Code of Practice before dismissing".

This was a case in which the employer knew all the material facts. There was every reason to think that the reason for the dismissal might be related to a disability. It was not a case where the alleged discriminator did not know and had no reason to know that the reason for his actions might be related to a disability.

Answering the factual questions in this case

(a) What is the treatment complained of?

88. The treatment complained of is the eviction process as a whole. This began with the service of the Notice to Quit and continued with making and pursuing the claim for possession. This clearly falls within the prohibited acts defined in section 22(3)(c). At each step along the way, the Council had to decide whether or not to proceed.

89. Nothing much was made in the argument before us of the requirement in section 22(3) that the disabled person be "occupying those premises". It may be that they deserve closer attention another day: can a squatter, for example, claim to be occupying premises when he has not and had never had a lawful right to do so? But although Mr Malcolm was not actually occupying the premises when the Notice to Quit was served, he had evicted the sub-tenants and resumed occupation in April 2005, long before the possession action was tried.

(b) What was the reason for the treatment?

90. The immediate reason for serving the Notice to Quit was the subletting and parting with possession of the flat. The reasons for bringing the possession claim were those set out in the claim form and quoted in para 46 above. Neither was done because of Mr Malcolm's disability as such. A local authority might well be vulnerable to judicial review if they did not take action against a tenant who did not require to occupy a dwelling as his principal home and had gone so far as to disable himself from doing so by subletting it.

(c) Did that reason relate to the disabled person's disability?

91. I have great difficulty in seeing how the Council's reason for serving the Notice to Quit could have been related to Mr Malcolm's disability. Although they may have had the means of knowing about his mental illness, there is no evidence at all that either the illness or a potential link with his behaviour was "present to their minds" when that decision was taken, nor that it should have been.

92. Bringing the possession action, however, was another matter. By that stage they had been told of the illness. They had not yet had Dr Sivathasan's report, but they had had the letter of 8 July 2004 from Mr Clifford and Dr Sivathasan which was quite sufficient to put them on notice that there might have been a connection between the subletting and the mental illness. If the analysis above is correct, they should at least have addressed their minds to this question and then weighed it up in deciding what action to take.

93. In the event, however, the judge found as a fact that the reason for the treatment, that is the subletting, was not causally related to the

illness. On the contrary, it was a "planned decision closely linked with [his] proposed purchase on mortgage as a result of the Right to Buy . . . the error was in the timing of the events because he arranged to sub-let before the purchase had been completed. But I cannot conclude on all the evidence that. . . that it was an irrational act caused by his illness".

94. The Court of Appeal felt able to go behind that finding because they thought it was affected by the judge's earlier conclusion that Mr Malcolm was not disabled at all. There was, of course, a connection between the two findings. The evidence of his business dealings over that time was one reason for her finding on the first issue. But there was nothing irrational about the decision to sublet. It was done when the purchase was apparently "in the bag". It would enable him to service the mortgage and get some return on the property while he was out of work. The only error was in jumping the gun. The judge was in a much better position than anyone else to form a view of his thinking and motivation at the time. I cannot say that her conclusion on this point was one to which she not entitled to come.

95. This also suggests that, if the Council had addressed their mind to whether the subletting was related to the mental illness, they too would have reached the conclusion that it was not. The connection would not have displaced the reasons why they had begun the process by serving the Notice to Quit.

(d) Was the treatment less favourable than the treatment of others to whom that reason did not apply?

96. In my view, the comparison has to be made with people who had not sublet. Obviously their treatment is more favourable. So were it not for the conclusion I have reached on (c), I would have been bound to conclude that there had been unlawful discrimination (unless it could be justified, which it could not). This does place a huge focus on the reason for the treatment and the closeness of the connection between that reason and the treatment. But it appears that that was the result which Parliament intended.

(3) *What is the consequence of unlawful disability discrimination for the landlord's right to regain possession?*

97. I turn at last to the appellant's primary argument – that the DDA does not supply a defence to a claim for possession to which the claimant is entitled. The Court of Appeal's decision in *Manchester City Council v Romano (Disability Rights Commission intervening)* [2005] 1 WLR 2775 can be distinguished, because that was a case where the court had a discretion whether or not to grant the claim for possession. The health of the tenant has always been a factor in judging whether it is reasonable to do so. The landlord's obligations under the DDA can be taken into account in that context although they are not determinative.

98. In this context, where the landlord has the right to possession, Mr Goudie relies upon the decision of the Court of Appeal in *S v Jacqueline Floyd (Equality and Human Rights Commission intervening)* [2008] EWCA Civ 201. Mrs Floyd was the private landlord of premises let to S on an assured tenancy since 1996. There was an outstanding order in earlier proceedings for over £4,000 in unpaid rent. The rent had again fallen into very substantial arrears, which were admitted. It is a mandatory ground for possession under the Housing Act 1988 that at least eight weeks' rent lawfully due is unpaid at the date of the notice of intended proceedings and of the hearing of the claim. The tenant, S, defended the claim among other things on the ground of his disability, ill-health and old age. The district judge refused to grant an adjournment in order that his capacity to defend the proceedings could be investigated. In the Court of Appeal it was also argued that the judge should have adjourned in order to investigate a possible defence under the DDA. Rejecting that argument, Mummery LJ, giving the judgment of the court, said this at para 48:

> "It is not immediately obvious (a) how the 1995 Act could provide a basis for resisting a claim for possession on a statutory mandatory ground or (b) how a landlord would be unlawfully discriminating against a disabled tenant by taking steps to enforce his statutory right to a possession order for admitted non-payment of rent for 132 weeks. The 1995 Act was intended to provide remedies for disabled people at the receiving end of unlawful discrimination. It was not aimed at protecting them from lawful litigation or at supplying them with a defence to breach of a civil law obligation. Like other anti-discrimination legislation, the 1995 Act created statutory causes of action for unlawful discrimination in many areas, such as employment, the provision of goods facilities and services and the disposal or management of premises, but it did not create any special disability defence to the lawful claims of others, such as a landlord's claim for possession of premises for arrears of rent."

Mummery LJ went on to distinguish *Floyd* from the Court of Appeal's decision in this case on two grounds. First, the Council here were relying on their contractual right to possession rather than the statutory right in the 1988 Act (para 70). Second, the Court of Appeal had held that the subletting related to the tenant's disability. In *Floyd*, a finding that the reason for the proceedings related to the disability was impossible. It had never been suggested that the reason for the non-payment of rent was disability rather than the tenant's objection to the increase in rent (paras 70 and 71). The Court remarked upon the urgent need for this House to clarify the scope of the application of the DDA in possession proceedings (para 73).

99. Of the two reasons given for distinguishing this case, the first is not easy to understand. While it is true that the Council were relying on the terms of the contractual tenancy, which was left after the secure tenancy had been destroyed by operation of law, it is not clear why a contractual claim should be treated any differently from any other irresistible claim to possession, whether it arises under a statute or at common law, for example against a trespasser. The legal relationship between landlord and tenant always depends upon their contract, although in some cases Parliament has intervened to give the tenant great protection. The second, however, is an important distinction between the facts of the two cases. If I am right in my conclusion that the eviction in this case was not for a reason related to the tenant's disability, the two cases are not in conflict.

100. More importantly, however, although Mr Goudie places great weight on the passage from *Floyd* quoted at para 98 above, the second reason given for distinguishing this case does not suggest that the DDA can never be a defence to what would otherwise be an unbeatable claim to possession. It is consistent with the view that an unlawful act of discrimination *could* constitute such a defence.

101. Among the unlawful acts prohibited by the DDA is eviction. Clearly that must apply to an eviction which would otherwise be lawful. If it were unlawful for other reasons there would be no need to prohibit it. The DDA makes unlawful many other acts which would otherwise be perfectly within the law. Section 25(1) of the DDA provides that a claim under Part III of the Act "may be made the subject of civil proceedings in the same way as any other claim in tort". Normally this would be a claim for damages after a *fait accompli*, and section 25(2) makes it clear that these may include compensation for injury to feelings. But there is nothing to exclude the normal availability of an injunction to restrain a

threatened tort in appropriate circumstances. Furthermore, para 5(2) of Schedule 3 expressly preserves the making of an application for judicial review, to restrain a public authority from acting unlawfully. Thus the DDA must contemplate, not only that victims be compensated after the event but also that the unlawful discrimination be prevented from taking place at all.

102. As already mentioned, the Equality and Human Rights Commission favour a middle course. They reject the course taken by the Court of Appeal, that possession should be refused in all cases where the possession claim or notice to quit is tainted by unlawful discrimination. They recognise that this would lead to unsatisfactory results, particularly where a private person was thereby deprived of property rights in potential breach of article 1 of the First Protocol to the European Convention on Human Rights, but also where there were good public interest grounds for a public authority to regain possession. No doubt, the Commission would not wish to see the whole idea of disability discrimination brought into disrepute, as it could so easily be if a person in the position of Mrs Floyd, or of the Council in this case, were unable to recover possession or to take other entirely justified action against a tenant simply because of their disability. Equally, the Commission reject the other extreme, that the remedy for any unlawful discrimination is limited to damages. They argue for a middle course in which the court has a discretion whether or not to grant the possession order, having weighed up all the competing interests.

103. I entirely agree with the Commission that such a discretion would be much the best solution. Furthermore, far and away the simplest way to provide for it would be by expanding the list of potential justifications for the landlord's actions in section 24(3). This could be done by regulations made under section 24(5) for that very purpose. Whatever the outcome of this appeal, I urge that this be done as a matter of urgency. If *Clark v Novacold Ltd* survives, and applies to section 24(1)(a) in the same way as it applies to what was section 5(1)(a), as I believe that it both should and does, then all these cases will turn on the closeness of the connection between the disability and the landlord's reason for acting as he did. This would mean that the closer the connection between the disability and the tenant's inability to pay the rent or otherwise comply with the obligations of the tenancy – the more obvious it was that the tenant had fallen into arrears because of his disability - the more difficult it would be for the landlord to take action to recover either the rent or the property. Yet it cannot have been intended that a landlord should be obliged in effect to lend their property indefinitely to a person with no prospect of paying the rent. That would

indeed bring the DDA into disrepute. Your Lordships' approach to the comparator question avoids this inconvenient result.

104. In the meantime, however, it is difficult to find a way to arrive at any discretion. If the Notice to Quit is an unlawful act under the DDA, the landlord should not be able to rely upon it for the purpose of claiming possession. If, as in this case, the notice to quit is not unlawful, because at that stage the landlord did not know of the disability, bringing the possession claim might still be unlawful. If it were unlawful, then I agree with Lord Bingham that the court cannot be expected to give legal effect to an unlawful act. Unlike Lord Bingham, however, I would have expected the defence to be made out quite often, unless the courts are readily prepared to accept that the reasons for the landlords' actions are related to their rights and responsibilities as landlords and landowners rather than to the disabilities of their tenants. Mr Jan Luba QC, who appears for Mr Malcolm, was prepared to accept that if the Council had said that their reason for proceedings was that they always evicted non-occupiers, that would have taken them out of the Act. But although I also take the view that, at present, the answer lies in the landlord's reason for his conduct, I cannot think that it is strong enough to bear the weight which must be placed on it if just results are to be achieved in the large numbers of cases in which the issue might arise.

105. In the present case, however, I would hold that there was no unlawful discrimination against Mr Malcolm, because the reason for the Council's actions was not related to Mr Malcolm's disability. In agreement with your Lordships in the result, and on most of the issues, therefore, I would allow the appeal and restore the order of the circuit judge.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

106. What is the obligation placed upon landlords towards the disabled under the Disability Discrimination Act 1995? Is it the obligation to treat the disabled no less favourably than those not disabled? Or is it to treat them more favourably? That is the central question for your Lordships' determination on this appeal.

107. Nowadays—since the 2005 amendments to the Act—in certain respects a landlord must treat the disabled more favourably: he must make reasonable adjustments in relation to the premises. And that, indeed, equates to what has always been the position with regard to employers and those who provide goods, facilities and services: they from the outset have been under a duty to make reasonable adjustments to cater for disability and have been liable for discrimination if they fail to do so—see for example the decision of the House in *Archibald v Fife Council* [2004] UKHL 32, 2004 ICR 954. But where providers (be they employers, suppliers or landlords) are under no express statutory duty to make adjustments of this nature, are they nonetheless, under the primary non-discrimination provisions of the 1995 Act (sections 5(1)(a), 20(1)(a), and 24(1)(a)), forbidden to treat the disabled in the same way as they would treat anyone else? All three provisions are in materially identical terms. Section 24(1)(a) being at the heart of this appeal, that is the one I shall set out:

> "[A] person . . . discriminates against a disabled person if (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply . . . "

108. The question arose in the employment context in *Clark v Novacold* [1999] ICR 951 where an employee was dismissed following serious injuries likely to prevent his return to work for about a year. Plainly his dismissal was for a reason which related to his disability. But was he thereby being treated less favourably than the employer would have treated "others to whom that reason [did] not or would not apply"? It was accepted on all sides that any employee proposing a year's absence from work would also have been dismissed. That notwithstanding, however, the Court of Appeal held that the disabled employee had been treated less favourably than others would have been treated because the comparison to be made was with those employees who were not disabled and who were therefore continuing to do their work. My noble and learned friend, Lord Scott of Foscote, has already cited extensively from Mummery LJ's leading judgment in the Court of Appeal and I need not repeat it here.

109. By the same token, argued the tenant in *S v Jacqueline Floyd (Equality and Human Rights Commission intervening)* [2008] EWCA Civ 201, her landlord's action in seeking to evict her on the statutory ground of non-payment of rent for over eight weeks (in fact for 132 weeks)—arrears which it was contended had accrued because of the

tenant's disability—constituted unlawful discrimination under section 24(1)(a) because the landlord was treating her less favourably than he would have treated a tenant who was up to date with the rent.

110. And again by the same token the respondent tenant in the present appeal argues (as he did with success before the Court of Appeal) that the appellant landlord's treatment of him should be compared, not to how they would have treated any other tenant who sublet, but rather to someone keeping to the terms of his tenancy.

111. *S* failed in her appeal and it is convenient at this stage to note Mummery LJ's reasoning in the leading judgment in the Court of Appeal:

> "The 1995 Act was enacted to provide remedies for disabled people at the receiving end of unlawful discrimination. It was not aimed at protecting them from lawful litigation or at supplying them with a defence to breach of a civil law obligation. Like other anti-discrimination legislation, the 1995 Act created statutory causes of action for unlawful discrimination in many areas, such as employment, the provision of goods, facilities and services and the disposal or management of premises, but it did not create any special disability defence to the lawful claims of others, such as a landlord's claim for possession of premises for arrears of rent. The legislation is not about disability per se: it is about unlawful acts of discrimination on a prohibited ground, ie, unjustified less favourable treatment for a reason which relates to the disabled person's disability." (para 48)

112. Like Lord Scott, I too find that paragraph convincing but at the same time difficult to reconcile with what the learned Lord Justice had earlier said in *Clark v Novacold*. What difference in principle is there, I respectfully ask, between a "civil law obligation" on the one hand to pay rent or otherwise vacate (or be evicted from) the premises, and on the other hand to do one's work or otherwise vacate (or be dismissed from) the job? I cannot see why the same reasoning dictating the failure of *S's* appeal should not also have defeated Mr Clark's claim. If, indeed, as Mummery LJ said in *Floyd*, "The legislation is not about disability per se: it is about . . . unjustified less favourable treatment for a reason which relates to the disabled person's disability", then it cannot be right to construe section 24(1)(a) (or sections 5(1)(a) or 20(1)(a)) in such a

way that the requirement to show less favourable treatment will always and by definition be satisfied. Toulson LJ pointed that out (at para 155) in the judgment below and my noble and learned friend Baroness Hale of Richmond recognises it at para 71 of her opinion: the construction adopted in *Clark v Novacold* "reduces the comparison test to one which will always be met".

113. To my mind—and here again I am in agreement with Lord Scott (para 32)—Parliament must rather have intended "a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not". A meaningful comparison requires also that treatment cannot be discriminatory unless the supposed discriminator knows of the disability (although obviously he need not know that it satisfies the statutory definition of disablement). This alternative and narrower approach to the section thus solves the further very real problems which otherwise arise as to whether, and if so what, knowledge is required for discrimination to be established under the Act.

114. I recognise, of course, that this approach to the section reduces its reach: it confines it largely if not entirely to the proscription of direct discrimination only. But that perhaps is not, after all, so surprising. Disabilities are too diverse in their nature for the concept to lend itself easily to the notion of indirect discrimination—the imposition of requirements ostensibly neutral but in fact having a disproportionate and unjustifiable impact on those sought to be protected. What indirect discrimination against the disabled would equate to, say, a requirement for employees to be at least six feet tall—presumably indirectly discriminatory against both women (sex) and those of Asian origins (race)? The needs of the disabled are rather different and require sometimes to be met by positive action. As I noted at the outset, where Parliament is clearly intent not merely on levelling the playing field for the disabled but in securing positive discrimination in their favour it does so by requiring reasonable adjustments to be made to cater for their special difficulties. As Lady Hale observes (at para 74), section 21(1) is, for example, apt to cater for the blind man's need to bring his guide-dog into the restaurant—the most frequently deployed illustration of the problems of disablement. If landlords similarly are to be required to allow guide-dogs into tenanted premises (assuming ordinarily that animals are forbidden), or to make other specific provision for the disabled over and above what they would ordinarily provide or permit, then (insofar as the 2005 amendments have not already achieved this) legislation can be enacted accordingly.

115. Whether, however, it would ever be thought appropriate to legislate sufficiently beneficially towards disabled tenants to allow them to remain in possession despite running up huge arrears (as in *Floyd*) or subletting all or part of the premises (as here) may be doubted. There must come a point at which the wider interests of the disabled would actually be *dis*advantaged by such legislation, when landlords would begin to entertain a real reluctance (section 22 of the Act notwithstanding) to grant them tenancies in the first place. Those considerations, however, are for the future.

116. I am in no doubt that, unamended, the 1995 Act did not avail this respondent in the particular circumstances of this case. However favourably from his point of view the court might have viewed the facts—even supposing, that is, he was disabled at the material time, that but for his disablement he would not have sublet the premises, and that the Council knew this to be so—these possession proceedings could not properly have been held discriminatory contrary to section 24(1)(a).

117. If, of course, this is right, it becomes unnecessary to address either of the factual issues arising. For what it is worth, however, I am inclined—again, I think, in common with Lord Scott to share my noble and learned friend Lord Bingham of Cornhill's view that the Court of Appeal was entitled to find the respondent disabled at the material time, and Lady Hale's view that there was no adequate connection between that and his subletting of the premises.

118. I too would allow this appeal and restore the order of Judge Hallon at first instance.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

119. This appeal raises a number of points relating to the scope and meaning of the provisions of Part III of the Disability Discrimination Act 1995 ("the 1995 Act") insofar as they apply to "Premises". In particular, the competing arguments appear to require a choice to be made between two interpretations of the definition of discrimination in section 24, one of which (supported by the appellant, the London

Borough of Lewisham) would give the anti-discrimination provisions of section 22 an unattractively restrictive effect, and the other of which (supported by the respondent, Mr Courtney Malcolm) would give those provisions an extraordinarily far-reaching scope.

120. The facts and centrally relevant statutory provisions have been clearly set out and explained by my noble and learned friends, Lord Scott of Foscote and Baroness Hale of Richmond, whose opinions I have had the privilege of reading in draft. I gratefully adopt what they have said for the purposes of this opinion, in which all references to statutory provisions are to those of the 1995 Act in its original form, unless the contrary is stated.

The issues

121. It appears to me that that Mr Malcolm can only defeat Lewisham's claim for possession on the ground that he would be subject of unlawful discrimination contrary to section 22(3)(c), if he can establish the following six propositions:

(a) He must have been suffering at the relevant time from a "disability" within section 1(1);
(b) He must have been "treat[ed]" by Lewisham in a manner falling within section 22(3)(c);
(c) The "reason" for the treatment must "relate to" the disability within section 24(1)(a);
(d) The treatment must, also under section 24(1)(a), be "less favourabl[e]" than the actual or hypothetical treatment accorded to a comparator, namely a non-disabled person;
(e) The discrimination cannot be "justified" by Lewisham pursuant to section 24(2);
(f) The resultant discrimination gives him a defence to the action for possession.

122. There is no substantial difference of principle between the parties on issues (a) and (b), although there is disagreement whether the Court of Appeal was entitled to interfere with the Judge's conclusion on issue (a). As to issue (c), there are three questions of principle, namely how one assesses the "reason", how closely connected it has be with the disability; and whether it is necessary for the alleged discriminator to know of the disability in order for his action to be unlawful; also, on the

facts of this case, Lewisham contends that the Court of Appeal was not entitled to interfere with the Judge's conclusion.

123. Issue (d) raises what is the most difficult and probably the most significant point of in the appeal, namely how one characterises the comparator. Lewisham does not contend that, if there is unlawful discrimination, it can be justified, so issue (e) does not arise. Issue (f) raises a point of principle as to the effect of unlawful discrimination.

124. I propose to deal with issues (a), disability, and (b), treatment, first, as they are relatively self-contained and uncontroversial. However, issue (c), the reason's link with the disability, and issue (d), the comparator, are connected. It is convenient to take issue (d) before issue (c), partly because issue (c) has more than one strand and partly because it is easier to deal with once issue (d) has been resolved. Issue (f), remedy, is best considered immediately after issue (d).

Did Mr Malcolm suffer from a disability?

125. It is rightly common ground that the question whether Mr Malcolm suffered from a disability is to be determined as at the time he granted the unlawful subtenancy. By section 1(1), a person suffers from a disability "if he has a physical or mental impairment which has a substantial and long-term effect on his ability to carry on normal day-to-day activities", and there are supplementary provisions in schedule 1. The Judge held that Mr Malcolm's schizophrenia did not have a "substantial and long-term adverse effect on his ability to carry out normal day-to-day activities" as at the time he effected the subletting. This conclusion was reversed by the Court of Appeal on the grounds that she applied, or must have applied, the wrong test for substantiality and that she did not properly consider the long-term aspect (see per Arden LJ at paras 76 to 94).

126. So far as the proper approach is concerned, Lewisham, correctly in my opinion, did not challenge the Court of Appeal's view that "substantial" in section 1(1) of the 1995 Act requires the effect of the disability simply to be more than minor or trivial (in accordance with the guidance given by the Employment Appeal Tribunal in *Goodwin v The Patent Office* [1999] ICR 302 at 310C). The Judge did not expressly refer to this rather low threshold, but that may well have been because it was common ground before her.

127. The Judge's decision on this issue was one with which any appellate court should have been slow to interfere, especially as it was commendably carefully considered and expressed. Nonetheless, I think the Court of Appeal was right to reverse it. I will give my reasons very shortly, as the facts and arguments were comprehensively explored by Arden LJ in paras 76 to 94 of her judgment.

128. I do not agree that the Judge failed properly to consider the long-term aspect: she did not have much evidence about it, and she took what evidence she had into account. However, in agreement with the Court of Appeal, I consider that the Judge was wrong to conclude that Mr Malcolm's disability was not "substantial". It appears to me that the unchallenged evidence of the two doctors and the social worker established Mr Malcolm's case on the issue.

129. Much of Dr Sivasathan's evidence is set out in para 76 of Arden LJ's judgment. Dr Steadman said that "any decisions" made by Mr Malcolm at the relevant time "would have been likely to have been made within the context of impaired thinking and in such an impaired state, it is common for people to make decisions which are not in their best interests and this may well have been the case here." That left open the possibility that it was not "the case" that his schizophrenia caused Mr Malcolm to effect the subletting, but it shows that Dr Steadman believed that Mr Malcolm suffered from a disability within section 1(1).

130. It may well be that, in reaching her conclusion (which she described as "knife-edge"), the Judge was influenced by her conclusion that, when deciding to proceed with the subletting, Mr Malcolm was not significantly influenced by his schizophrenia, but that is a different question from whether he fell within section 1(1). It is true that Dr Sivasathan's assessment, and hence Dr Steadman's assessment, were partly based on what Mr Malcolm said, and the Judge was unimpressed with his testimony. Nonetheless, bearing in mind the relatively low threshold which a person with an undoubted disability needs to cross in order to bring himself within section 1(1), the correct conclusion in the present case was that a sufficient degree of disability was established.

The treatment to which Mr Malcolm was subjected

131. This is an uncontroversial issue in general terms, but it is not entirely easy to analyse by reference to sections 22(3)(c) and 24(1)(a). The treatment to which Mr Malcolm was, and is being, subjected can be divided up into a number of actions, namely being served with a notice to quit, being served with a claim for possession of the flat, having the action heard, having an order for possession made against him, and (albeit potentially) having a warrant of possession executed against him. Alternatively, it can be seen as a single composite action, starting with the notice to quit and ending with the execution of the warrant. Either way, it appears clear that these steps fall within the ambit of section 22(3)(c), as they either are part of the process of "evicting" Mr Malcolm or they involved "subjecting him to [an] other detriment".

132. I would hold that, for the purposes of section 22(3)(c), a landlord should, at least normally, be treated as involved in a single exercise of "evicting" a tenant from the moment the notice to quit is served until the possession claim is concluded. That accords with the reality of the matter; each step from the decision to serve the notice to quit was taken for the purpose of evicting Mr Malcolm. It would, at least normally, not only be artificial to treat individual stages of a single exercise as discrete acts; it would also run the risk of unnecessary complication.

133. However, that does not mean that it would be wrong to treat different stages of the possession-seeking exercise differently. For instance, where the reason for seeking possession (or, if relevant, the landlord's knowledge), changes during the course of the procedure, it may be that an exercise, which had started off as lawful, could thereby become unlawful under the 1995 Act.

134. It is convenient to mention another point at this juncture. It rightly remains common ground that Lewisham "manage[s]" the flat within section 22(3), and, until the oral argument developed before your Lordships, it had been common ground (albeit tacitly) that Mr Malcolm was "occupying" the flat. However, Lewisham suggested that, until he returned to live in the flat in May 2005, Mr Malcolm was not "occupying" the flat. In particular, therefore, it was said that he was not occupying the flat, and therefore entitled to the protection of section 22(3)(c), when the notice to quit was served and the possession proceedings were started.

135. I agree with Mr Jan Luba QC, who appeared for Mr Malcolm, that it is too late for Lewisham to raise that argument. Neither the effect

of the grant of the subtenancy nor the nature of Mr Malcolm's intentions at the time of the subletting was examined before the Judge. Both or either of those matters could well be relevant to the issue of whether he was "occupying" the flat between June 2004 (when he sublet it) and May 2005 (when he returned). Further, there were hardly any submissions on the precise meaning in section 22(3) of "occupying", a word whose interpretation depends very much on context. Quite apart from this, Mr Malcolm was undoubtedly occupying the flat before Lewisham's possession claim was heard, and he will be there if and when Lewisham applies for a warrant of execution.

The comparator under section 24(1)(a) of the 1995 Act

136. The most important and difficult issue raised on this appeal is the nature of the comparison exercised to be carried out in relation to a claim under section 24(1)(a). The issue may be characterised as identifying the meaning of "that reason" in the phrase "others to whom that reason does not or would not apply". Lewisham's case is that "that reason" refers back to the "reason which relates to the disabled person's disability", whereas Mr Malcolm (supported by the Commission) argues that "that reason" simply refers back to "the reason". Thus, on his case, unlike that of Lewisham, the causal link is not included when considering "that reason" in section 24(1)(a). On Lewisham's case, the comparator involves stripping out the disability but not the reason, so there would only be discrimination if a non-disabled person to whom the same reason would apply would be accorded more favourable treatment. On Mr Malcolm's case (supported by the Equality and Human Rights Commission), the comparator involves stripping out the reason and the disability, so there would discrimination if a non-disabled person to whom the reason did not apply was accorded more favourable treatment.

137. Accordingly, in the present case, Lewisham says that there would be no discrimination even if the Court of Appeal was right in concluding that Mr Malcolm's schizophrenia amounted to a disability within section 1(1), and there was a sufficient link between that disability and the reason for seeking possession. That is because Lewisham's treatment of Mr Malcolm was no different from its treatment of any other secure tenant who had sublet. On the other hand, given that the only reason Lewisham is seeking possession is because Mr Malcolm had sublet, and the subletting, according to the Court of Appeal, was attributable to his disability, he contends that there was discrimination because he was "treated less favourably" than a non-disabled tenant who had not sublet.

138. Either reading of section 24(1)(a) is linguistically defensible, and, as Mr Rabinder Singh QC, for the Commission, said, choosing between them is difficult. The point was considered by the Court of Appeal in *Clark v Novacold Ltd* [1999] ICR 951, in relation to the subsequently repealed section 5(1)(a), which contained effectively the same definition of discrimination, in relation to employment, as section 24(1)(a) in relation to premises. In a judgment, with which Beldam and Roch LJJ agreed, Mummery LJ decided that the interpretation promoted by Mr Malcolm in these proceedings, which I shall call the wider construction, was correct – see the discussion at 960G to 965D.

139. Not without considerable misgivings, I have come to the conclusion that Lewisham's argument, in favour of what I shall call as the narrower construction, is to be preferred, at least in relation to section 24(1)(a). Although either reading of the section can be said to accord with the words used, it appears to me that the narrower construction is the more natural. If "the reason" the landlord is seeking possession is non-payment of rent due to the tenant's disability, to take as a comparator a non-disabled tenant who is similarly in arrear with his rent appears sensible, whereas, at least at first sight, it seems somewhat odd to use as a comparator a tenant who has not failed to pay rent at all. Indeed, in *Novacold*, Mummery LJ at 963B described the narrower construction as "the obvious way of determining" whether there had been discrimination (foreshadowing what my noble and learned friend Lord Bingham of Cornhill says at the start of para 14 of his opinion, which I have had the advantage of reading in draft).

140. Further, as Toulson LJ pithily said in the Court of Appeal at para 155, the wider construction would mean, at least on the basis of the present state of the authorities, "that the complainant is logically bound to be able to satisfy the requirement of showing that his treatment is less favourable than would be accorded others to whom the reason for his treatment did not apply" because "without the reason there would not be the treatment" The same point is made more fully by Lord Scott, in paras 32 and 33 of his opinion, and it obviously calls into question whether the wider construction is correct.

141. On the other hand, it is fair to say that, on the narrower construction, the reach of section 22, and therefore its beneficial effect, is very limited. That is, in principle, a powerful argument in favour of the wider construction, as anti-discrimination statutes should, at least in general, be construed benevolently towards their intended beneficiaries. The consequences of the narrower construction would now be somewhat

mitigated by sections 24A to 24M of the 1995 Act, which were added in 2005 and impose significant duties on landlords in relation to the terms of letting and the physical state of the demised and associated premises, where the tenant is disabled. However, the fact that those provisions now exist cannot be invoked as an aid to the construction of section 24.

142. While the narrower construction results in section 24 having a very limited reach, the wider construction would, by contrast, produce a remarkably extensive, and, from a land owner's point of view, potentially highly invasive, result. Indeed, as Mr James Goudie QC, for Lewisham, said, the consequences of the wider construction of section 24(3) are extraordinary, and have been commented on in the Court of Appeal, even when adopting it (see e.g. in *Manchester City Council v Romano* [2004] EWCA Civ 834, [2005] 1 WLR 2775, paras 121 to 123). It would mean that a secure tenant, whose failure (such as non-payment of rent, breach of covenant, or cesser of residence) would normally give a landlord a right to possession and a money claim, would be immune from suit, potentially indefinitely, if the failure was in some way causally linked to his disability.

143. Thus, a private sector landlord is entitled to possession as of right against an assured tenant if more than eight weeks of rent is in arrear – see section 7(3) of, and ground 8 of Schedule 2 to, the Housing Act 1988. On the wider construction of section 24(1)(a), a landlord could not seek possession against a tenant on this ground if the arrears were attributable to the tenant's disability, which would seem to be a somewhat startling result. It was a result considered and rejected by the Court of Appeal in *S v Floyd* [2008] EWCA Civ 201, where the tenant was 132 weeks in arrear. At para 69, Mummery LJ (with whom Lawrence Collins LJ and Munby J agreed) held that the landlord's contractual right to possession on the basis of a mandatory ground (i.e. where the court did not have to be additionally satisfied that it was reasonable to order possession) was not precluded by section 22(3)(c). He distinguished the case from *Romano*, where the Court of Appeal, relying on *Novacold*, had reached a different conclusion in relation to a ground for possession where the landlord also had to establish that it was reasonable to order possession.

144. It was agreed before your Lordships, rightly in my view, that the reasoning in para 69 of *Floyd* could not be supported: as a matter of logic. The right of a landlord of any premises to possession is always contractual, in the sense that he cannot obtain possession if he has no contractual right to it. The effect of statutes such as the Housing Acts

1985 and 1988 Acts is to fetter this contractual right: when one talks of a statutory provision giving the landlord the right to possession, the reality is that the provision removes a fetter on the landlord's contractual right imposed by another statutory provision. Accordingly, the conclusions on this point in *Romano* and *Floyd* cannot stand together, as Lord Scott and my noble and learned friend, Lord Brown of Eaton-under-Heywood have said. (However, if, as I believe, the result in *Floyd* is right, that emphatically does not mean that a tenant's disability is irrelevant when considering, in a case such as *Romano*, whether it is reasonable to make an order for possession against him).

145. The fact that Mummery LJ was unhappy about applying, indeed ultimately failed to apply, his reasoning in *Novacold* to the facts in *Floyd* is unsurprising. Indeed, it is very significant for present purposes, in that it calls into question the correctness of the reasoning in *Novacold* on the proper approach to the statutory comparator, or at least the applicability of that reasoning to section 24(1)(a).

146. As Lord Scott pointed out in argument, the effect of the wider construction of 24(1)(a) could produce a particularly unjust regime for landlords. Section 22(1) and (4) preclude discrimination by a prospective landlord so far as his preparedness to let, or to permit an assignment, to disabled persons. On the wider construction, this would mean that, under section 22(1) and (4), a landlord could not lawfully refuse to let, or permit an assignment, to a person with a record of non-payment of rent due to disability, so he would often be obliged to let to such a person. Thereafter, under section 22(3)(c), he might never obtain possession against that person for non-payment of rent. Indeed, in the light of the closing words of section 22(3)(c), Mr Luba accepted that the landlord could not even sue for rent arrears. .

147. The wider construction appears to result in other surprising consequences. It would mean that a licensee, whose licence had expired and who refused to vacate because of physical or mental disability, could not be evicted, or even sued for damages, by virtue of section 22(3)(c). Even a person who entered as a trespasser would, as Mr Luba accepted, appear to be immune from suit if his entry or remaining on the property was attributable to his disability.

148. As I have mentioned, as a matter of general policy, there is much to be said for the view that the court should lean in favour of an interpretation which assists the intended beneficiaries of anti-

discrimination legislation. However, the legitimate interests of those whose common law rights are affected by the legislation must also be borne in mind. If the wider construction results in the legislation benefiting more groups than the narrower construction, then, absent any good reason to the contrary, the former should prevail. However, where the wider construction would involve private rights being taken away without compensation, potentially in circumstances which could reasonably be regarded as extraordinary and positively penal, the policy arguments appear to me to point in favour of the narrower construction.

149. Additionally, it appears to me that considerable difficulties could be encountered in determining whether "the reason … relate[d] to the disability" if the wider construction was correct. In the present case, Lewisham contends that its reason for seeking possession was because of its housing management policy, which cannot be said to be related to Mr Malcolm's disability. If that is right, then it seems to me that section 22(1)(c) would be a broken reed, as an evicting landlord could always claim that he was relying on his policy of obtaining possession whenever he could, or his policy of always seeking possession against tenants who breached their covenants. That would involve adopting a very narrow approach to the "reason" which, as I see it, would be inconsistent with the justification for, and indeed would defeat the purpose of, the wider construction in relation to the comparator.

150. On the other hand, if, in the present case, the reason was caught by section 24(1)(a), it would mean that *Floyd* was wrongly decided, which I find hard to accept, but it seems to me that it must follow. In that case, possession was sought because of non-payment of rent by the tenant, which was attributable to his disability, whereas here possession is sought because the tenant sublet, which, at least according to the Court of Appeal, was attributable to his disability. Indeed, I have difficulty in seeing how, as a matter of logic, the decision in *Williams v Richmond Court (Swansea) Ltd* [2006] EWCA Civ 1719, discussed at the end of para 85 of Baroness Hale's opinion, could be justified if the present case is caught by section 24(1)(a). The reasons that the landlord in that case refused to install a stair-lift, insofar as they were based on "aesthetics, cost of repair, inconvenience" (per Richards LJ at para 43), cannot alter the fact that, on the wider construction, the disabled tenant was being treated less favourably than her comparators, and the landlord's reasons as quoted did not fall into any of the categories of statutory justification (although there was an additional reason which might have done, but does not appear to have been relied on).

151. In summary, then, the wider construction accords less naturally with the words used in section 24(1)(a), it involves what, on analysis, amounts to a pointless comparator exercise, it produces startling, indeed penal, results, and it leads to difficulties when it comes to deciding if "the reason … relates to the … disability". For those reasons, I am of the view that, notwithstanding the consequent very limited scope of section 22, the narrower construction is to be preferred, at least unless there is a good reason, which I have not so far considered, to adopt the wider construction.

152. Although he saw considerable logic in adopting the narrower construction in *Novacold*, Mummery LJ favoured the wider construction for a number of reasons. The first was the difference between the language of the 1995 Act and that of other anti-discrimination legislation (at 963B-D). I am not convinced that the different language of one statute, concerned with a similar but different problem, can be safely relied on as a guide to the meaning of an expression in another statute. Secondly, Mummery LJ said that the wider construction avoided problems over comparators which the narrower construction could raise (at 963F-H). In my view, while such problems may well arise in the employment context, they would rarely, if ever, arise in the context of section 24 Indeed, as can be seen from para 45 in the judgment of Richards LJ in *Richmond Court*, the wider construction can lead to difficulties with comparators.

153. Thirdly, Mummery LJ cited an example (the exclusion of blind people from a café because of a general prohibition against dogs) given by the minister in his statement introducing the 1995 Act in the House of Commons, which suggests that the wider construction was intended by the legislature. In paras 76 to 79 of her opinion, Baroness Hale now takes that point further, by tracing the Parliamentary history of the wording of the discrimination definitions in the 1995 Act, and identifying another ministerial statement (in this House). I accept that both the drafting history and at least one of the two ministerial statements can fairly be said to support the wider construction, and they have caused me to review my preference for the narrower construction.

154. I have reached the conclusion, however, that the parliamentary material does not justify adopting the wider construction. The issue is difficult, and neither interpretation produces a particularly satisfactory result. However, I do not think that this is one of those rare cases where recourse to ministerial statements is appropriate. The narrower construction, which I would adopt applying normal principles of

interpretation, does give section 24 a pretty limited ambit, which some might regard as surprising, but it is far from absurd or capricious. The wider construction, however, does appear to lead to results which could be fairly characterised as absurd and capricious. It seems scarcely appropriate to invoke ministerial statements in support of such an interpretation. To put it another way, I am in insufficient doubt as to the correct answer to justify looking at the parliamentary material.

155. Quite apart from this, I am not convinced that either of the ministerial statements can be regarded as conclusively indicating that the wider construction of section 24(1)(a) is what was intended by the legislature. The guide dog example, quoted by Mummery LJ, was not so expressed as to make it clear that the enforcement of a general ban on dogs in a restaurant was intended to be unlawfully discriminatory against blind people. All that the minister said was that "it would be a prima facie case of indirect discrimination against blind people and therefore unlawful". That does not tell one whether the prima facie conclusion would be displaced if the policy of the restaurant was to ban all dogs.

156. In any event, such discrimination would be covered by section 19(3)(a) or (f) - being in relation to "access to and use of any place which members of the public are permitted to enter" or "facilities for … refreshment…"), in respect of which discrimination is defined in section 20. The discrimination discussed in the ministerial statement quoted by Baroness Hale is concerned with employment, and therefore related to what was section 4, in respect of which discrimination was defined in section 5. The present case, of course, is concerned with section 22, and hence with the definition of discrimination in section 24. Under section 5(3), an employer was given a fairly wide ground for justifying discrimination, namely that he must have a reason for it which is "both material to the circumstances of the particular case and substantial". No such broad grounds exist under section 22(3).

157. It is true that the three definitions of discrimination in the 1995 Act were all made at the same time, but no consideration whatever appears to have been given in parliament to the meaning, let alone the effect, of the reworded section 24(1)(a). It seems questionable whether, in any event, it would be right to take the exceptional course of relying on a ministerial statement in those circumstances.

158. It would, on the face of it at least, be very surprising if section 24(1)(a) had a different meaning from the effectively identically worded section 5(1)(a), but it would not be an impossible conclusion. While the 1995 Act has a single definition of "disability" which is generally applicable, it has three effectively identical definitions of "discrimination", each of which applies in different fields (employment, goods facilities and services, and premises). The combination of the contrast between section 5(3) and section 24(3), and the fact that the wider construction of section 5(1)(a) has been assumed to be right for some years – perhaps together with other factors, such as subsequent implied parliamentary approval – could conceivably justify the decision in *Novacold* being correct as to the effect of section 5(1)(a), despite the conclusion I have reached as to the meaning of section 24(1)(a). However, no party argued for such a conclusion, and, as at present advised, it seems to me that this was realistic. As Lord Brown points out in para 111, the principle reasons for rejecting the wider construction of section 24(3) is its potentially extraordinarily penal consequences for property owners and the apparent pointlessness of the comparison exercise, and the same arguments apply to the wider construction of section 5(1)(a) in relation to employers.

If the treatment was unlawful, does that give Mr Malcolm a defence?

159. The discussion in the preceding section assumes that, if Lewisham was unlawfully discriminating against Mr Malcolm contrary to section 22(3)(c) by maintaining these proceedings, the court could not make an order for possession. Mr Singh argued, however, that a landlord's right to possession in a case where section 22(3)(c) applied was not automatically barred, but was a matter for the court's discretion. In other words, in a case such as this (or indeed *Romano* or *Floyd*), it was said that the court has to balance the landlord's contractual right to possession (permitted, as it were, by the Housing Act) against the fact that section 22(3)(c) renders it "unlawful".

160. In agreement with the Court of Appeal and with your Lordships, I cannot accept that argument. If the service of the notice to quit in the present case was unlawful under section 22(3)(c), then the court could not give effect to it. If, by seeking an order for possession, a landlord is acting in a way the legislature has held to be unlawful, then, again, the court cannot make such an order. In either case, the court would be permitting, indeed facilitating, an unlawful act. The fact that the court will not always enjoin an unlawful act (e.g. a trespass) is nothing to the point: it is one thing to refuse to restrain a common law tort; it is another

to make an order enforcing a statutorily unlawful claim. Quite apart from this, the balancing exercise involved in exercising the suggested discretion would be very difficult, and there is no statutory or other guidance as to how it should be carried out: it would lead to unpredictability in an area of law where there is quite enough uncertainty already.

The need for knowledge of the disability

161. The question whether a landlord need know of a tenant's particular disability in order to be guilty of discrimination under section 22 does not seem to me to be capable of an entirely simple answer. If, at the time of the alleged discriminatory act, the landlord has no reason to know of the tenant's disability and the act is not inherently discriminatory, then I consider that a landlord would not be acting unlawfully. So, in this case, it seems to me that, when it served the notice to quit, Lewisham could not have been acting unlawfully, even if, as the Court of Appeal thought, the subletting had been causally linked to Mr Malcolm's schizophrenia. Service of a notice to quit, either generally or because the tenant has sublet, is plainly not inherently discriminatory, and, at least on the evidence your Lordships have been taken to, Lewisham had no reason to think that Mr Malcolm suffered from schizophrenia or that it was linked to the subletting.

162. In my opinion, it would require very clear words before a statute could render a person liable for damages for discrimination against a disabled person, owing to an act which was not inherently discriminatory carried out at a time when the person had no reason to know of the disability which could render the act discriminatory. Sections 22 to 25 contain no such clear words; indeed, if anything, rather the contrary. I agree with what all your Lordships say on this issue.

163. Different considerations apply where the act is obviously liable to be actually or even potentially discriminatory. To take an obvious, rather crass, example, it would be discriminatory if a landlord advertised property as unavailable for people with one or more disabilities. Further, in a case such as the present, I consider that a landlord could be liable if, in all the circumstances, he reasonably ought to have been aware of the disability. Whether, in a particular case, it can be said that an act is obviously potentially discriminatory, or that a landlord ought to have been aware of the disability must turn very much of the facts of that

case. In those circumstances and because the outcome of this appeal does not turn on such an issue, it is not appropriate (even if it were possible) to give any guidance on those matters.

The "reason" for the treatment and the link with the disability

164. There are various ways in which the "reason" under section 24(1)(a) can be characterised in this case. For instance, that Mr Malcolm had sublet, that he was in breach of covenant, that he had ceased to reside, that he had lost security of tenure, or that Lewisham wanted to control who lived in its housing stock. There was some dispute whether the "reason" refers to the landlord's subjective motivation or the legal ground on which he relies, and, if it is the subjective motivation, whether one looks for a policy reason or a case-specific reason. Difficulties could also arise where there is more than one reason, or where it is said that the link between the reason and the disability is too indirect or slender.

165. As already mentioned, it seems to me that these problems are much easier to solve if, as I believe it should be, the comparator issue is determined in favour of the narrower construction. Once one decides that discrimination under section 24(1)(a) involves comparing the treatment of the disabled person with the treatment of a non-disabled person who is otherwise in the same position, the attention to the reason for the treatment becomes more focussed, and there is much less room for uncertainty or injustice. The sort of problem thrown up by facts such as those in *Richmond Court* simply does not arise. Further, on this approach, there is no policy reason for adopting anything other than a comparatively generous approach to the question of the link between the treatment and the disability.

166. In my view, it is plain that the "reason" in section 24(1)(a) cannot be confined to the legal ground, because a prospective landlord, under section 22(1) has a legal right to refuse to let as, and on the terms, he chooses. Also, if a landlord voluntarily agreed with all but one of his tenants in a block of flats to vary the user covenants in their leases in some beneficial way, but did not accord that privilege to a tenant because he was disabled, it would be absurd if that was not a "reason" within section 24(1)(a). Additionally, the fact that knowledge of the disability (including what should be known) is required, supports the argument that one is normally primarily concerned with the state of mind of the alleged discriminator. Crucially, this is also supported by

the language of section 22(1): the reference to the "reason" for the treatment supports the notion that one is concerned with the alleged discriminator's subjective motivation, rather than with the objective legal ground.

167. For similar reasons, I consider that, when identifying "the reason" for the purposes of section 24(1)(a), in the context of a claim for possession which concerns an individual tenant rather than a group of tenants, it would normally not be appropriate simply to look at the landlord's broad policy ground. What requires to be identified is the specific ground which applies to the particular case. Thus, in the present case, I do not believe that the "reason" should be treated as being Lewisham's desire to manage its housing stock or not to have a non-resident tenant or to enforce its tenants' covenants. As already mentioned, such a reason would, at least normally, be outside the ambit of section 24(1)(a), and consequently would enable a landlord to avoid the reach of the section in almost every case; for instance, by saying that his policy was to obtain possession of any property in his portfolio whenever he had a legal ground for doing so.

168. However, that obviously does not mean that the legal ground will be irrelevant to the "reason". Indeed, where there is a legal ground, it will be centrally important given my conclusion on the comparator issue, as the legal ground would be assumed to apply to the comparator.

169. The words "relates to" suggest that a relatively loose or indirect connection between the reason and the disability would suffice. In agreement with Toulson LJ (at para 146 in the Court of Appeal), I would expect that the link between the "treatment" and the "disability" would always, or at least almost always, be causal, but not in the limited sense in which that term is used in other fields – e.g. in tort. I find it very hard to conceive of circumstances where the "but for" test was satisfied without the link being established, but I am not prepared to say that such a case could not arise. It may also be that in some cases the link could exist where that test was not satisfied. Given that the comparator required by section 24(1)(a) leads to the section having a relatively narrow ambit, it would be more consistent with the purpose of the 1995 Act, and unlikely to be unfairly prejudicial to alleged discriminators, if a broad and flexible effect is given to the words "relating to".

170. In the present case, I consider that there would have been a causal link between the reason and the disability, if, contrary to the conclusion

of the Judge, the subletting was in some way linked to Mr Malcolm's schizophrenia. The treatment to which he was subjected was eviction, and the reason for this can fairly be characterised as being that he had sublet. However, because it cannot, and was not, suggested that Lewisham would have treated any other secure tenant who had sublet differently from Mr Malcolm, there could be no discrimination in the light of the conclusion I have reached on the comparator issue.

171. If the wider comparator construction (adopted by the Court of Appeal and preferred by Baroness Hale) is correct, then there would have been discrimination, if there had been a sufficient link between the disability and the subletting. Lewisham would not have sought, or have been able to seek, possession against Mr Malcolm if the flat had not been sublet, as it was the subletting which deprived Mr Malcolm of security of tenure and which put him in breach of covenant. Accordingly, on the wider construction of the comparator test, if there was a causal link between Mr Malcolm's schizophrenia and the subletting, there would be a sufficient connection between the "reason" and the "treatment" to engage section 24(1)(a). I therefore turn to consider that issue, although, on my view, it is academic.

The link between Mr Malcolm's subletting and his disability

172. On the facts, the Judge found that the subletting "was a planned decision closely linked with [the]… proposed purchase on mortgage" and that she could "not conclude, on all the evidence … that [it] was an irrational act … caused by [Mr Malcolm's] illness". For reasons given in paras 105 to 108 of Arden LJ's judgment, she and Longmore LJ (at para 132) overruled that finding, although Toulson LJ had doubts on the point (para 150).

173. I share Toulson LJ's doubts; indeed, I am of the view that the Court of Appeal ought not to have overruled the Judge's conclusion on this issue. She saw Mr Malcolm and heard him give evidence, which did not generally impress her as reliable, and she took into account documents he had executed, conversations he had had, and transactions he had entered into, around the time of the subletting.

174. I am unpersuaded by the point that the Judge's conclusion on this issue was somehow infected by her mistaken conclusion on the anterior issue of whether Mr Malcolm was "disabled". Her mistake was not as to

the nature or extent of his schizophrenia: it was as to whether it was sufficiently serious to fall within section 1(1) of the 1995 Act. Nor does it appear to me that the Judge overlooked any relevant facts. Dr Sivasathan did not help on this issue. Dr Steadman was not able to say that Mr Malcolm's schizophrenia was so severe as to make it likely that the subletting was relevant to his decision and action in subletting the flat; he merely said that it "may well have been". Thus, it was a matter for the Judge to decided, on the basis of the evidence, whether what "may well" have been the case was in fact what happened.

175. It is true, as pointed out by Arden LJ, that the Judge did not mention that Mr Malcolm was not advised by solicitors about subletting. However, that was consistent with the behaviour of a sensible non-disabled person, who wished to save money or appreciated that a breach of covenant was involved. The notion that Mr Malcolm appreciated the need to keep the subletting secret is consistent with his subsequent denial to Lewisham that it had taken place. Nor does it appear to me that there was anything inherently unlikely in a secure tenant subletting, thereby imperilling his tenancy and his right to buy. It involved a commercial risk which no doubt many people in Mr Malcolm's position would not have taken, but it was a risk which both experience and perusal of housing law reports suggest secure tenants are not uncommonly prepared to run, and no doubt frequently get away with. It is true that Mr Malcolm had worked in Lewisham's housing department and, for many years before that, with a housing association, but, for all one knows, his experience may have suggested to him that his subletting would remain undiscovered by Lewisham.

176. It was also said that the Judge misdirected herself by setting too high a standard when she asked herself the question: "was the subletting caused by Mr Malcolm's schizophrenic illness?" I do not agree. The word "caused" was not in my judgment used by the Judge to indicate any higher standard of linkage between Mr Malcolm's schizophrenia and his subletting of the flat than was warranted. It is clear from her reasoning that she took the view that Mr Malcolm had taken a risk by subletting the flat before he completed the purchase, and that his assessment of the risk was not influenced by his schizophrenia. If that conclusion had been inconsistent with the medical evidence, or had been one that no reasonable judge could have reached in the light of other evidence, there would have been grounds for interfering. But it was not.

Conclusion

177. For these reasons, I would allow Lewisham's appeal, on the grounds that (a) (in agreement with Lord Brown and Baroness Hale) the Court of Appeal ought not have overruled the Judge's conclusion that there was no causal link between Mr Malcolm's schizophrenia and his subletting of the flat, and, even if the Judge was wrong on that issue, (b) (in agreement with Lords Bingham, Scott and Brown) there was no discrimination because the Court of Appeal applied the wrong approach to the identification of the comparator. I would therefore restore the order of Judge Hallon requiring Mr Malcolm to deliver up possession of the flat to Lewisham.