"Forensic Disaster"? - an Analysis of *Rosebery Housing Association Ltd v Williams & Anor* (2021) EW Misc 22 (CC)

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Introduction

1. The December 2021 decision in ***Rosebery Housing Association Ltd v Williams & Anor*** where the landlord's application for an injunction was dismissed and £27,500 damages awarded to the Defendant, is one that all housing practitioners will likely see referenced with regularity in the near future.

2. It will be imperative for any individual involved in housing litigation to have a proper understanding of the issues raised within *Williams* when dealing not only with injunctions against disabled occupiers but also general anti-social behaviour based claims against tenants within other contexts, such as in possession claims.

Case Summary

Injunction Application

3. Rosebery made an application under s.1 of the ASBCPA seeking an injunction against the tenant Cara Williams ("CW") and her mother, Elaine Williams ("EW"). CW was a disabled person under the meaning of s.6(1) Equality Act 2010 and EW was her sole carer. At the opening of the trial, EW provided undertakings in lieu of an injunction which were accepted by both Roseberry and the Court and the claim proceeded solely against CW.

4. CW entered into a shared ownership with Rosebery, the freeholder of the Property, in 2010. Although a part-owner, CW occupied as an assured tenant for the purposes of Part 1 Housing Act 1988.

5. Neighbour disputes were reported from 2012 and escalated in 2017. Complaints were made to Rosebery, the Council and the Police about CW and EW and complaints similarly received from CW. The majority of the complaints against CW surrounded her filming and recording her neighbours incessantly from within her home, her car and the street. Other allegations included intimidation and abuse, but the crux of the issues was the filming.

6. Rosebery applied for an anti-social behaviour injunction against CW and EW in June 2020, supported by witness statements from 4 named neighbours and the housing officer. From over 100 allegations, 6 specimen incidents were relied upon as directed by the Court within a Scott Schedule.

7. Rosebery failed to prove 5 out of the 6 specimen incidents. HHJ Luba QC noted the lack of corroborating records or contemporaneous notes of such incidents which might have been reflected in e-mails or diary sheets by way of example. Indeed, a number of the incidents were only corroborated by weak hearsay witness statements which could not be tested. This contrasted on occasion with CW's own evidence which was detailed, supported by e-mail complaints and corroborated in part by the Claimant's own witnesses. Rosebery's evidence was described as a "forensic disaster".

8. Save for a short period of historic noise nuisance, abated almost 2 years prior to the trial, which had in itself only been perpetrated in response to recorded noise nuisance from another neighbour, none of the allegations were proven.

Counterclaim

9. CW brought a counterclaim for unlawful discrimination. She suffered from Obsessive Compulsive Disorder ("OCD") which had first developed in 2009 and resulted in a number of referrals to mental health teams and inpatient stays at psychiatric facilities. CW was described by the experts as being "severely disabled" and having "severe mental health problems". CW's OCD often manifested itself in an extensive and obsessive need to film her surroundings under the belief that it may keep her safe. Rosebery knew of the OCD diagnosis and by trial had accepted that she was a disabled person for the purposes of s.6 Equality Act 2010.

10. The counterclaim alleged that in its dealings with CW and by bringing and continuing with proceedings against her, Rosebery had acted unlawfully and discriminated against CW.

11. HHJ Luba QC held that Rosebery plainly knew of CW's disability and subjected her to a "detriment", that being the bringing and continuing of injunction proceedings. The facts of the case supported Rosebery having treated CW unfavourably because of something arising as a consequence of her OCD, in particular her need to record and film her surroundings. On the question of proportionality, he concluded "*It cannot be proportionate to press for a remedy which it is not just and convenient for a Court to grant*" [145] and noted that the claim should never have been brought and it was "*inexplicable*" that the case was pressed on with.

Outcome

12. Rosebery's application for an injunction was dismissed. The majority of incidents were unproven and it would not be just or convenient to order an injunction for the single "lowest rung" noise nuisance allegation.

13. CW succeeded on her unlawful discrimination claim. Damages for injury to feeling were awarded at £27,500.

Analysis and Implications for Landlords

14. *Williams* deals with two distinct sets of issues;

    (i) The evidential burden requirements in satisfying claims brought under s.1 ASBCPA
    (ii) The unlawful discrimination counterclaim

Injunctions

15. In practical terms, it is far more likely that the difficulties faced Rosebery in succeeding on its injunction claim will arise with greater regularity in the County Courts. The anecdotal presumption that injunctions are "easy" to obtain and that reliance can be wholly placed upon hearsay witness statements and uncorroborated incidents has been firmly dispelled by the judgment in *Williams*. Absent consistent, credible and corroborated evidence of anti-social behaviour that can be tested at trial, the burden of proof is unlikely to be discharged. Specimen incidents should reflect the strength of the Claimant's case and be the "strongest" of the allegations within the larger claim.

16. HHJ Luba QC did provide some helpful commentary on the "type" of specimens incidents the Court might anticipate within a Scott Schedule in such matters;

> "*When constrained, by earlier judicial order, to advancing its case on only six sample allegations one might have expected it to select 'typical' instances from the mass of material on which it thought it was able to draw. The six samples would have each been the subject of clear, direct, corroborated evidence from witnesses who could be called. Each example would have had a clear 'audit trail' cross-referenced to a contemporaneous note or record or copy of the 'victim's complaint' followed by material showing that it was put to Cara at the time without any proper explanation in response. To the fore, one might have thought, would be matters in respect of which police officers, housing staff or Council officials could give direct evidenc*e. [78]"

17. In preparing Scott Schedules for anti-social behaviour trials, be it possession or injunction, care ought to be taken in extrapolating incidents which are corroborated by contemporaneous reporting/records, witness statement evidence of multiple witnesses and confirmation that these allegations have previously been "put" to the Defendant. In the absence of such strength of evidence, the Court is entirely able to find the allegations unproven, which may then apply to the entire "class" of anti-social behaviour which that specimen incident was selected to reflect.

18. The Judgment also serves as a reminder for landlords as to the importance to adopt a neutral position when dealing with cross-complaints from tenants. The inference is that Rosebery effectively "took a side" in this neighbour dispute and proceeded with the mindset that there was a set of perpetrators, CW and EW, and a set of victims, the other neighbours. In truth, the evidence throughout indicated that there was anti-social behaviour perpetrated by both sides and on many occasions it was CW who was the true victim.

19. Landlords should strive to objectively analyse the situation on the ground, as it were. Whilst it may be tempting to prefer the accounts given by a group of neighbours over that of a lone individual, quantity does not negate the importance of quality, accuracy and credibility of evidence. Context and circumstance are paramount to such an assessment. Had Rosebery not taken a certain view and investigated issues more fully and put the allegations to CW, they would have been provided with extensive video and camera footage which would likely have changed the perspective of the case long before trial.

20. Furthermore, the failure by Rosebery to provide contemporary notice to a tenant of allegations against them was heavily criticised.

<u>Counterclaim</u>

21. *Williams* serves as warning against a cavalier or "tick box" exercise towards fulfilling Equality Act obligations. Landlords are expected to do more than simply acknowledge a medical diagnosis when taking steps or actions against disabled occupiers.

22. By example, Rosebery's Equality & Human Rights Impact Assessment specifically recorded that CW "*may have a disability of OCD"* and that Rosebery do *"not know, and are unable to say, whether the anti-social behaviour and nuisance that Cara Williams causes is attributable to any disability*" [106]. Yet Rosebery did little to obtain the necessary information on the impact of CW's OCD on her alleged behaviour. Such a blinkered approach continued even when CW wrote to Rosebery stating that her OCD manifested in a need to record her surroundings.

23. Furthermore, despite being provided with details of CW's condition and its impact by her solicitors and conducting further Equality Act Assessments, Rosebery continued to maintain that the legal action was justified on the impact on other residents.

24. Whilst Rosebery had engaged with other agencies and in fact a multi-agency meeting had been held with representatives from local Community Mental Health Services, the contribution of those individuals to CW's disability was minimal. Their remit had been to assess her capacity rather than to ascertain whether her behaviour arose in consequence of her known OCD diagnosis. It was therefore simply not fit for purpose.

25. It is particularly notable that at the same time the Council had abandoned any legal action against CW, following such multi-agency meetings, and the Council noted that it was uncertain as to how to proceed with an injunction "*due to nature of mental health problems and OCD*" [105], yet Rosebery proceeded to issue proceedings undeterred.

26. *Williams* is perhaps unusual in that in tandem with the landlord engaging in Equality Act breaches, the Council was effectively complying with the same obligations and taking a starkly different approach to CW.

27. However, it reflects common issues in disability related claims, where landlords theoretically have policies and assessments in place to comply with the duties of the Equality Act 2010, but officers conducting the case have little to no actual grasp of what such obligations require in practical terms. The housing officer for Rosebery *"fully acknowledged that he did not know of the terms of section 149 and was not familiar with the public sector equality duty"* [135].

28. When subjecting a disabled occupier to any potential detriment, including the service of an NSP or issuing injunction proceedings, serious and substantial efforts ought to be taken to investigate the possible impact of such a disability on the behaviour complained of and what can be done to support the tenant in alleviating that causative factor well before any legal action is even contemplated.

Award for Damages and the Vento Bands

29. Pursuant to ***Vento v Chief Constable of West Yorkshire Police*** **[2002] EWCA Civ 1871** HHJ Luba QC applied the Vento bands in assessing discrimination damages. These are widely used within employment tribunal matters arising from discrimination and assess the measure of damage discrimination in relation to injury to feelings. The Vento Bands are inevitably the appropriate mechanism for calculating damages arising from discrimination in a housing context also.

30. There are 3 bands or categories which determine the range of damages to be awarded;

(i) The lowest band – this will be for the least serious cases, such as where the discriminatory act is a one-off - current range £900-£9100

(ii) The middle band – serious cases, but ones where an award in the highest band would not be appropriate - current range £9100 - 27,400

(iii) The highest band – these are the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment which has a profound effect on the victim - current range £27,400-45,600

31. In *Williams,* HHJ Luba QC rejected submissions from Rosebery that the lowest Vento band was the appropriate one to apply and held;

> "*This was significantly more than a 'least serious' case such as an isolated or one-off incident…I am satisfied that this case justifies an award reflecting a degree of seriousness just within the lower reaches of the top band. That band is described in Vento as appropriate for "the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race.". That the characteristic here is disability, and that the discriminatory conduct has extended over a considerable period with very significant adverse impact on the disabled person, to my mind that brings this case into at least the lowest reaches of the top band*." [172]

32. In assessing the damages as significant, HHJ Luba QC noted the following hallmarks of the case [168-169];

(i) The present proceedings should never have been brought

(ii) Red flags had been raised by the Council's earlier decision not to go down this route

(iii) Once issued, in light of the response received, proceeding should have been stayed or abandoned

(iv) The matter had continued to impact CW whilst others continued to subject her to unjustified and serious abuse that was not addressed by Rosebery

(v) CW's written and "compelling" oral evidence spoke to the very considerable toll the discrimination has taken on her mental health and general wellbeing.

Conclusion

33. *Williams* is a perhaps an extreme example of how such injunction claims against disabled Defendants can be manifestly disproportionate and unjust from inception. However, many of the issues highlighted within the case are reflective of common and recurring problems seen in a multitude of injunction trials and those where Equality Act defences and counterclaims are raised.

34. The most significant learning points of the case are likely that;

(i) Injunction proceedings should not be issued on the basis that they are a "quick fix."
(ii) Allegations of ASB ought to be raised with tenants at the time of complaint and well ahead of proceedings being issued.
(iii) Specimen incidents should be specific and the quality of consistent, contemporaneous and corroborating evidence will be paramount to proving any allegations.
(iv) A proper appreciation for the obligations of the Equality Act should be robustly contemplated
(v) Landlords should seek specialist advice and to inform themselves fully in relation to medical conditions and disabilities.
(vi) "Obvious" lesser measures must be explored and all practicable steps for support, referral and alternative resolution explored in detail before a disabled tenant is subject to any detriment.

35. Landlord can and should expect to see not only Equality Act defences but counterclaims being raised with greater regularity in response to both injunction and possession claims from hereon out.

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Law is correct as at 22nd February 2022

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