

GLS Legitimate Expectation Webinar

CASE REFERENCE

R. (on the application of Bibi) v Newham LBC (No.2)

Queen's Bench Division (Administrative Court)

11 July 2003

Westlaw Case Analysis 3 pages

Official Transcript 15 pages

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Case Analysis

Where Reported

[2003] EWHC 1860 (Admin); [Official Transcript](#)

Case Digest

Subject: Housing

Keywords: Homelessness; Local authorities' powers and duties; Secure tenancies; Shorthold tenancies; Suitability

Summary: homelessness; accommodation; local authority's duty to offer suitable property; secure tenancy unnecessary

Abstract: B, a homeless person, sought a declaration that the local authority, N, had a subsisting duty to B pursuant to the [Housing Act 1985 s.65\(2\)](#) to secure that suitable accommodation became available for her occupation. N, acting under the mistaken belief that its duties under s.65(2) could only be discharged by offering B a secure tenancy, offered B a shorthold tenancy whilst she remained on the housing list. N subsequently offered B two secure tenancies, which she rejected. Following the decision in [R. v Brent LBC Ex p. Awua \[1996\] A.C. 55](#) N realised that the duty was only to offer suitable accommodation, which it maintained it had done with the shorthold property. The Court of Appeal found that that N was under a duty to consider the B's applications for suitable housing on the basis that B had a legitimate expectation that she would be provided with suitable accommodation on a secure tenancy, but did not determine whether or not the duty under s.65(2) had been discharged. B contended that N had not discharged its duty under s.65(2) since the two storey accommodation had not been suitable, as required by s.69(1), because she had a disabled daughter.

Held, refusing the application, that N had discharged its duty under s.65(2) to offer accommodation that was suitable, within the meaning of s.69(1). The assessment forms on which N based its assessment of suitability did not set out definitive criteria that had to be satisfied. To hold that the shorthold accommodation was not in fact suitable for B and her family went against the evidence that B had occupied the property for five years without complaint and had told N in two interviews that she was satisfied with it. Furthermore, in a previous hearing her counsel had said that the accommodation was satisfactory for B, [R. v Brent LBC Ex p. Omar \(1991\) 23 H.L.R. 446](#) applied and *Awua* followed.

Judge: Owen, J.

Counsel: For B: Christopher Maynard. . For the local authority: David Matthias.

Solicitor: For B: Morgan Hall. . For the local authority: Council Solicitor.

Related Cases

R. (on the application of Bibi) v Newham LBC (No.1)

[Official Transcript](#); QBD

R. (on the application of Bibi) v Newham LBC (No.1)

[\[2001\] EWCA Civ 607](#); [\[2002\] 1 W.L.R. 237](#); [\(2001\) 33 H.L.R. 84](#); [\(2001\) 98\(23\) L.S.G. 38](#); [\[2001\] N.P.C. 83](#); [Times, May 10, 2001](#); [Official Transcript](#); CA (Civ Div)

Significant Cases Cited

R. v Brent LBC Ex p. Awua

[\[1996\] A.C. 55](#); [\[1995\] 3 W.L.R. 215](#); [\[1995\] 3 All E.R. 493](#); [\[1995\] 2 F.L.R. 819](#); [\[1995\] 3 F.C.R. 278](#); [\(1995\) 27 H.L.R. 453](#); [\[1996\] Fam. Law 20](#); [\(1996\) 160 L.G. Rev. 21](#); [\(1995\) 145 N.L.J. 1031](#); [\(1995\) 139 S.J.L.B. 189](#); [\[1995\] N.P.C. 119](#); [Times, July 7, 1995](#); [Independent, July 25, 1995](#); HL; 1995-07-06

R. v Brent LBC Ex p. Omar

[\(1991\) 23 H.L.R. 446](#); [\(1992\) 4 Admin. L.R. 509](#); [\[1991\] C.O.D. 467](#); [Times, May 13, 1991](#); [Independent, April 30, 1991](#); QBD; 1991-04-29

All Cases Cited

R. v Brent LBC Ex p. Awua

[\[1996\] A.C. 55](#); [\[1995\] 3 W.L.R. 215](#); [\[1995\] 3 All E.R. 493](#); [\[1995\] 2 F.L.R. 819](#); [\[1995\] 3 F.C.R. 278](#); [\(1995\) 27 H.L.R. 453](#); [\[1996\] Fam. Law 20](#); [\(1996\) 160 L.G. Rev. 21](#); [\(1995\) 145 N.L.J. 1031](#); [\(1995\) 139 S.J.L.B. 189](#); [\[1995\] N.P.C. 119](#); [Times, July 7, 1995](#); [Independent, July 25, 1995](#); HL; 1995-07-06

R. v Brent LBC Ex p. Omar

[\(1991\) 23 H.L.R. 446](#); [\(1992\) 4 Admin. L.R. 509](#); [\[1991\] C.O.D. 467](#); [Times, May 13, 1991](#); [Independent, April 30, 1991](#); QBD; 1991-04-29

Significant Legislation Cited

[Housing Act 1985 \(c.68\) s.65\(2\)](#)

[Housing Act 1985 \(c.68\) s.69\(1\)](#)

Legislation Cited

[Access to Justice Act 1999 \(c.22\)](#)

[Civil Procedure Rules 1998 \(SI 1998/3132\)](#)

[Housing Act 1985 \(c.68\) Part 3](#)

[Housing Act 1985 \(c.68\) s.3](#)

[Housing Act 1985 \(c.68\) s.6\(2\)](#)

[Housing Act 1985 \(c.68\) s.65](#)

[Housing Act 1985 \(c.68\) s.65\(2\)](#)

[Housing Act 1985 \(c.68\) s.68\(2\)](#)

[Housing Act 1985 \(c.68\) s.69](#)

[Housing Act 1985 \(c.68\) s.69\(1\)](#)

[Housing Act 1985 \(c.68\) s.69\(1\)\(a\)](#)

Housing Act 1985 Part III

[Housing Act 1996 \(c.52\) Part 7](#)

Housing Act 1996 Part VII

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IN THE HIGH COURT OF JUSTICE
IN THE QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Friday 11th July, 2003

B e f o r e:

MR JUSTICE OWEN

- - - - -

THE QUEEN ON THE APPLICATION OF MANIK BIBI

Claimant

- v -

LONDON BOROUGH OF NEWHAM

Defendants

- - - - -

Computer-Aided Transcript of the Stenograph Notes of
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(Official Shorthand Writers to the Court)

MR CHRISTOPHER MAYNARD (instructed by MORGAN HALL SOLS) appeared on behalf of
the CLAIMANT

MR DAVID MATTHIAS (instructed by LEGAL SERVICES DEPARTMENT TO LB NEWHAM)
appeared on behalf of the DEFENDANT

J U D G M E N T
(As Approved by the Court)
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1. MR JUSTICE OWEN: On 5th October 2001 Burnton J gave permission to the claimant to apply for judicial review of decisions made by the London Borough of Newham. The application was principally directed to decisions made by the authority in June 2001 and in October 2001. But as a result of events in the period that has since elapsed the only limb of the original application now pursued is the claim under paragraph 7.1 of the claim form to:

"A Declaration that the Council has a subsisting duty to the Claimant pursuant to section 65(2) of the Housing Act 1985 to secure that suitable accommodation becomes available for her occupation."

2. The issue between the parties can be simply stated. It is submitted on behalf of the claimant that she applied to the authority on 13th March 1991 for assistance as a homeless person. On 31st May 1991 the authority acknowledged that it owed her a duty under section 65(2) of the 1985 Act. But it is submitted that the authority has since failed to discharge its obligations to her. The respondent, to whom I shall refer as 'the authority', contends that it discharged its obligations under section 65(2) by arranging for the claimant and her family to be accommodated at 34 Jade Close, London E6, a property of which she took up occupation on 26th October 1995.
3. The issue may be simply stated, but the historical context in which it arises is complex. The principal features relevant to the issue now before me are as follows. Between 1991 and 1995 various temporary accommodation was provided to the claimant and her family.
4. On 26th October 1995 she was granted an assured short-hold tenancy of 34 Jade Close, a two-storey maisonette, for a term of six months by the London and Quadrant Housing Trust. She remained in occupation of 34 Jade Close until August 2001.
5. In March 1997 the claimant was offered accommodation at 6 Scott House, Queen's Road, London E15, and on 26th March 1997 the council wrote to her saying that it had discharged its duties to her under section 65(2) of the 1985 Act by the offer of secure tenancy at 6 Scott House.
6. In November 1998 the authority made a further offer to her of a tenancy at 73 Stephens Road, London E13. Still labouring under its misapprehension as to the nature of its duty, the authority again asserted that it had discharged its duties under section 65(2) by making the offer of accommodation of 73 Stephens Road. That offer was also rejected by the claimant.
7. On 11th January 1999 the claimant's appeal officer wrote to solicitors acting for the claimant in the following terms:

"Mrs Bibi applied for homelessness assistance on 13.3.91, and her application has been dealt with under Housing Act 1985 Part III. At one time it was believed that duties under that Act could only be discharged by the offer of a secure tenancy. Accordingly, the Council placed accepted applicants into temporary accommodation until such time as a tenancy in social housing could be granted. Since R v London Borough of Brent ex parte Awua, it has been accepted that duties under that Act were in fact discharged by any offer of suitable accommodation. This means that in this case duties were discharged by the offer of 34 Jade Close."

8. The claimant's response to that letter was to apply for permission judicially to review a number of decisions made by the authority in relation to the claimant's housing, culminating in the decision contained in the letter of 11th January 1999 that the authority had discharged its duty to her under Part III of the 1985 Act by the provision of accommodation at 34 Jade Close.
9. Leave to apply for judicial review was granted by Harrison J on 30th April 1999 and in due course the application came before Turner J, who gave judgment, both in the case of Bibi and in the case of Al-Nashed, in which the same point arose. The judgment was given on 28th July 2000. At the start of his judgment Turner J set out the issue that arose in both Bibi and Al-Nashed in the following terms:

"1. These two applications raise the same point in relation to the discharge by a housing authority of its duty to house the unintentionally homeless under the provisions of section 65(2) of the Housing Act 1985."

He then went on to set out the relevant statutory provision and continued:

"The problem arises out of the fact that in each of the present cases, believing that its duty under the section was to provide permanent secure accommodation to both of the applicants, the respondent authority stated that it would provide such a home as soon as it could. Neither applicant has yet been provided with permanent housing.

2. The statements made to both applicants in these cases were made by the respondents before the House of Lords had clarified the nature of the duty which such an authority owed under section 65(2). It was accepted at the Bar that before the case of R v Brent LBC ex parte Awua [1996] 1 AC 55 the common understanding among housing authorities was that in order to comply with their section 65(2) duty, if they were not immediately able to provide an applicant with permanent accommodation, housing authorities were entitled to adopt a staged approach to the fulfilment of their duties. The facts of these two cases may be extreme, but they indicate clearly the difficulties which present themselves to local authorities due to a clarification in the law which has had the effect of declaring what the law on the topic has always been but in a manner which was contrary to that which they had previously believed."

10. At paragraph 17 of his judgment Turner J formulated the point that arose in Bibi's case in the following terms:

"It can be seen that, although in a slightly less extreme form, the point which arises in this case is the same that arises in Al-Nashed. It can be formulated thus: The respondents having erroneously believed that, until the decision in Awua, in the House of Lords, they were under an obligation to provide permanent accommodation to those to whom they owed a duty under Part III of the Act of 1985 had conducted themselves in that manner until they appreciated that the original offer of (temporary) accommodation might have constituted discharge of their duty. Does this leave persons who were unintentionally homeless for a period in the one case of nine, and the other five, years without a remedy from the authority which had said that they would provide each of them with permanent accommodation? Or does their state as unintentionally homeless persons in priority need continue each time that the temporary accommodation ceases to be available to them and that they must make fresh applications successively under the current statutory provisions (Act of 1996)?"

11. Then at paragraph 21 Turner J set out the case advanced on behalf of Mrs Bibi, the claimant in the instant case:

"For the applicant Bibi, the contention was somewhat differently expressed. It was said that the provision of temporary accommodation in October 1995 did not operate to discharge the respondents' section 65(2) duty because they had not considered that what they did had that effect. Whatever might be the court's decision in relation to this first point, the action of the respondents in requiring L & Q to take action to repossess the property at 34 Jade Close (above) was not lawful. It was an unjustified interference with the legal relationship which existed between L & Q and the applicant. On the evidence which can be deduced from the respondent's housing file in respect of the applicant, it is manifest that, in making the offer in respect of this property, the respondents had not intended to make an offer which would discharge their duty under section 65(2). Accordingly such duty was not and has not been discharged."

It is to be emphasised that that passage of the judgment set out the contentions being advanced on behalf of the applicant, not the learned judge's findings.

12. The rival contention then advanced on behalf of the respondent was set out at paragraph 25 of the judgment in the following terms:

"In so far as the case of Bibi is concerned, the contention was that the provision of 34 Jade Close discharged the respondents' duty under section 65(2). Likewise, the provision of the property at Albany Road was also capable of satisfying that same duty. Subsequent offers of accommodation were made neither under the provisions of Part III of the Act of 1985 nor under Part VII of the Act of 1996. Since the applicant was now threatened with homelessness her position was that she should now apply under Part VII of the latter Act."

13. The learned judge came to the conclusion that the facts gave rise to a legitimate expectation that the authority would continue -- and I quote from paragraph 27 of the judgment -- "to enjoy the substantive benefit of the

representations, or promises, in the shape of permanent and secure accommodation being made available to them".

14. After hearing further submissions from counsel the learned judge made an order, the relevant part of which is contained in its paragraph 2 and was in the following terms:

"There be Declarations that the Respondents are bound to treat the duties originally owed by them to both Applicants under section 65(2) Housing Act 1985 as not discharged until the Applicants be provided by them with suitable accommodation on a secure tenancy."

15. The authority appealed to the Court of Appeal. The court upheld Turner J's finding that the representation made by the council in 1991, albeit on a misunderstanding as to the proper construction and application of section 65(2), gave rise to a legitimate expectation that the claimant would be provided with suitable accommodation with secure tenure. But the Court of Appeal came to the conclusion that Turner J had gone too far in the form of the declaration that he made. In addressing the question of what the court should do Schiemann LJ, in giving the judgment of the court, said at paragraphs 63-67:

"63. The present case illustrates a potential conflict between the 'legitimate aspirations' of those who have been told that they are on the housing waiting list and what the Authority's allocation scheme is on the one hand and the 'legitimate expectations' of those to whom promises have been made by the Authority the fulfilment of which conflicts with the priorities contained in the allocation scheme on the other.

64. In an area such as the provision of housing at public expense where decisions are informed by social and political value judgments as to priorities of expenditure the court will start with a recognition that such invidious choices are essentially political rather than judicial. In our judgment the appropriate body to make that choice in the context of the present case is the authority. However, it must do so in the light of the legitimate expectations of the respondents.

65. Turner J declared that the Authority were 'bound to treat the duties originally owed by them to both applicants under section 65(2) as not discharged until the applicants be provided by them with suitable accommodation on a secure tenancy'. Rightly, he did not direct that they be given priority over everyone else who was on the housing register and was seeking the same type of accommodation. The applicants' counsel have not suggested that he should have so directed. They wish merely to hold the declaration which was made.

66. The Judge accepted that the applicants each have a legitimate expectation that they would be provided with suitable accommodation on a secure tenancy. We agree. However, we consider that the Judge went too far in the form of declaration which he made since it seems implicit in his declaration that there cannot be factors which inhibit the fulfilment of the legitimate expectations, even where the Authority has never so concluded.

67. We consider that it would be better simply to declare that the Authority is under a duty to consider the applicants' applications for suitable housing on the basis that they have a legitimate expectation that they will be provided by the Authority with suitable accommodation on a secure tenancy."

16. What is clear from the judgments is that neither Turner J nor the Court of Appeal addressed the issue with which I am concerned, namely whether the authority was right to assert, by its letter of 11th January 1999, that it had in fact discharged its duty to the claimant under section 65(2) by arranging for her and her family to be accommodated at 34 Jade Close.
17. In the course of the hearing I sought the assistance of counsel as to whether anything was to be achieved by the claimant pursuing her claim to the declaration that she seeks for the following reasons. The authority is currently considering a further application for accommodation made by the claimant under Part VII of the 1996 Act. It arose in this way. Proceedings for possession of 34 Jade Close culminated in the execution of a warrant for possession on 29th August 2001, when the claimant and her family were in Bangladesh on an extended holiday. The claimant returned to the United Kingdom on 4th September 2001 and on 1st October 2001 made a fresh application for housing on the basis that she was homeless. I should emphasise that that application was made without prejudice to the contentions that she was advancing in her application for judicial review.

18. On 14th December the authority wrote to the claimant informing her that it was satisfied that she had "rendered herself intentionally homeless due to being evicted from 34 Jade Close, E16, as a direct result of your refusal of an offer of suitable accommodation". The letter also contained a very lengthy summary of the claimant's housing history. The claimant sought a review of that decision.

19. On 21st February 2002 the authority again wrote to the claimant saying:

"We are instructed by our client department that upon reconsidering the complaints made by your client in these proceedings, our client department is not satisfied with the procedures involved in the offer to your client of 73 Stephens Road, London E15 in November 1998. Accordingly, our client department has decided that your client's refusal of 73 Stephens Road should not be regarded as an unreasonable refusal of accommodation. The consequence of this is that your client will be restored to the Council's Housing Waiting List and, subject to the inquiry referred to below, will enjoy the same position on that list as would have been the case if she had never been offered 73 Stephens Road - details of her precise position on the List will be provided in due course. Furthermore, the question of 'intentionality' with regard to the refusal of 73 Stephens Road will not overshadow your client's current application to the Council under Part VII of the Housing Act 1996, although her current application may be affected by the inquiry referred to below."

20. Then on 12th June 2003 the authority wrote again, having completed its review of the decision of 12th December 2002. The letter explained that the authority had come to the conclusion that the claimant was not homeless nor threatened with homelessness in 28 days as her husband owned a substantial residence in Bangladesh.

21. On 16th June the claimant's husband died and it was then submitted on her behalf that any property that he may have owned passed automatically to his surviving sons and that the claimant had no right to occupy it.

22. On 26th June the authority therefore wrote, agreeing to reconsider the review decision in the light of that information.

23. Thus, there is currently a live application before the authority under Part VII of the 1996 Act. It is also relevant to note that, quite apart from her homelessness applications, the claimant is on the authority's waiting list for housing and has been since at least 1991. In those circumstances it was appropriate to consider what, if any, benefit would accrue to the claimant by pressing her claim for a declaration, given that the homelessness application is currently being considered on its merits and by reference to the current statutory regime.

24. Mr Maynard eventually persuaded me that the application is not merely academic. If the duty for which he contends subsists then the burden will be on the authority to show why it should not be performed, whereas if he does not the burden is on the claimant to satisfy the authority that she is now homeless. As he puts it, the declaration sought would crystallise the legitimate advantage that he submits that she enjoys.

25. I turn then to consider the substantive issue. The relevant statutory provisions are contained in section 65 and section 69 of the Housing Act 1985. Section 65(2) provided that:

"Where they are satisfied that he has a priority need and are not satisfied that he became homeless intentionally, they shall, unless they notify another local housing authority in accordance with section 67 (referral of application on grounds of local connection), secure that accommodation becomes available for his occupation."

Section 69(1) provided in its amended form that:

"A local housing authority may perform any duty under section 65 or 68 (duties to persons found to be homeless) to secure that accommodation becomes available for the occupation of a person --

(a) by making available suitable accommodation held by them under Part II (provision of housing) or any enactment, or

(b) by securing that he obtains suitable accommodation from some other person, or

(c) by giving him such advice or assistance as will secure that he obtains suitable

accommodation from some other person,

and in determining whether accommodation is suitable they shall have regard to Part IX (slum clearance), X (overcrowding), and XI (houses in multiple occupation) of this Act."

26. The issue between the parties is in essence whether 34 Jade Close was suitable accommodation for the claimant and her family. The claimant's daughter Ayesha Begum is disabled. She had poliomyelitis as a child and in consequence has weakness in her left leg. Her mobility is restricted and she has difficulty in using stairs. Mr Maynard submits that 34 Jade Close did not satisfy the authority's own criteria as to suitability and was therefore not 'suitable' within the meaning of section 69. In that context he referred me to a number of documents from the authority's housing file on the claimant.

27. On 30th- January 1995 a medical/welfare and vulnerability assessment form was completed by a case worker in relation to Ayesha, the claimant's daughter. Under 6(b) the box against "no internal stairs/steps essential" is ticked.

28. On 16th- October 1995 a nomination form for temporary accommodation was completed. The relevant section contains the following entry:

"Limited steps as one daughter has disability."

29. An update of the basic information recorded on the authority's database dated 1st November 1995 recorded that the claimant's daughter was disabled and "has difficulty with stairs".

30. On 24th- April 1997 the director of housing for the authority wrote to solicitors acting for the claimant in relation to an offer of accommodation that had been made to her, saying, inter alia:

"It has been agreed that accommodation with internal stairs is not suitable."

The documents also contain a form dated 24th- March 1997 which records the result of a medical assessment for applicants who had received an offer of accommodation. Interestingly, under section (e), the box against "no internal stairs/steps essential", does not have a tick indicating that that is essential but in fact has a cross.

31. Finally -- and I should add that this is not intended as an exhaustive review of all relevant entries within the records -- in May 1999 an occupational therapy team from the authority's social services department carried out a housing needs report which, under the heading "functional problems in present accommodation", recorded:

"Difficulty ascending/descending stairs."

32. 34 Jade Close is a maisonette with a short flight of ten to thirteen stairs. Mr Maynard therefore submits that the property did not meet the authority's own assessment of what was suitable for the claimant and her family. Mr Matthias submits that the accommodation was suitable. He points out that it was occupied by the claimant and her family for five years without complaint. Far from complaining, the evidence shows that she and her family regarded it as suitable for their requirements and wanted to carry on living there. In her affidavit, sworn on 5th September 2001 in support of this application, the claimant said:

"3. When, in 1991, the Council promised that it would provide us with a permanent home, I believed in that promise. I have been waiting for ten years for the Council to fulfil its promise. Until the beginning of 1999 I always believed that our accommodation at 34 Jade Close was a temporary expedient and that the Council would provide us with a permanent council house tenancy of suitable accommodation. Before we moved into 34 Jade Close the Council had decided that, in order to be suitable for my household, any accommodation we were offered should have no internal steps. I believed that the Council would abide by that decision also. When we moved into 34 Jade Close I did not expect it to be long-term accommodation. I did not object to it even though the bedroom for my daughter is upstairs. Indeed, I have made no secret of the fact that I liked 34 Jade Close. It is a present accommodation and I like the immediate area. We have been happy living there despite its drawback that there is an internal staircase which my daughter has difficulty in managing. I am advised, and I believe, that the fact we have been content with this accommodation does mean [and there is obviously a missing 'not'] that it is suitable accommodation for my daughter's needs."

33. I accept that the claimant always regarded 34 Jade Close as a temporary expedient. That, after all, was the basis on which it was let to her and reflected the authority's misunderstanding as to the nature of the duty that it owed her. But as to the suitability of the premises, it is noteworthy that in the last sentence of the passage from her affidavit that I have just set out she is careful to advance the argument as to suitability on the basis that it is made on advice; and the assertion that the accommodation was not suitable has to be considered in the light of her own statements, made in the course of interviews conducted by representatives of the authority with the assistance of interpreters. In the course of the interview that took place on 24th March 1999 the claimant said:

"The current accommodation we are in is suitable."

In a further interview on 12th October 2001, an interview that postdated the affidavit to which I have just made reference, the following question and answer were recorded:

"Q. Did you consider it [the property with which we are concerned] suitable for your household's requirements?

A. Yes."

34. Mr Matthias also relies upon the statement made by Mr Maynard in the hearing before Harrison J on 30th April 1999 when seeking permission to bring the first application for judicial review. It is set out in the affidavit of Paul Clark of July 1999. The relevant passage reads as follows:

"Moreover, on 30th April 1999 I was in Court when the Applicant's counsel Mr Maynard told Harrison J that the Applicant 'would not have sought to challenge 34 Jade Close if it had been offered as permanent accommodation because it is satisfactory accommodation for her'."

Mr Maynard accepts that that is an accurate account of what he said on that occasion, but nevertheless seeks to argue that 34 Jade Close was not suitable accommodation by reference to what he describes as the authority's own criteria, notwithstanding that the claimant regarded it as entirely satisfactory, lived there for five years and wanted to continue to live there.

35. The relevant test as to suitability under section 65(2) and 69 of the Act was succinctly put by Henry J in R v London Borough of Brent ex parte Omar, 23 HLR 446 at 455:

"The essential question that I have to ask is, could a reasonable housing authority, properly directing itself, conclude that in offering that flat to the Omars they were performing their section 65 duty in the manner laid out in section 69(1)(a), namely, by making available suitable accommodation to the applicant."

Henry J then went on to hold that to discharge its duty under section 69(1)(a) an authority must make available accommodation that is suitable for the person or persons to whom the duty is owed; in other words, that the authority must take account of the circumstances of the persons to whom the duty is owed in so far as they are relevant to the issue of suitability, as well as to the matters specifically identified in section 69, such as overcrowding and houses in multiple occupation.

36. The difficulty in this case is that the issue is clouded by the fact that the authority approached the discharge of its duty on an erroneous basis, namely that it was under an obligation to provide secure housing for the claimant and her family. 34 Jade Close was not available on a permanent basis. As I understand it, it was made available by the housing association that owned it on a short-term basis. Thus, when the offer of 34 Jade Close was made and accepted, the authority plainly did not regard itself as discharging its section 65(2) duty as it was not secure, that is to say permanent, accommodation: hence the issue that I am now invited by the parties to consider, namely whether the authority was correct in its assertion, albeit retrospective, in the letter of 11th January 1999 that it had in fact discharged its duty under section 68(2).
37. The claimant's case is simply that, although the accommodation was regarded by the claimant and her family as entirely satisfactory, it was nevertheless not suitable by reference to the authority's own criteria as it contained ten to thirteen internal steps.
38. The assessment of the suitability of premises under section 65(2) and section 69 is necessarily a balancing exercise, in that there are a number of factors to be weighed. The presence of stairs within a property was obviously a highly relevant consideration given Ayesha Begum's disability, but was not, in my judgment, conclusive as to the suitability of the premises. That is perhaps illustrated by the difference in emphasis between the welfare vulnerability assessment form dated 30th January 1995, which indicated "no internal stairs/steps

essential" and the result of the medical assessment of 24th March 1997, in which there was no tick against the box marked "no internal stairs/steps essential".

39. The forms and assessments to which I was referred by Mr Maynard are, in my judgment, simply the means by which the material relevant to an assessment of suitability is collated. They do not set out definitive criteria that have to be satisfied. I consider that to hold that 34 Jade Close was not in fact suitable for the claimant and her family would fly in the face of the evidence. As Mr Matthias observed in the course of his submissions, the claimant's housing history demonstrates that she has no hesitation in arguing that accommodation offered to her is unsuitable, and in that context it is noteworthy that on 23rd November 1999 solicitors acting on her behalf wrote to the authority complaining as to dampness in the bathroom at No 34 Jade Close and asking for the linoleum to be replaced. There was no suggestion in that letter, nor of course at any other time, that the property was in any sense unsuitable for the claimant and her family. She happily occupied 34 Jade Close for five years without complaint and would no doubt still be there were it available to her. She expressed complete satisfaction with the property in the interviews to which I have made reference and her counsel in the context of the first application for judicial review asserted in terms that it was satisfactory accommodation for her. In those circumstances I am satisfied that the authority was correct in its assertion in the letter of 11th January 1999 that it had discharged its duty under section 6(2) by the provision of accommodation at 34 Jade Close. The authority was entitled thereafter to proceed on the premise that it had discharged its duty.
40. It follows that the claimant is not entitled to the declaration sought.
41. Yes, Mr Maynard.
42. MR MAYNARD: My Lord, there follows the issue of costs. On that issue plainly I have lost.
43. MR JUSTICE OWEN: Yes.
44. MR MAYNARD: However in this case there have been a number of different issues and I would invite you to approach the question of costs on the basis that there have been different issues; and on the issues which appeared live when the case commenced, certainly as to the question of the suitability of 73 Stephens Road, which was the fundamental question which was being challenged in the decision of 14th June 2001, that is a matter upon which the claimant succeeded, albeit by a sensible concession on the part of the local authority. That is contained in their letter of February 2002. They say in terms in that letter, which is at page 66 of volume 2; my Lord, there in the second paragraph they say:

"We appreciate that your challenge to the decision of the Council's Divisional Director for Regeneration and Sustainability dated 14th June 2001 remains a live issue" -- this is after they have made the concession -- "in the current proceedings for judicial review that your client has instigated, since that decision was not dependent upon the Council's view of your client's conduct in refusing 73 Stephens Road".

With respect, in part it was because he had said that she was not on the housing list because she had refused that property. But they then go on:

"However, we apprehend that your challenge to the decision of the Council's Best Value Manager dated 3rd October 2001 ... "

That was the decision which was incorporated into the claim form by an amendment because it was issued two days before the hearing before Stanley Burnton J.

"... is now rendered wholly academic, and we should be grateful for your confirmation that you will not seek to pursue it further save as regards the question of costs."

My Lord, in my submission, therefore, the costs which follow on from issues in relation to the suitability of 73 Stephens Road should be the claimant's costs.

45. MR JUSTICE OWEN: Yes.
46. MR MAYNARD: As to the decision letter of 14th June, there are really two issues in that letter. One is the Stephens Road issue; one is the legitimate expectation/allocation scheme issues. In that regard the evening before the commencement of this final hearing, on Wednesday evening I indicated to my learned friend and sent

in a further supplementary skeleton to the court to say that I did not propose to pursue the claim for a mandatory order directing the local authority to review its allocation scheme.

47. MR JUSTICE OWEN: Was your client notified of the new allocation scheme when it came into effect? I do not remember the date off-hand.
48. MR MAYNARD: I think it was 9th September.
49. MR JUSTICE OWEN: 2002?
50. MR MAYNARD: 2002.
51. MR JUSTICE OWEN: Yes. Was your client notified that the new allocation scheme had come into effect in September 2002?
52. MR MAYNARD: I have no instructions to that effect one way or the other, my Lord. I am afraid I cannot help.
53. MR JUSTICE OWEN: Mr Matthias may be able to help me on that. The reason I asked the question, Mr Maynard, is that it occurs to me that it may have been automatic to inform all those on the list at the point at which there was a change in the allocation scheme.
54. MR MAYNARD: My Lord, yes.
55. MR MATTHIAS: (Instructions taken.)
56. MR JUSTICE OWEN: Are you able to help, Mr Matthias?
57. MR MATTHIAS: I am not able to help, save to say that the scheme was widely publicised. Whether Mrs Bibi was personally written to about it is not something with which I am able help.
58. MR JUSTICE OWEN: I do not think one could draw any inference from the wide publicity, given that English is not her first language and that it was necessary for her to use interpreters in interview. That is most helpful, thank you.
59. MR MAYNARD: My Lord, even if Mrs Bibi might have known, I certainly say that it is incumbent upon the local authority, when faced with proceedings of this sort, where a challenge is made to the allocation scheme and they change it fundamentally, then, consistently with their duties to help achieve the overriding objective in the Civil Procedure Rules, there is at least some obligation upon them to inform --
60. MR JUSTICE OWEN: Likewise those who instruct you. I mean they are obviously involved in work of this nature and if Mrs Bibi herself did not know of it, one would assume that those instructing you would know, when there was such a major and important change, so far as their own practice was concerned.
61. MR MAYNARD: I am not attended this afternoon and I cannot answer that question on behalf of those instructing me.
62. MR JUSTICE OWEN: No.
63. MR MAYNARD: But I would draw attention to a letter that was written on 3rd July this year, only very recently, a week before these proceedings.
64. MR JUSTICE OWEN: Do I have it?
65. MR MAYNARD: My Lord, no. It was not included in the bundle, for perhaps fairly obvious reasons. It is the second paragraph to which I particularly draw my Lord's attention. I do not know whether my learned friend has a copy. (Handed to the Judge.) (Pause.) My Lord, it is the last sentence of the second paragraph --
66. MR JUSTICE OWEN: Yes, I see.
67. MR MAYNARD: -- where attention is drawn to the merits of what we understood the position to be, and if there had been any change then it is incomprehensible why those instructing me had not been told. It was not until I received my learned friend's skeleton argument, to which he helpfully attached guidance which --

68. MR JUSTICE OWEN: Which had the result that you realised you could not advance that argument?
69. MR MAYNARD: It was sufficient to know that. Perhaps I could have asked for an adjournment to consider it further, but it really was not going to go anywhere.
70. MR JUSTICE OWEN: Yes.
71. MR MAYNARD: So in those circumstances I say that the costs of the issues in relation to whether the allocation scheme could properly have given effect to Mrs Bibi's legitimate expectations ought to be her costs. I appreciate that it was a matter where the claimant did not pursue it, but it is really a matter where we could have been put on notice in September last year.
72. My Lord may have noticed that this case came on or there were moves to bring this case on for hearing in September/October last year, shortly after the change in the scheme had been brought into effect. At that stage it would have been an appropriate stage, in my submission, for the local authority to say: before we even consider going on and the difficulties which Mrs Bibi has with funding, the goalposts have moved -- I do not say that in a pejorative way but simply in a descriptive way -- and we are now on a different field. So that is what I say in relation to the costs of that issue.
73. As it developed, the principal issue which my Lord has identified in his judgment between the parties in the hearing was whether 34 Jade Close was suitable accommodation.
74. MR JUSTICE OWEN: Yes.
75. MR MAYNARD: My Lord, in that regard the decision of 14th June 2001, which was the index decision that we sought to review, did not contend that the duty had been discharged by 34 Jade Close. That relied on 73 Stephens Road. The grounds for contesting the claim, which are in page 50 of volume 1 of the bundle, do not rely upon the suitability of 34 Jade Close as being an answer to the claim. The only document in which it is raised in correspondence is it is raised in passing in a letter of 12th December 2001, which is at page 50 of volume 2. I do invite my Lord's attention to that, simply to see how it is mentioned in passing. It is the second substantial paragraph --
76. MR JUSTICE OWEN: Yes, I have it.
77. MR MAYNARD: -- the sixth line down. That really is the only clue that there is for the claimant to know that that is the issue which is going to be the crux until really until yesterday morning. As my Lord said when I was endeavouring to open the case; 'Well I would rather like to hear from Mr Matthias to see how it is being put in the light of the judgments.'
78. MR JUSTICE OWEN: Yes.
79. MR MAYNARD: My Lord, in the correspondence that I just passed up there was a letter, dated 6th March 2002, which is at the front of it, and that responds to the local authority's letter of 21st February. That is where those instructing me set out what they conceived the position to be. Very clearly they took the view that there was a concession that the duty continued and that the only --
80. MR JUSTICE OWEN: It is rather difficult to see how they could have thought that that was conceded in the light of the letter to which you just directed my attention of 12th December.
81. MR MAYNARD: It is because it followed on from the understanding of the letter of 25th February, which was the one which made the concession -- 21st February, I am sorry -- which appeared to simply say: well, there is the legitimate expectation issue which we had understood to be the outstanding one, but nothing more. Be that as it may, there does not appear to have been any response to this letter. There was an attempt to bring some regularity to the proceedings and assist by having --
82. MR JUSTICE OWEN: Let us just see where that takes you, shall we? If the complaint that you have just made is valid and you were not alerted to the fact until very late in the day that the real issue to be resolved yesterday and today was the issue of whether the accommodation was suitable, you are not suggesting, are you, that that issue would have been conceded by you on behalf of your claimant --
83. MR MAYNARD: My Lord, no.

84. MR JUSTICE OWEN: -- so that it would not have been necessary for it to be tried out?
85. MR MAYNARD: We had understood that there was not an issue on it.
86. MR JUSTICE OWEN: Your complaint is that you should have been alerted to the fact that there was an issue earlier and I am exploring what the consequence of that would have been. The consequence is that we would have had this trial.
87. MR MAYNARD: That is right, but all I say --
88. MR JUSTICE OWEN: But you lost.
89. MR MAYNARD: But what I say in relation to that issue is that the costs of that issue should be limited to the costs of yesterday and today.
90. MR JUSTICE OWEN: But realistically, Mr Maynard, in the light of the complaint you have just made about not being put on notice of it, what other costs are there?
91. MR MAYNARD: That is precisely -- I simply seek that that is expressed in the terms of the order.
92. MR JUSTICE OWEN: Yes.
93. MR MAYNARD: My Lord, if there are any other issues as to the conduct of the case...
94. My Lord will have noted that there was a pre-action letter on 21st June 2001. There was a reply on 22nd August 2001 from the local authority, which again did not raise this issue. My Lord, unless can I assist further?
95. MR JUSTICE OWEN: That is most helpful, thank you.
96. Yes, Mr Matthias.
97. MR MATTHIAS: My Lord, I take the points in turn. So far as the allocations policy is concerned, the new allocations policy came into force, as my Lord has been told, in September of last year. Now, as I say, I am not in a position to say whether Mrs Bibi was written to individually or not. What I am able to say -- and those who sit behind me have instructed me to this effect -- that there was very wide-spread publicity indeed in the borough about the change in the policy, and that of course is not surprising. Those who instruct my learned friend are a Newham firm who, I am instructed, are very well known to the housing department of the London Borough of Newham because they do a lot of this sort of work. I am sorry that my learned friend does not have his instructing solicitor behind him, but what I would do is I would invite my Lord to suppose that Messrs Morgan Hall were alive to the fact of the new allocations policy in 2002. It would be highly surprising if they were not. I, of course, have no difficulty with accepting that my learned friend was not aware of it -- there is no reason why he should be -- but those who instruct him ought to have been well aware of it.
98. What I go on to say about that, though, is this. My learned friend in the supplemental skeleton that he provided me with late in the afternoon of the day before this trial began by stating in those supplemental submissions that he was not proposing to pursue this application for judicial review on the basis set out in his main skeleton argument because of the new allocations policy. But, my Lord, I was never preparing to come to court for the hearing of this application for judicial review to defend it on the basis that: 'Now there is a new allocations policy, your claim must fail'. My Lord will have seen from the skeleton argument that I put in that I was coming to court to defend the decision that was under challenge on an entirely different basis. I was coming to court to defend the challenge on the basis that it was a lawful and reasonable decision in its own terms. True enough I went on to say that of course the situation has changed because there is now a new allocations policy, but that was not the burden of my defence. That was information that the court needed to be aware of. If I understood the way in which my learned friend was proposing to put his case before his last minute change, what he was proposing to say was -- although I was not entirely clear -- that the old allocations policy, the old allocations scheme was in some way unlawful because it was incapable of taking account of the legitimate expectation that his client had; although my Lord will remember from my skeleton that I was not quite clear whether he was saying that or not. But if that is what he had said in oral submissions then my case was very much going to be to the effect that that is not right. The old allocations policy had plenty of scope within it to accommodate the legitimate expectations of Mrs Bibi, if on a review of the matter it had been decided that effect should be given to those legitimate expectations. As it was, the decision letter that I thought was going to be under challenge concluded that there were factors of policy considerations that necessarily outweighed the legitimate expectation.

With every respect to my learned friend, the submission that it is only because he learned at the last minute about the new allocations scheme that he had to abandon the entirety of the argument contained in his main skeleton is, in my submission -- it is certainly not agreed, and in my submission it is simply not correct.

99. MR JUSTICE OWEN: Yes.
100. MR MATTHIAS: He then proceeded to indicate to me on the evening before the hearing an entirely new basis of how he was proposing to put his case before my Lord. What he was proposing to argue was that the duty under section 65(2) had never been discharged.
101. My Lord, fortunately -- and I am grateful to him, of course, because he gave me that amount of warning -- I was able to prepare submissions in response and the matter was able to be properly aired before my Lord. If he had not told me that over the telephone, I would have been entirely taken by surprise.
102. When one looks at the claim form here, which is volume 1, page 11, in my submission it does not foreshadow any of the contentions that have been advanced before my Lord at this hearing. (Pause.) It is section 3: "The details of the decision to be judicial reviewed". We see that following its amendment there are three decisions. There was no application to review or to challenge the decision contained in Paul Clark's letter of 11th January 1999. I could, my Lord, have taken the point when my learned friend sought to argue this before you yesterday that he had not had permission to do so, but frankly those who instruct me are as anxious as anybody to see some finality for this on-going litigation. So it appeared sensible to just allow my learned friend to have his head and to argue that which he wished to argue in the final analysis before my Lord, which he has done and my Lord has dismissed his application.
103. MR JUSTICE OWEN: Yes.
104. MR MATTHIAS: I concede that of the three decisions he was seeking to challenge in the application for judicial review for which Stanley Burnton J gave him permission, one of those, that is the one at item 5, has gone and it went because the local authority reconsidered the matter itself --
105. MR JUSTICE OWEN: Yes. That is the 23 Stephens Road suitability issue?
106. MR MATTHIAS: 23 Stephens Road, that is right. That though, my Lord, is notable as it only came in as an amendment to the claim form. The claim form as originally drafted did not have that in at all.
107. My learned friend draws my attention to the ones that have been crossed out. There it is.
108. MR JUSTICE OWEN: Thank you.
109. MR MATTHIAS: I would invite my Lord to order that the claimant pay the costs of this application for judicial review in its entirety, not to be enforced without the leave of the court or whatever -- I think there is a preferred formulation.
110. MR JUSTICE OWEN: There is a new formula, yes, which no doubt the learned associate will be able to assist us with.
111. MR MATTHIAS: My Lord, I am obliged. The item at point 5 -- that is to say the issue over the suitability of 73 Stephens Road -- is a small claim in the scheme of it. This application for judicial review, we can say without fear of contradiction, would have gone the distance whether that was there or not. I would urge my Lord against making an order for costs against Newham in respect of that item alone because if my Lord did that it would have the unfortunate consequence of meaning that the authority had to pay out money, because it would not have the protection of the shield that the claimant has --
112. MR JUSTICE OWEN: Yes.
113. MR MATTHIAS: -- in respect of a costs order, whereas she, with a much larger potential costs order against her, would have to pay out nothing.
114. MR JUSTICE OWEN: Yes.
115. MR MATTHIAS: Unless I can be of any further assistance?

116. MR JUSTICE OWEN: No, thank you.
117. MR MAYNARD: In reply to that, 73 Stephens Road was the subject matter of paragraphs 1 and 2 in section 3(i) and (ii) of the claim form. The reason why it was amended to exclude those was because that had the effect -- the new decision which took place two days before the hearing was plainly one which was within time. The court did not have to extend time for a review of that and that superseded the two earlier decisions, which is why the new paragraphs 1 and 2 are taken out.
118. My Lord, with respect, there were considerable costs which attached to that decision. This court has not been burdened with considering in detail any part of the allocations policy manual, but it would have been the claimant's submissions that the fatal aspects of 73 Stephens Road were the complete failure to comply with the provisions of the policy manual. In order to deal with that one has to go through the entirety of the housing file and the entirety of the allocations policy manual, without, it has to be said, very much assistance from the local authority themselves as to how it ought to be interpreted. My Lord, that is what I say in relation to 73 Stephens Road.
119. My learned friend says, well you cannot see from the claim form that the argument would turn upon the suitability of 34 Jade Close. That is because at the time that the claim form was issued and at the time for respondent's notice nobody thought that that was what the council were going to found their argument upon. It was not in the respondent's notice. It was not relied upon in the decision letter of 14th June 2001. That is why it is not highlighted in the claim form, because the claim form seeks a declaration, which is predicated upon the assumption -- which it turns out was erroneous -- that the only offer upon which the council sought to rely was the offer of 73 Stephens Road. That is why the issue came up later. I accept what my learned friend says that it is not presaged in the claim form. That is why it came up late.
120. So my Lord, my final position, fall-back position, if you are not with me on my submissions as to costs, is that in any case of doubt then the appropriate course is to make no order. There are in this case arguments on both sides, and in my submission if you are not satisfied --
121. MR JUSTICE OWEN: There usually are, Mr Maynard.
122. MR MAYNARD: -- that my arguments have sufficient force then I would invite you simply to make no order as to costs. That would be an appropriate course where both parties are in essence reliant upon the public purse.
123. MR JUSTICE OWEN: I would like the assistance of both of you as to -- if I were minded -- and this is obviously not a matter about which I have yet made up my mind -- to award the claimant the costs of 73 Stephens Road but order that those costs were set-off against a costs order in favour of the respondent, what would be the practical effect of that?
124. MR MATTHIAS: I apprehend, my Lord, that it would reduce the potential costs that --
125. MR JUSTICE OWEN: That the authority could recover?
126. MR MATTHIAS: Yes.
127. MR JUSTICE OWEN: But it would not give the claimant an immediate claim to recover costs from the authority?
128. MR MATTHIAS: I am not sure, my Lord. I am not sure that would be --
129. MR JUSTICE OWEN: Mr Maynard?
130. MR MAYNARD: Any costs which are recovered from the local authority go straight to the Legal Services Commission, but the --
131. MR JUSTICE OWEN: What, even if I ordered that they be set-off of the costs that are ordered to be paid --
132. MR MAYNARD: Which are recovered, and if they are set-off then ... In a case where neither party were publicly funded then that would clearly be the appropriate order to make. In this case it is an appropriate order, although the practical effect of it may be minimal because Mrs Bibi is not in a position to pay any costs at all anyway and therefore nothing is really going to change the position. It will only have practical effect if she were

in a position to meet some part of the local authority's costs. So in that sense -- I hope that I am making myself clear -- I think --

133. MR JUSTICE OWEN: I understand what you are saying, but I am not sure that that necessarily follows simply because both parties are publicly funded.
134. MR MAYNARD: It follows in this sense: because she cannot pay, and therefore an assessment -- if my Lord does not assess her liability to pay under the Access to Justice Act and delegated legislation as being nil now, then it will have to be assessed at some point, if the local authority ever choose it to be so assessed, by a costs judge and it is going to be assessed at nil. So she is in a position really where the local authority are not going to be able to recover anything from her with which to set-off the amount which otherwise they would have to pay to the Legal Services Commission. The practical outcome could be that if upon a detailed assessment the costs judge were to be persuaded that the costs attributable to the issue of No 73 Stephens Road outweighed the costs attributable to all other issues then it may be that the local authority would have to pay something to the Legal Services Commission. That would have a practical effect. That is a matter really for the determination of the costs judge upon a detailed assessment at some future date, so upon the consideration there is some merit, there is purpose, there is utility to such an order.
135. MR JUSTICE OWEN: Yes, Mr Matthias.
136. MR MATTHIAS: My Lord, in my respectful submission, it would be highly undesirable if there was any risk of the authority having to in fact pay money by way of costs, having won the day on the main issue upon which the claimant sought to advance her claim at trial. One way if my Lord was minded to mitigate the rigour of a full costs order in favour of the claimant to take account of the fact that one aspect of her claim was effectively conceded by the authority, my Lord might consider the possibility of making no order as to costs up to 21st February 2002, that being the date when that one issue was conceded.
137. MR JUSTICE OWEN: Give me the date again.
138. MR MATTHIAS: 21st February 2002, my Lord, that is when the one issue, the reasonableness of 73 Stephens Road, was conceded. So one might fairly say that up until that time let each party bear its own costs. Thereafter, my Lord, you may think it appropriate to give the local authority its costs on the usual terms, not to be enforced without leave, because the claimant has not succeeded on any of the issues that remained live after 21st February 2002.
139. MR JUSTICE OWEN: Yes. Thank you.

JUDGMENT ON COSTS

140. MR JUSTICE OWEN: I have carefully considered the submissions made by both parties in relation to the issue of costs, in particular the consequences that ought properly to flow from the fact that the respondent authority conceded one of the principal limbs of the application on 21st February 2002. I have come to the conclusion that justice would be done in relation to costs if I made no order as to costs up until 21st February 2002, that thereafter the claimant be ordered to pay the authority's costs, but that the determination of the claimant's liability for the payment of such costs be postponed pending further application.
141. Mr Matthias, Mr Maynard, I am helpfully reminded by the associate that that is the form that currently prevails.
142. MR MATTHIAS: I am obliged.
143. MR JUSTICE OWEN: Yes.
144. MR MAYNARD: I seek permission to appeal to the Court of Appeal. The particular issue is whether the medical assessment in relation to the stairs -- my Lord I think said that it was necessarily a balancing exercise. The stairs were "highly relevant but not conclusive". My Lord, it is whether in essence the local authority are entitled to go back on their assessment. My Lord characterised those, I think as --
145. MR JUSTICE OWEN: Mr Maynard, if you wish to continue vigorously to pursue this particular litigation you will have to seek leave from the Court of Appeal.
146. MR MAYNARD: I am grateful, my Lord.

(The court adjourned and then shortly afterwards reconvened.)

147. MR JUSTICE OWEN: You are not done with me yet, Mr Maynard.
148. MR MAYNARD: I am sorry, my Lord, no. I forgot to ask for legal services assessment of the claimant's cost.
149. MR JUSTICE OWEN: Yes, of course.