

## Possession Claims and Disability – What does the Future Hold?

In recent years, the Courts have increasingly had to consider the impact of the Disability Discrimination Act 1995 ('the 1995 Act') on landlord and tenant law. That consideration has led to a number of interesting decisions, in particular involving residential possession proceedings.

### Background

A person managing property is under a duty not to discriminate against his occupiers. Section 24 of the 1995 Act provides that a person discriminates against a disabled person 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 and he cannot show that the treatment in question is justified'.

This legislation was reviewed by the Court of Appeal in Richmond Court (Swansea) Ltd v Dorothy Williams [2006] EWCA 1719. In that case, a landlord refused to give consent for a disabled 81 year old tenant to install a stair-lift (at no expense to the landlord) which she clearly required to access her third floor flat. The tenant claimed to have been discriminated against on the grounds of her disability. The court accepted that the landlord had refused consent for reasons unrelated to the disability and therefore it had not treated the tenant less favourably than it would have treated other tenants. The landlord would have refused to grant consent for a stair-lift to a non-disabled person as well so had not discriminated against the disabled person. Although probably a correct interpretation of the 1995 Act, this would have been of little comfort to Mrs Williams.

### New developments - the decision in Lewisham v Courtney Malcolm

A differently constituted Court of Appeal interpreted section 24 of the 1995 Act with a differing emphasis in London Borough of Lewisham v Courtney Malcolm [2007] EWCA 763, leading to what some might consider to be an unsatisfactory result for landlords.

Section 22 of the 1995 Act makes it an offence to discriminate against a disabled person by, for example, evicting them from property.

Mr Malcolm was a secure tenant who had unlawfully sublet his property, thereby losing his statutory protection under section 93 of the Housing Act 1985. This

legislation provides a mandatory ground for possession in such circumstances, with no apparent defence available to the tenant. The council served a notice to quit on Mr Malcolm, and subsequently commenced possession proceedings. However, Mr Malcolm suffered from schizophrenia, and the court accepted that his disability was related to him unlawfully subletting the property. Therefore, the court ruled that Mr Malcolm *did* have a defence because the claimants had discriminated against him in seeking possession. The reasoning was that, following section 24 of the 1995 Act, the 'reason' for the claimants bringing possession proceedings - the existence of the illegal subletting - was 'related' to Mr Malcolm's disability. Furthermore, the relationship did not mean that it had to be the sole cause of the illegal subletting, rather that the subletting 'engaged some aspect of Mr Malcolm's disability'.

This interpretation led the court to conclude (unlike in the Richmond Court case) that because the claimant's reason for seeking possession was 'related' to Mr Malcolm's disability, it was not necessary to consider whether the claimant would have treated a non-disabled tenant who illegally sublet his property in the same way or not. That the claimant's proceedings were prompted by a circumstance 'related' to Mr Malcolm's schizophrenia was enough in itself to show unlawful discrimination. Furthermore, the appeal judges decided by two to one that it did not make any difference that the claimant had no knowledge of Mr Malcolm's disability at the time of serving the notice to quit.

### **Effect of the decision**

This decision puts landlords in a difficult situation. First, it appears that section 24 can be interpreted very widely in terms of what might be 'related' to a tenant's disability. Therefore it may be that landlords have considerable difficulty in bringing possession proceedings against a disabled person without those proceedings being considered unlawful discrimination. Many would consider that these consequences go well beyond what Parliament envisaged the purposes of the 1995 Act as being. Second, landlords need to be aware that unlawful discrimination can occur even when they have no knowledge that a tenant suffers from a disability. Third, it seems that the courts consider that the 1995 Act is capable of, as it were, overriding mandatory grounds for seeking possession and giving tenants a defence to possession proceedings. Consequently landlords may face an unfamiliar uncertainty as to when they can recover possession on statutory grounds.

Nonetheless, the case law in this area appears to be far from settled. Three years before the Malcolm case, in Manchester City Council v Sharon Romano [2004] EWCA 834 the Court of Appeal highlighted the difficulty of establishing the 'relationship' between the defendant's clinical depression and her persistent anti-social behaviour, as a consequence of which her landlord sought a possession order. In that case, the possession order was granted, and the court went as far as to voice concern at potentially 'absurd and unfair consequences' for landlords as a result of the 1995 Act. Some might take the view that the decision in Malcolm has done little to clarify the difficulties highlighted in the Romano case.

At the time of writing (October 2007), the London Borough of Lewisham is seeking leave to appeal to the House of Lords. No doubt landlords and practitioners will

watch the appeal (if it materialises) and the subsequent evolution of case law in this area with interest.

As things stand, landlords would be well advised to keep the 1995 Act firmly in mind and proceed carefully if they are involved in a dispute with a disabled tenant. The consequences of not doing so could be severe, both financially and in terms of the landlord's reputation.

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