

**Spring 2008**

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## Editorial

Welcome to the Spring 2008 edition of Zenith Chambers' Housing Law Newsletter.

As ever the world of housing law has moved on somewhat since the Winter 2007 edition and topical as ever we have articles on anti-social behaviour; disability discrimination amongst other important developments over the past few months.

The Housing Team at Zenith Chambers continues to grow, with the addition of Ruwena Khan, former pupil and John Paul Swoboda, current pupil.

The Housing Team are also pleased to welcome back from maternity leave, Nicola Phillipson. As many of you will be aware, Nicola had a baby girl, Pippa, in June last year. Time has flown by with Pippa now over 9 months and sleeping well.

So what of those important recent developments in housing law?

At the time of going to press, we are currently awaiting the decision in the *Malcolm* case (more on this later). The House of Lords heard arguments at the end of April in relation to the interplay between the Disability Discrimination Act 1995 and possession proceedings for anti-social behaviour under the Housing Act 1985. As soon as we are aware of the Opinions we intend issuing an addendum to this bulletin. Allied to this is the case of *S v Floyd*, where the Court of Appeal considered the circumstances where a claim under ground 8 (8 weeks rent

arrears) should be adjourned pending a DDA defence. The case is authority for the proposition that those advising tenants should obtain sufficient evidence to put before the court so as to persuade it that not only is the tenant incapacitated in the conduct of proceedings, but also that section 22 discrimination is at least *prima facie* made out. We will of course be wiser once the Opinions in *Malcolm* are available.

In relation to the creation of a secure tenancy, the Court of Appeal has given a warning to Local Authorities to be careful when providing tenants with accommodation styled as a "non-secure licence". In the case of *Mansfield DC v Langridge*, the Court simply indicated that as the agreement fell within section 79(3) of the 1985 Act and none of the exceptions applied in schedule 1 to the Act then a secure tenancy had been created.

Whilst these cases are probably very rare, the Court of Appeal, in *Nat West Bank v Ashe* has recently confirmed that a lender who has not received a mortgage payment for more than 12 years, loses its right to claim possession of the mortgaged property, the mortgagors accordingly were in adverse possession and section 15 of the Limitation Act 1980 applied.

Developments continue apace in relation to anti-social behaviour with seemingly a decision coming out of the Court of Appeal on

what seems to be a weekly basis. In *Hastoe Housing Association v Ellis*, the Court has indicated that a county court has the power to accept an undertaking as part of an order adjourning possession proceedings under section 9 of the Housing Act 1988, and presumably *mutatis mutandis* section 85 of the 1985 Act. This is another useful tool in relation to anti-social behaviour cases where a possession order might not be appropriate.

Finally, I would like to draw your attention to two more cases where the Court of Appeal has continued its tough stance against anti-social behaviour. In the case of *Accent Peerless Ltd v Kingsdon*, the Court upheld an outright possession order made against tenants with mental health problems, notwithstanding there had been an improvement in their behaviour. In the case of *Sandwell MBC v Hensley* the Court substituted an suspended possession order for an outright order in circumstances where the tenant had been caught cultivating large amounts of cannabis in his tenancy: the case being one of serious criminal behaviour.

In terms of publicly funded legal services, I would like to draw to your attention the issue of CLACS - Community Legal Advice Centres. As you will be aware, in our region Gateshead was one of the first CLACS to be established and in accordance with policy, the Legal Services Commission is in the



Chris Dodd

## Editorial (Continued)

process of extending CLACS around the region. CLACS will take over the provision of publicly funded legal advice and assistance in social welfare law to the exclusion, as far as I understand it, of all other providers. It is important therefore that current providers are aware of developments in their area. The bidding stage for a CLAC has just completed in Hull where A4E has come out as the preferred supplier. In this region, CLACS are currently planned for Wakefield and the North Yorkshire, although at the time of writing I am

unsure what the extent of North Yorkshire is. The importance of CLACS in relation to providing independent advice in housing law cannot be underestimated as they will probably evolve into the only providers of independent housing law services in the area funded jointly by the local authority and the LSC.

Finally, I would just like to say a few words about the housing team. The housing team members at Zenith Chambers are committed to the provision of excellence in housing law. Members of the

team undertake both landlord and tenant work and we aim to provide the highest level of expertise and knowledge in housing law to all our clients. This is why, when we run training courses and seminars we invite both landlord and tenant representatives and we circulate this newsletter to both landlord and tenant representatives. We believe this rounded service gives us the edge as advocates and specialist advisers.

Phillip Barber

## Anti-Social Behaviour: a Review of Recent Cases

### **Brent London Borough Council –v- Doughan [2007] EWCA Civ. 13**

#### *Possession Order – blame on Local Authority landlords*

The Local Authority landlord appealed against a decision of a Judge refusing to make a possession order against the Defendant. The Defendant was a tenant of a second floor flat in a converted house. He moved in in 1995. His downstairs neighbour was an RTB lessee. The Defendant and his neighbour had mental health issues. Upon receiving complaints from neighbours, that the Defendant had been shouting, swearing and playing loud music, an injunction was obtained. He breached it, and received a suspended committal order. There was nothing for eight months, after which further allegations were made, albeit of a limited nature.

At trial the Judge refused to make an order for possession. Although she was satisfied that the Defendant had been noisy and caused annoyance, she opined that:

“In the harsh world of urban living it is to be expected that our neighbours will disturb us from time to time” and

The difficulties could and should have been foreseen by a competent housing authority, when placing a large excitable man with a history of problems with his neighbours as a neighbour to an old, vulnerable woman.

The landlord appealed on the basis that:

The Judge had failed to take into account the effect that the Defendant’s behaviour had upon his neighbour.

The Judge was wrong to take into account the condition of urban living and the alleged failure of the Housing Management Department suitably to house him and his neighbour; and

The Judge had failed to consider the risk of repetition.

The appeal failed. Conditions of urban living and the alleged failure of the Housing Department were not wholly relevant considerations and, in any event, they were not determinative in the Judge’s

decision. As to the risk of repetition, the Judge had considered the risk and was entitled to conclude that it was small. The risk of repetition had to be seen in the context of the fact that there had been only two or three incidents over a period of eighteen months.

### **Raglan Housing Association Limited –v- Alex Patrick Fairclough [2007] EWCA Civ 1087**

#### *Ground 14(b)(ii) of the Housing Act 1988 Schedule 2 does not apply only to offences committed by the tenant during the period of his tenancy*

The Appellant(s) appealed against an order for possession obtained by the Respondent housing association. F was an assured tenant of a cottage. He had previously been a tenant of another nearby cottage. He had pleaded guilty to fifteen counts of making indecent photographs of children by downloading them on his computer from the internet and other related offences. He had been sentenced to an extended sentence of four



Simon Read

years' imprisonment, comprising a custodial period of twelve months and an extended licence period of three years.

When the Respondent learned of the convictions it sought possession under Ground 14 of the Housing Act 1988 Schedule 2. The Judge held that F had been convicted of an indictable offence committed in or in the locality of the dwellinghouse within Ground 14(b)(ii) and that it would be reasonable to make a possession order having regard to the nature and gravity of the offences committed.

The Appellant submitted that the acts which constituted the offences had not been committed at the time when he was tenant of the cottage of which possession was sought and that Ground 14(b)(ii) only applied to the offences committed by the tenant during the period of his tenancy of the dwelling in question and did not apply if the offences were committed before the tenancy commenced.

Chadwick LJ held that paragraph (b)(i) was directed to one particular type of behaviour likely to cause distress or annoyance to neighbours, namely the manner in which the premises themselves were used. However, paragraph (b)(ii) was much broader, being directed to behaviour in the locality in general. Even if paragraph (b)(i) was to be construed as limited to convictions arising out of the use of the premises during the tenancy agreement, of which it might be said that the tenant as tenant could fairly be held responsible, there is no reason why paragraph (b)(ii) should be construed in the same way because the tenant could probably be held responsible for the way in which he had behaved in the locality both before he became a tenant and afterwards.

Once it was accepted that those who had committed indictable offences in the neighbourhood where they lived were to be regarded as liable to behave in a manner that was annoying or intimidating to their neighbours in future, as paragraph (b)(ii) assumed, there was no reason to think that Parliament intended to restrict the paragraph to offences committed during the currency of the tenancy. Ground 14 merely contained a pre-condition to the exercise of the Court's power to grant possession: the Court was not entitled to exercise that power unless it was satisfied that it was reasonable to do so. Accordingly, there was nothing in the language of paragraph (b)(ii) or in the underlying policy limiting its scope to offences committed during the currency of the tenancy.

**Sandwell Metropolitan Borough Council –v- Hemsley (CA) Civ Div 1-Nov 2007**

*Outright possession order in relation to cultivation of cannabis*

The Appellant Local Authority appealed against a possession order, suspended for two years, made against the Respondent (H). Following a search of H's home in 2005, police officers found an extensive and sophisticated cannabis cultivation operation involving the use of hydroponics. H admitted possession of the equipment and pleaded guilty to a charge of being knowingly concerned with the cultivation of cannabis.

The Local Authority later became aware of his conviction and began proceedings against him for eviction on the basis that he had violated his tenancy agreement. The Local Authority applied for an outright order on the grounds that H had broken an obligation of the tenancy agreement and was guilty of con-

duct likely to cause nuisance or annoyance to the neighbours.

The Judge made a possession order, suspended for two years on the basis that, on the evidence, H appeared to have ceased his offending behaviour.

The authority submitted that the Judge erred in the exercise of its discretion by taking into account irrelevant matters. The authority argued that the conviction triggering the proceedings in 2005 was sufficient to warrant a possession order and that there was little optimism about H's future conduct in light of many previous convictions for similar offences.

Arden LJ repeated that where an individual committed a criminal offence, a possession order should only be suspended in exceptional circumstances where there was cogent evidence to demonstrate that the offender's particular conduction had ceased. She referred to *Bristol City –v- Moussah* and *Stonebridge Housing Action Trust –v- Gabidon*.

Arden LJ held that it was clear that the Judge's reasons for suspending the order did not stand up to scrutiny since they were sparse and provided little explanation as to which facts she considered were relevant. The Judge appeared to have adopted H's assertion that he had turned over a new leaf, that H's attitude to drug dealing was poor and that he described it as a hobby. Of particular concern was that the decision made was without hearing oral evidence from H, particularly in light of his previous offending. Although the Judge made a passing reference to H's previous convictions, she did so without referring to the impact they had had on her decision.



**Phillip Barber**



**Nicola Phillipson**



**Vilma Vodanovic**

In the circumstances, it was held that the Judge had exercised her discretion poorly, as H had run a sophisticated operation with complete disregard for his tenancy agreement and those around him. Local Authorities and providers of social housing had a duty to keep areas free of criminal conduct where possible, and unless a Court was provided with evidence demonstrating real hope that an individual had changed their ways, those authorities were entitled to an outright possession order.

### **Accent Peerless Limited v Kingsdon [2007] EWCA Civ 1314**

*Outright possession order properly made against nuisance tenants even though they were suffering mental health problems and their behaviour had improved before trial*

The Defendants (mother and daughter) were tenants of the Claimant under an assured weekly tenancy. Both defendants suffered from post traumatic stress disorder and, as a result, were hypersensitive to noise and tended to exaggerate the effect on them of

noise and other disturbances. They made repeated complaints about their neighbours to the Environmental Health Department, to the Housing Association and to the police, wrote in their neighbours' name to companies requesting advertising materials and mailshots, and telephoned their neighbour's employer making a false allegation against him.

Psychiatric evidence stated that the defendants could control their behaviour to a degree but their feelings about their current situation would not change and they would be unlikely to give up their campaign against their neighbours. Their behaviour might improve if they underwent treatment but the defendants were unwilling to receive such treatment.

The Judge found that the defendants were guilty of the acts of nuisance and annoyance and that their conduct was unjustified. He found that the neighbours had suffered anxiety and distress as a result of the harassment and he accepted that they felt like prisoners in their own home. He found that any discrimination against the defendants under the Disability Discrimi-

nation Act 1995 was justified and granted an outright possession order.

The defendants appealed to the Court of Appeal contending that in the light of the psychiatric evidence and the historic nature of the nuisance, it was not reasonable to make a possession order or, alternatively, that any order should be suspended.

The Court of Appeal dismissed the appeal. The judge had taken into account the improvement in the defendants' behaviour but had found that this did not mean that the nuisance had ceased. He had formed a view that the mental condition of the Defendants was such that something else would be likely to happen even if there was no precise repetition of what had occurred before. This was a view which was manifestly open to him on the evidence and he was therefore entitled to decide that it was reasonable to make an outright order.

**Nichola Phillipson  
Justin Crossley**

## **What can we expect of the House of Lords in Malcolm v Lewisham LBC, and Possession & ASBI/ASBO claims**



**Andrew Wilson**

You may be aware that the House of Lords was due to hear the Council's appeal in this case on 28 & 29 April 2008, with the judgment being handed down some 6 to 8 weeks later. It is expected that the Lords' judgment will have huge ramifications for the rights of disabled people in defending possession proceedings, and of their landlord (and lenders) in recovering possession. The Court of Appeal judgment at [2007] EWCA Civ 763 has just been reported at [2008] HLR 14.

Appeal to the Lords has not been restricted to any particular points. The Court of Appeal had identified 4 issues for resolution: whether the lack of security of tenure prevented the defendant from a s.22 Disability Discrimination Act 1995 ("DDA") defence; whether Mr Malcolm's mental impairment amounted to a "disability" for these purposes; whether the decision to start proceedings related to his disability; and whether the authority's lack of knowl-

edge of the disability was relevant to deciding whether there was discrimination under the DDA.

The decision in Malcolm extended the principles in the DDA that were first set out in North Devon Homes Ltd v Brazier [2003] EWHC 574, QB; [2003] H.L.R. 59, and then clarified in Manchester City Council v. Romano [2004] EWCA Civ 834; [2004] H.L.R. 47, to cases where the possession did not depend on a discretionary ground for

possession. That will potentially include occupiers of temporary accommodation, as well as former Assured and Secure tenants who have lost their security of tenure – “tolerated trespassers”.

Many social and public landlords are concerned that as a result of the law as it stands in this case, and the increasingly-exploited decision in Romano, it is becoming increasingly difficult to bring successful possession actions against tenants with health problems that amount to a disability within the meaning of the DDA 1995. Similarly, many tenants’ advisers at last see a way in which to challenge situations where their clients, who are personally blameless due to mental health problems or personality disorders, are facing eviction.

In particular, it can seem that occupiers with mental health problems, which have resulted in behaviour (including accruing rent arrears) that has prompted the landlord to take action, have a cloak of invulnerability - unless the claim can be justified by there being serious adverse effects on others’ health or safety as a result of that behaviour. The principle extends, it seems, to injunction claims – although the Court of Appeal may be called upon to decide that point soon. But it is often but not always the case that, unlike in Brazier, a disabled tenant’s anti-social behaviour has a significant enough effect on their neighbours’ well being to cause at least one of them to suffer, in some way, thus providing the landlord with the necessary statutory justification for bringing the claim (see below). Where ASB is thought to be connected to a health problem, many public and social landlords are now carefully examining the basis of proceedings before issuing them.

But notably, where possession is sought against a disabled occupier on arrears grounds, it may appear impossible to justify the claim in the sort of terms that the DDA requires. How can the existence of a tenant’s rent arrears, run up because they are unable to manage their budgeting properly due to (say) depression or even alcoholism or drug dependency, be reasonably said to jeopardise another person’s health or safety? In order to succeed in its claim for possession there, the landlord would have to satisfy the statutory justification in s.24 (3)(a) of the DDA, which requires that the possession order “is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person)”.

Landlords may try to justify such evictions by reference to the good of the greater number – i.e., if we don’t recover arrears, we can’t spend the money on repairs or improvements which prevent our other tenants, their families and their visitors from being endangered. A host of counter-arguments to that then spring up: and there would be likely to be problems proving the “endangerment to health” issue in those circumstances. This is despite Brooke LJ’s words at paragraphs [69-70] of his judgment in Romano, which set the bar low –

[The landlord] does not have to prove that that person’s health or safety has actually been damaged. The world Heath Organisation has since 1948 adopted the following definition of the word “health”: “Health is a state of complete physical, mental and social well-being and not merely the absence of disease and infirmity.” If health is endangered, that state is put at risk. The statute does not use the words “seriously endangered” ... Trivial risks to a

person’s health should be disregarded.

There is more, potentially. Assured Shorthold Tenants of private landlords may seek to defend possession proceedings on DDA grounds, brought on the “no fault” s.21 Notice procedure. This may occur where their or a family member’s health has led to budgeting problems and resulting arrears, and the landlord is relying on a s.21 Notice in order to use the Accelerated scheme in CPR Part 55, knowing that the rent arrears (which caused them to bring proceedings in the first place) would be practically irrecoverable.

And what of the occupier of housing, provided by a Council, an RSL, or even a private landlord, pursuant to arrangements temporarily to accommodate an applicant pending a decision or a review on the duty owed under the homelessness provisions of the Housing Act 1996? Where the original homelessness was the result of rent or mortgage arrears judged due to the occupier acting “deliberately”, meaning that the authority decided that they were intentionally homeless (s.191(1)), the provider of the temporary accommodation will want to evict the occupier after that finding of intentionality, as s.190 permits. There is an argument that such treatment is unlawfully discriminatory, because the eviction from TA “relates to” the disability, if the disability contributed to the running up of the debt which led to the eviction from the applicant’s original home, and hence the placement in TA. The DDA’s test is rather different to the test for intentional homelessness. An otherwise routine and completely undefendable possession claim could be declared unlawful as a result.

This short article is not an exercise in clairvoyance, but it must be remembered that



**Sarah Greenan**



**Kate Hunter-Gordon**



**Tom Tyson**

the DDA was, after all, passed in order to promote and defend the rights of the disabled, and it is certainly succeeding in doing that here. While many providers of housing and their advisers have high hopes that their Lordships will limit the effect of Malcolm, the Judicial Committee of the House of Lords cannot re-write the DDA. The effect of their decision may therefore be quite limited – assuming even that they side with the landlord at all. Such criticism that the Lords may make of the effect of the DDA in such circumstances may be yet another instance where they remind us that the job of reform is Parliament's alone.

For all its exponents' keenness to exploit its provisions for their clients' advantage, the law can be slow to react. It took nearly 8 years from the passage of the DDA before its potential effect in possession proceedings began properly to be appreciated, with the 2003 decision in *Brazier*. And does anyone remember that a similar task of statutory amendment was envisaged in 1996, when Lord Browne-Wilkinson invented the concept of the "tolerated trespasser"? (*Burrows v. Brent LBC* (1996) 1 W.L.R. 1448; (1997) 29 H.L.R. 167, HL). And has that been sorted out by Parliament yet?

**Simon Read**



**Justin Crossley**

## The Yorkshire Housing Law Practitioners' Association

YHLP A is a fresh attempt to create and foster a sense of community for all those who are involved in housing management, advice and litigation in the region, and it held its first meeting in September 2007. Those who advise and assist both providers and consumers of housing are welcome to join and participate – and we are pleased to say that members of the local judiciary have attended and spoken at our meetings, too.

YHLP A was formerly known as the West Yorkshire Housing Law Group, which despite the best efforts of its management crew, stopped meeting in about 2003. There is an existing South Yorkshire Housing Law Group based in Sheffield – with whom YHLP A shares membership – and which we hope will go from strength to strength. Another lively local group serves North Derbyshire and Nottinghamshire. We are not aware of any local groups serving the Tyne/Wear/Tees or Humber areas. Since WYHLG's apparent demise 5 years ago, there was nothing to unite or represent the interests of any housing advice professionals in the wider area of Yorkshire and the Humber. So "Region" means anywhere eastwards from the top of the Pennines across to the coast, and from around Teesside southwards down to the North Midlands.

Meetings are to be held at least 5 times per year, based in Leeds, and these meetings will revolve around a central speaker who will talk on a topic relevant to housing law. Materials from the talk are distributed on the night, and will (in due course) be downloadable from the website: each meeting entitles

you to 1 CPD hour or point. The meetings have been held in the state-of-the-art main Lecture Theatre at BPP Law School, just by Leeds Station, for whose continuing support the association is indebted.

YHLP A's inaugural meeting in September 2007 was kindly opened by HHJ Simon Grenfell, the Designated Civil Judge at Leeds County Court and District Registry; he introduced the main speaker. This was John Gallagher, Shelter's Principal Solicitor, who reviewed the past year's main developments with enthusiasm and insight. Then Janus-like, for the next meeting in December the members were chuffed to be able to hear Jan Luba QC speak very entertainingly and informatively about the Year Ahead in housing law. In February, two members of the local Bar, Beth Darlington and Tom Tyson, spoke about recent developments in the law relating to cohabittees; and human rights and the law of trespass, respectively.

The group hopes to develop a habit of holding an "Information Exchange", discussing developments of local interest and requests for help and information between members at the end of each session, and then later to adjourn for refreshments to some respectable local salon. Meetings have been attended by between 30 and 50 people, so far.

Dates and subjects for future meetings are yet to be confirmed, but it is hoped

to cover the Government's proposals for a dedicated Housing Court, and the suddenly very hot topics of disability and mental capacity issues.

YHLPAs has created a database of members who are involved in housing law and management. To keep costs down and admin tasks simple, the committee emails members with details of the meetings. If you wish to be added to the database, please email YHLPAs accordingly. There is no formal membership structure, but there are charges per head, per meeting (£5 private and statutory sector; £2 voluntary sector; free for the unwaged, trainee solicitors and pupil barristers). The association is run informally, by a Steering Committee, of which the members are:

Adrian Tonge, Principal Lawyer, Leeds City Council

Carl Gallagher, Partner, Zermanskys Solicitor

Phillip Barber, Barrister, Zenith Chambers

Simon Read, Barrister, Zenith Chambers (secretary)

Clare Hirschhorn, Solicitor, Davies Gore Lomax

The committee are entirely self-appointed, ad hoc and de facto, and so welcome anyone who would like to contribute to the work of the association; bookkeeping, inviting speakers, website maintenance and development. It meets approximately every other month in Leeds. If you think you can help, or would just like a chat about the work of the association, please feel free to call (c/o Zenith Chambers, 0113 245 1986) or

e m a i l  
[y.h.l.p.a@btinternet.com](mailto:y.h.l.p.a@btinternet.com).

Please note the association's website at [www.yorkshirehousinglaw.co.uk](http://www.yorkshirehousinglaw.co.uk), which Phil Barber has recently been developing.

Currently, there are no committee members from the voluntary sector or who are non-statutory in-house advisers, so YHLPAs would particularly welcome their participation. It's early days yet, but the group would welcome and encourage your support and attendance.

**Simon Read**



**Anesh Pema**

## CASE NOTES

### **PORTER v SHEPHERDS BUSH HOUSING ASSOCIATION [2008] EWCA Civ 196**

P appealed against a ruling upholding a decision of a district judge to dismiss his application under section 85(4) of the Housing Act 1985 for the discharge/ rescission of a suspended possession order made in favour of SB. The suspended possession order had been made in 1997 after P, a secure tenant, had fallen into rent arrears. As P had failed to comply with the conditions of the order the secure tenancy came to an end. In 2006 P paid off the rent arrears.

The district judge held that the tenancy could not be revived under s85(4) as P had not complied with the conditions of the order; P

was a 'tolerated trespasser'. The court felt bound by the decision in *Swindon BC v Aston* (2002) EWCA Civ 1850, which had cited *Marshall v Bradford MDC* (2001) EWCA Civ 594, where it had been held that the court's powers under s85(4) arose only if the conditions in the relevant possession order had been complied with.

P argued before the Court of Appeal that:

the Court should follow *Payne v Cooper* (1958) 1 QB 174;

the court should grant, under CPR r.3.1(2)(a), a retrospective extension of time for the payment of the rent arrears, therefore enabling the relevant powers under s85(4) to be exercised;

his rights under the ECHR Article 8 had been breached.

The Court of Appeal held that *Payne* was distinguishable as it related to an unconditional order whereas s85(3) of the Act obliges the court to impose conditions with respect to payment of rent arrears. *Marshall* concentrated upon the wording of the Act and was held to be "careful and persuasive."

It was held that it would be "alien" to acknowledge a power under the CPR to extend time when the object of the extension is to make possible the rewriting of a valid order made under s85. It was not suggested that the conditions were unreasonable when imposed, nor had anything rendered the original order misconceived. CPR r.3.1(2)(a) did not permit the court to take that course. Equally it was held that there was no inherent jurisdiction in the court to amend the order



**Helen Greaterex**



**Michelle Stuart-Lofthouse**

## Case Notes

retrospectively.

It was doubted whether Article 8(1) was engaged where P had an exclusive right of occupation and there were no possession proceedings against him. Furthermore, it was held that Article 8 had a very limited role in regulating the law which governs the relationship between landlord and tenant.

The appeal was dismissed.

### **RUWENA KHAN**

#### **S v Jacqueline Floyd v The Equality and Human Rights Commission [2008] EWCA Civ 201**

The Court of Appeal in giving their judgement in this case discussed the inter-relationship between the Housing Act 1988, where a landlord seeks possession order, and the Disability Discrimination Act 1995.

At the time proceedings were issued S was an assured tenant, and Mrs Floyd the landlord, of a flat. On the 3 March 2006 Mrs Floyd gave notice to S that she intended to apply to the court for a possession order. S admitted that he was in arrears in excess of £7,000

(approximately 132 weeks of rent). Mrs Floyd's claim for possession was based on the mandatory grounds of more than 8 weeks of rent arrears, under section 7(3) and Ground 8 in Schedule 2 to the 1988 Act.

It was argued before the Court of Appeal that the District Judge should have granted an adjournment as requested as an allegation of disability discrimination warranted an adjournment. The Court of Appeal found there was no discrimination on the basis of disability and there was therefore no need for an adjournment; Mrs Floyd issued proceedings because of non-payment of rent and not because of S's alleged disability, Obsessive Compulsive Personality Disorder.

S's case was distinguished from Manchester City Council v Romano [2004] EWCA Civ 834 (a case where the local authority sought possession from mentally ill secure tenants on the grounds of nuisance) as S's case concerned a claim for possession on mandatory grounds under the Housing Act 1988 whereas Romano's case was concerned with a claim for possession on discretionary grounds under the Housing Act 1985.

S's case was distinguished from Lewisham v Malcolm [2007] EWCA Civ 763 as in Malcolm's case the court found

that the subletting by Malcolm that led to the landlord issuing possession proceedings related to Malcolm's disability, schizophrenia. In contrast the Court of Appeal found S failed to pay his rent because he was unhappy with the increase in rent, a factor not attributable to his alleged disability.

The distinction made by the Court of Appeal between Malcolm's case and S's case is far from clear, not least as the Cognitive Behavioural Therapist's description of S's symptoms, as stated in the Court of Appeal's judgement, might lead one to the conclusion that S failed to pay his rent precisely because of the disorder he suffers from.

The House of Lords has the opportunity to clarify the relationship between the Housing Act 1988 and the Disability Discrimination Act 1995 as the appeal from Lewisham v Malcolm is to be heard by the Law Lords imminently.

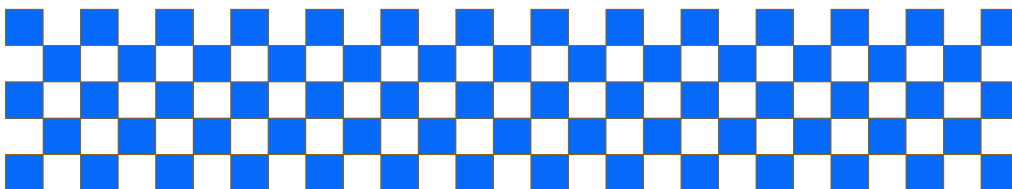
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