Hardwicke Building

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PROPERTY TEAM NEWSLETTER

Article: Mental Capacity Act 2005 – New Rules; Same Problems

Considerable publicity and column inches have recently been dedicated to the effect of s.22(3)(c) of the Disability Discrimination Act 1995 ("DDA") in possession proceedings, on both discretionary and mandatory grounds. This has led parties, their representatives and Judges also to question whether the person who is said to be disabled lacks 'capacity'; despite the fact that these are two quite distinct issues. It is also useful to revisit the issue of capacity in light of the fact that the Mental Capacity Act 2005 ("the Act") came into force this year, and the consequential amendments to the CPR that have been in place since 1 October 2007.

Some of the changes to the CPR introduced by the Act are purely cosmetic and impose little additional burden on practitioners. For example, a person said to lack capacity is now to be identified as a 'protected party' rather than a 'patient' and the term 'receiver' has been replaced with 'deputy'. However, practitioners do need to familiarise themselves with the new Act and in particular the new test for capacity. Significantly, CPR rule 21.1 provides that "to lack capacity" means to lack the capacity to conduct the proceedings, rather than to lack capacity to manage and administer property and affairs. This test is arguably much wider than its predecessor.

When considering capacity, s.2(1) and 2(2) of the Act set down the fundamental test. A person is said to lack capacity if at the material time he is unable to make a decision for himself because of either a temporary or permanent impairment of, or disturbance in the functioning of the mind or brain. Some useful guidance in applying this test is found in section 3 of the Act, which expressly provides that a person lacks capacity if they are unable to:

a. understand information relevant to the decision (even if the information is presented in a culturally appropriate way, i.e. using simple language and visual aids);
b. retain information (albeit he will not regarded as unable to make a decision if he can retain information for a short period of time only);
c. weigh information in order to make a decision; and
d. communicate his decision by talking, using sign language or any other means.

In addition, the person must be unable to understand the reasonably foreseeable consequences of their decision, including the failure to make a decision (s.3(4)). Accordingly, a person is not to be treated as lacking capacity simply because he makes unwise decisions. It is of note that the Act does not impose a requirement that the person is able to believe the information provided to him relating to the decision. The starting point in all cases is the presumption that an adult (i.e. a person aged 18 or over) has capacity. This remains the case whether or not that party is disabled or has been found to be disabled within the definition of the DDA. It may be necessary therefore, to remind the court that the burden of proving lack of capacity falls on the person who alleges that he lacks capacity, and will usually, but not always, involve the filing of medical evidence, such as the report of an expert psychiatrist. Moreover, it may be necessary to draw the court's attention to the test under the new Act and the amendments to the CPR.

Realistically however, if there is any reason to doubt a party to proceedings has capacity the court will often feel bound to adjourn the proceedings until such time as the issue of capacity has been determined and the appointment of a litigation friend (if appropriate). Unfortunately, nothing in the Act or the new rules diminishes the danger that an unscrupulous defendant may seek to raise issues of capacity to engineer an otherwise unnecessary delay in the determination of proceedings brought against him. Hopefully, in light of the new test and rules, the courts can now be persuaded to take a more robust approach to defendants who raise the question of capacity, than has hitherto been the case.

Did you see...? Recent cases you may have missed

Real Property
Restrictive Covenants; Variation' Housing Act 1985 section 610;
Lawntown Limited v (1) Camenzuli & (2) Camenzuli [2007] EWCA Civ 949

Mr. and Mrs. Camenzuli appealed against the decision of the district judge to vary restrictive covenants so as to allow Lawntown Limited to convert a house next door to them into two flats. Lawntown had obtained planning permission for the conversion and applied to the county court under s.610 of the Housing Act 1985 to vary the covenants. This section applies to freehold as well as to leasehold land and is designed to

provide relief against covenants in so far as they would prevent the conversion of larger houses into two or more smaller dwellings. The judge held that the court should normally proceed on the assumption that the planning permission had been properly granted and should not have regard to matter already considered by the planning authority. Having evaluated three matters not considered by the planning authority, the judge agreed to vary the covenants declined to award compensation.

Held: The court's task under s.610, although triggered by a grant of planning permission, was separate from the planning process and required the court to make its own assessment of the relevant factors and the weight to be accorded to each one. As such the judge was wrong to confine his attention to those matters that had not been considered by the planning authority entitling the court to exercise the discretion afresh. On the facts of the case, however, the judge's decision would be upheld.

Landlord & Tenant
Leasehold Enfranchisement; Hope Value; Deferment Rate; Leasehold Reform Act 1967; Leasehold Reform, Housing and Urban Development Act 1993; Commonhold and Leasehold Reform Act 2002
Earl Cadogan and Cadogan Estates Limited v Sportelli (and 4 other conjoined appeals) [2007] EWCA Civ 1042

Appeals were brought on five decisions of the Lands Tribunal on the valuation of the freeholder's interest in collective enfranchisement, lease extension and leasehold enfranchisement of a single house. The Court of Appeal considered:-

Held: the appeal was dismissed. The key question was whether the letter was a matter which adversely affected the value of the reversion at the end of the lease. The judge had been entitled to prefer the evidence of the respondent's expert to the effect that there was unlikely to have been any adverse affect and to hold that no damages were therefore payable.

1. the proper deferment rate to be applied to the vacant possession value; and
2. the valuation of any 'hope value' following the Commonhold and Leasehold Reform Act 2002;

Real Property
Charging Orders; Implied Surrender of Security; s.53(1) of Law of Property Act 1925
C & W Berry Limited v Armstrong-Moakes [2007] EWHC 2101 (QB)

Held: The appeals were dismissed and the decisions of the Lands Tribunal were upheld. The Lands Tribunal had not acted irrationally in adopting a particular methodology for the calculation of the deferment rate. Thus, ordinarily the generic rates decided in Sportelli of 4.75% for houses (under the Leasehold Reform Act 1967) and 5% for flats to reflect greater management problems (under the Leasehold Reform, Housing and Urban Development Act 1993) will be applicable.

The Lands Tribunal had been correct in determining that Schedules 6 and 13 of the 1993 Act excluded hope value from the purchase price to be paid by the leaseholder. Hope value represents no more than the anticipation of future marriage value, (albeit marriage value has different statutory definitions under the 1967 and 1993 Acts). To include hope value would introduce an element of double counting in lease extensions and be contrary to the legislative policy which had deliberately removed the hope value of non-participating tenants (by the Housing Act 1996 amendments to the 1993 Act).

The issue of whether the Lands Tribunal created a binding precedent on the LVT was not determined by the Court of Appeal, though LJ Carnwath accepted that, in this matter, it was in the public interest for the Tribunal to provide guidance which would promote consistent practice in the LVT. He envisaged that there may be properties outside of the Prime Central London area where the evidence may call for a different deferment rate to be applied.

Landlord & Tenant
Leasehold Valuation; Commonhold and Leasehold Reform Act 2002; Right to Manage
Holding & Management (Solitaire) Ltd v 1 – 16 Finland St RTM Co Ltd 26th October 2007 Lands Tribunal

The appellant disputed the right of the Respondent to manage the building, arguing that the premises did not constitute a self-contained building or part of a building because it did not constitute a vertical division of the building as required by section 72(3)(a). The LVT found there was a vertical division save in respect of a parking area representing 2% of the floor area, which it held was not material.

Held: On appeal the Lands Tribunal reversed the decision of the LVT stating that the requirement under section 72(3)(a) was unqualified. The question was whether, including the area in question, the part of the building was, physically, a vertical division. On the facts, the departure from the vertical was not de minimis, and, accordingly, the part of the building in respect of which the claim was made did not constitute a vertical division of the building.Holding & Management (Solitaire) Ltd v 1 – 16 Finland St RTM Co Ltd 26th October 2007 Lands Tribunal

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The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

Telephone: 020 7242 2523
Web: www.hardwicke.co.uk/property
Team Email: property@hardwicke.co.uk
Clerks: Kevin Mitchell, Danny O'Brien, Paul Martenstyn, Daniel Kemp, Oliver Edwards & Richard Evans

Stephen Lennard	1976	Kerry Bretherton	1992	Alastair Redpath-Stevens	1998
Robert Leonard	1976	Alexander Goold	1994	Andrew Lane	1999
Wendy Parker	1978	Andrew Skelly	1994	Sarah McCann	2001
Karl King	1985	Alexander Bastin	1995	Dean Underwood	2002
Michelle Stevens-Hoare	1986	Edward Rowntree	1996	Michael Wheater	2003
Steven Woolf	1989	David Pliener	1996	Alice Marshment	2003
Sara Benbow	1990	Fiona Scolding	1996	Phillipa Harris	2005
aniel Gatty	1990	Brendan Mullee	1996	Andy Creer	2005
Rupert Higgins	1991	Nicola Muir	1998		
Arthur Moore	1992	Alison Meacher	1998		

Hardwicke Building New Square Lincoln's Inn London WC2A 3SB
Telephone 020 7242 2523 Fax 020 7691 1234 DX LDE 393