Hardwicke Building

Property Team

July 2007
Vol 13- Part 4

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.

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Article: The Disability Discrimination Act Defence in Mandatory Possession Claims

Section 22(3)(c) of the *Disability Discrimination Act 1995* ("*DDA*") provides that it is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises by evicting that person or subjecting him/her to other detriment. A person discriminates against a disabled person if, for a reason which relates to the disabled persons disability, they treat them less favourably than they treat or would treat others to whom that reason does not or would not apply, and cannot show that the treatment is "justified" (*s.24(1)*).

A possession action may be "justified" against a person disabled within the definition of the *DDA* if, amongst other specified reasons, the landlord reasonably believes that the action is necessary in order that the health or safety of any person, including the disabled person, is not endangered (*s.24(2)(3)*). This is not usually a difficult "hurdle" in nuisance possession claims (evidence permitting) but problematic when it comes to grounds relating to matters such as rent arrears and subletting.

Lord Justice Brooke in *Manchester City Council-v-Romano [2004] HLR 47(64)* confirmed that though a tenant may seek a declaration and/or injunction in possession proceedings in reliance on these *DDA* provisions the preferable route in discretionary cases was to use it as a defence in arguing that it would not be reasonable to make the order. That of course is fine where the ground for possession relied upon by the landlord is discretionary and an order cannot be made without the court finding it reasonable to do so, but what happens in cases where the court has no such discretion?

The Court of Appeal in *Romano* recognised this issue but was not required to decide upon it (68). This was however the situation faced recently by the Court of Appeal in *Lewisham LBC-v-Malcolm [2007] EWCA Civ 763* where the possession claim was brought on the basis of an (admitted) subletting of the whole of the demised premises. The landlord was not asserting that there was "justification" under the *DDA* (100), but rather that it did not apply.

The trial judge had also held that the *DDA* was not applicable, not only because she did not accept that the defendant had a disability (schizophrenia) for the purposes of the *DDA* but also because she found that it did not apply to cases where the security of tenure had already been lost (by reason of the subletting) and in any event that the defendant's actions in letting out the property were not caused by his disability.

The Court of Appeal, however, decided in the tenant's favour, holding that he was a disabled person for the purposes of the *DDA* and could rely on *s.22(3)(c)* even though he had no security of tenure and the court had no discretion not to make a possession order.

The other important findings of the Court of Appeal were (37):

(1) even though it was not shown that his disability caused him to enter into the sub-letting the judge should have found there was an "appropriate relationship" between the subletting and his disability (Toulson LJ casting doubts on this approach but not to the point of disagreement (152)). As Lady Justice Arden explained in the leading judgment (107);
(2) the landlord's lack of knowledge of the tenant's disability did not preclude a finding of discrimination contrary to *s.24* of the *DDA*.
(3) if the "*DDA* defence" was proved then the court should dismiss the proceedings.

Lady Justice Arden's further analysis was that once it was held that the discrimination was unlawful then "the notice to quit will cease to be a valid notice" (60), with the effect that his contractual tenancy continued (121). Lord Justice Longmore concurred with this finding (139), though it was not a view shared by Toulson LJ (169) on the grounds that there was no evidence that at the stage the landlord had reason to suppose that the sub-letting had anything to do with the tenant's disability.

At the time of writing a decision is awaited in *Floyd-v-Scott (B5/2006/1199)* where the landlord of an assured tenant was seeking possession on the mandatory rent arrears ground (ground 8). That appeal raises two DDA issues – does the *DDA* provide any defence? (presumably "yes" in principle in the light of the *Malcolm decision*); and, was the defendant's disability an exceptional circumstance justifying an adjournment (again, it

would be difficult to see why not if there is a credible "full defence" that could be run in the light of *Malcolm*). DJ Silverman at Edmonton County Court on the 15th February 2007 has already decided – in *Community Housing Association-v-Wye* – that an injunction should be granted to prevent a s.21 possession claim from being pursued (see "Legal Action" May 2007 @ 29). The *Malcolm decision* is an important one and provides a possible avenue for challenge by tenants in cases where previously their options may have been limited to non-existent. No doubt it will be noted by the duty adviser desks around the country and lead to more adjournments where the *DDA* question is put in issue.

Andy Lane

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

Real Property

Contracts for sale

Aribisala v St James Homes (Grosvenor Dock) Ltd [2007] EWHC 1694 (Ch)

The parties had entered into a contract for the sale and purchase of a leasehold property, which incorporated the Standard Conditions of Sale (4th edn) and a term whereby the buyer's deposit would be forfeit if they failed to comply with a notice to complete. The parties contractually agreed to exclude the application of s.49(2) of the LPA 1925. The buyer failed to complete and then applied to the Court for the return of the deposit. The vendor applied for summary dismissal of the application.

Held: Parties to a contract for sale of land could not exclude the LPA 1925 s.49(2) by agreement, as it did not grant the parties rights. Rather, it gave the court jurisdiction to determine questions arising out of the contract on an application by a vendor or purchaser, including whether a deposit should be repaid. Any agreement would be void as it was against public policy to allow parties to oust the jurisdiction of the court.

Real Property

Land Registration Act 1925; priority of charges; proprietary estoppels; Law of Property (Miscellaneous Provisions) Act 1989 section 2

Scottish & Newcastle plc v Lancashire Mortgage Corporation Ltd [2007] EWCA Civ 684

Legal charges in favour of the Claimants and Defendants, with the Defendants' charge being executed first. However, the Claimants' charge was registered first and thereafter they claimed priority under the Land Registration Act 1925. The Defendants contended that because the Claimants were aware that they had advanced money (some of which went to the Claimants) on the expectation that they were to have a first legal charge over the property, the Claimants were estopped from denying that their legal charge ranked behind the Defendant's, and the Judge at first instance agreed.

Held: In the circumstances, the Judge had been entitled to find that the Claimants had passively acquiesced in (as opposed to positively represented, encouraged or promised) the Defendants' expectation that they would obtain a first legal charge over the property and thus were estopped from thereafter asserting their priority. The estoppel was propriety in nature, but section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 was not relevant as there was no contract and the substantive effect of the estoppels was not the disposition of an interest in land, but a variation in the beneficial interests of the parties in the net proceeds of sale.

Landlord & Tenant

Collective Enfranchisement; Leasehold Reform, Housing and Urban Development Act 1993 section 13; validity of notices;

Sinclair Gardens Investments (Kensington) Ltd v Poets Chase Freehold Co Ltd [2007] EWHC 1776 (Ch)

The Landlord appealed against a decision that the tenant leaseholders were entitled to exercise collective enfranchisement. It was argued that the notice the tenants had purported to serve under section 13 of the Leasehold Reform, Housing and Urban Development Act 1993, though defective, nonetheless operated so as to prevented a further, compliant notice from being served within the next 12 months.

Held: The tenants were entitled to serve, and indeed had served, a valid notice under section 13 in April 2006. The earlier notice served in December 2005 did not comply with the requirements of the section and as such was invalid and not 'in force'. Since the landlord had drawn the invalidity of the December 2005 notice to the tenants' attention, section 13(8) of the Act did not apply, and the December notice did not have to be withdrawn, nor was there any deemed withdrawal under section 29(1). Accordingly there was no scope for section 13(9) to preclude the tenants from serving a valid notice in April 2006, which they had done.

Case summaries Andy Creer and Alice Marshment

Regulation Updater…

Law Commission's Report on Cohabitation

The Law Commission has published its recommendations for the reform of the law affecting cohabitants on separation. It did not propose that cohabitants should have the same rights as married couples or civil partners, but recommended a scheme whereby a court would be able to make an order to adjust the parties' respective property rights if they met certain criteria.

AMC