

BRIEFING NOTE

DISABILITY DISCRIMINATION - NEW CASE LAW MEANS THAT SOCIAL LANDLORDS MUST BE CAREFUL NOT TO UNLAWFULLY DISCRIMINATE WHEN TAKING ACTION AGAINST ANY OCCUPIER

On 25th July 2007, the Court of Appeal handed down a decision in ***Lewisham London Borough Council -v- Malcolm [2007] EWCA Civ 763*** which has far-reaching consequences. As a result of this decision, whenever an occupier has a disability, and that disability is likely to have played a part in conduct which has caused the Landlord to take steps aimed at securing possession, the question of unlawful discrimination, under the Disability Discrimination Act 1995, will arise. Social Landlords, particularly those managing supported accommodation, now need to be acutely conscious that, where disability through physical or mental factors is involved:

- ◆ Serving a notice or bringing possession proceedings against assured shorthold tenants, contractual tenants or licensees, for any reason, may be an act of unlawful discrimination
- ◆ Notices Requiring Possession, Notices to Quit and Notices to Determine served in cases of unlawful discrimination will be invalid
- ◆ It is arguable that requesting a Warrant of Possession against a tolerated trespasser may be an act of unlawful discrimination
- ◆ The Courts will not allow a Landlord to rely on or benefit from an unlawful act
- ◆ Ignorance of the disability will be no defence
- ◆ Landlords will be expected to have investigated the cause of the occupier's conduct before taking action

Background

For a number of years disability discrimination has been an issue where Social Landlords seek possession against assured or secure tenants on grounds of anti-social behaviour. It is often the case that the anti-social behaviour is caused or contributed to by mental ill-health, amounting to a disability, on the part of the tenant. This does not prevent the Landlord obtaining possession against the tenant, provided possession action is shown to be justified on the basis that it is necessary to protect health and safety.

Based on a previous decision of the Court of Appeal, in *Manchester City Council -v- Romano* [2005] 1 WLR 2775, it had been understood that, in terms of possession proceedings, considerations of disability discrimination were confined to those cases where possession is sought on discretionary grounds - that a Court would look at disability, discrimination and justification as part of deciding whether or not it is reasonable to grant a Possession Order.

The Latest Development

In the case of *Lewisham London Borough Council -v- Malcolm*, however, the Court of Appeal found that the relevant provisions of the Disability Discrimination Act 1995 are “unqualified” and are not restricted to cases where the occupier has security of tenure.

The case concerned a former secure tenant who had lost his security by moving out and sub-letting his Council property. After the Council had discovered the sub-letting, served a Notice to Quit and commenced possession proceedings, Mr Malcolm put forward a Defence based on the Disability Discrimination Act. The Council was unaware of his disability prior to his Defence being served. Mr Malcolm argued that his thoughts were confused as a result of his disability, schizophrenia, at the time that he entered into the sub-letting. His argument had been rejected in the County Court, but it was successful in the Court of Appeal.

The Appeal Judges held that both the Notice to Quit and the Claim for Possession constituted unlawful discrimination on the part of Lewisham. Mr Malcolm’s appeal against the making of the Possession Order was allowed and the possession proceedings were dismissed. The Notice to Quit was declared to be invalid, thereby enabling Mr Malcolm to retain the benefit of a contractual tenancy.

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