

The Death of the Disability Discrimination Act?

The House of Lords have overruled the Court of Appeal's decision in *Mayor & Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43 [judgment](#). In a comprehensive judgment the HL turned some aspects of the DDA and its interpretation on its head and have restricted the potential usage and effectiveness of the Act for disabled tenants and indeed disabled individuals generally.

What has undoubtedly played a rigorous role in the Lords decision is the potential width of the Act as per *Novacold* and *Romano*. Specifically the Lords have focussed on policy issues and whether it can be right that a private landlord seeking possession on account of rent arrears could be determined to have committed a discriminatory act by seeking possession of premises where the rent arrears have accrued as a consequence of disability. These factors allied with the fact that but for the disability argument the Claimants in *Malcolm* were bound to obtain possession were influential in the Lords decision.

Causation

The Court considered all aspects of the approach to be undertaken by the courts when considering a DDA defence save for the issue of justification. What appears key from the judgment is that there needs to be a causal link between the purported breach of the tenancy and the disability. Lord Brown and Baroness Hale took the view that there was an insufficient nexus between the disability in *Malcolm* and the physical act of sub-letting and allowed the appeal on these grounds alone. This underscores the continuing need for evidence to link the illness with the offending behaviour which has given rise to breach.

Knowledge

The Court agreed that the conclusion in *Malcolm* (CA) that the landlord was not required to have knowledge of the disability in order to commit a discriminatory act was one which was untenable and that Parliament could never have intended that a tort be committed without the knowledge of the tortfeasor. Lord Bingham stated as follows as regards the requirement of knowledge: -

A telephones restaurant B to book a table. He asks if he may bring a dog. B says that dogs are not allowed in its restaurant. A does not say, and B does not know, that A is blind. It seems to me contrary to principle to hold that on such facts B has committed an actionable tort sounding in damages.

As such, a landlord can now initiate possession proceedings without any particular knowledge of the tenant's disability.

The comparator – the demise of *Novacold*

It is the revision of the comparator test that has the greatest significance on a DDA action. This combined with the already difficult justification test for nuisance makes the DDA defence undoubtedly less likely to succeed

To establish discrimination under *Novacold* the discriminatory treatment was to be contrasted with treatment received by an individual who had not been discriminated against. Thus in *Novacold* (as per *Mummary LJ*)

A waiter asks a disabled customer to leave the restaurant because she has difficulty eating as a result of her disability. He serves other customers who have no difficulty eating. The waiter has therefore treated her less favourably than other customers. The treatment was for a reason related to her disability-her difficulty when eating. And the

reason for her less favourable treatment did not apply to other customers. If the waiter could not justify the less favourable treatment, he would have discriminated unlawfully

The House of Lords (Hale dissenting) conclude that Novacold and the comparator test that had been in situ was in fact erroneous and was inconsistent with what Mummery LJ had stated in a later case (*S v Floyd* and the Equality and Human Rights Commission [2008] EWCA Civ 201). Lord Scott (at para 35) attacking the Novacold test above ruled that a blind person refused entry to a restaurant because he has a guide dog with him is not being discriminated against because he is blind but is being discriminated against because he has a dog and that any like non-disabled person with a dog would be so discriminated against. Notwithstanding the obvious shortcomings of such a legal test, this was the majority verdict of the HL.

The test is now “Is the claim related to the tenant’s disability and has the tenant been treated less favourably than someone without that disability?” As such the comparison is with a person in a like situation. In a nuisance DDA nuisance defence the test would be as follows: -

Is the tenant being treated less favourably than other tenants (without a disability) who have committed acts of anti-social behaviour? If the answer to that question is negative then according to the Lords there is unlikely to be an act of discrimination committed by the landlord.

This test effectively eradicates at a stroke the impact of indirect discrimination and means that only acts of direct discrimination against a disabled person will now be actionable. As Baroness Hale forcibly notes in her dissenting judgment this places disabled persons on a lower tier (in respect of anti-discrimination legislation) than either women or ethnic minorities in like anti-discrimination legislation.

The future

Lord Bingham ruled out the contention of Lewisham that no defence would ever be able to succeed in a

housing type case, given the express wording of the DDA. However he stated that such cases were unlikely to succeed very often. Baroness Hale also addressed this argument and stated that Romano could be distinguished from Malcolm on the basis that possession was a discretionary judgment for the court and that as such DDA issues were relevant factors to be considered in the context of reasonableness.

The Housing Team take the view that the decision has undoubtedly diminished the prospects of success for most DDA type defences and has heightened the threshold for which such a defence is likely to succeed. Notwithstanding this it is clear from the comments of Lord Bingham and Baroness Hale that DDA defences remain arguable especially so where possession involves the discretionary judgment of the Court.

Homelessness

Lambeth v Johnston [2008] EWCA Civ 690 [judgment](#)

In the above appeal the CA considered the impact of Regulation 8(2) of the Allocation of Housing & Homelessness (Review Procedures) Regulations 1999 which states: -

- 8.—(1) The reviewer shall, subject to compliance with the provisions of regulation 9, consider –
 - (a) any representations made under regulation 6 ... and
 - (b) any representations made under paragraph (2) below.
- (2) If the reviewer considers that there is a deficiency or irregularity in the original decision, or in the manner in which it was made, but is minded nonetheless to make a decision which is against the interests of the applicant on one or more issues, the reviewer shall notify the applicant –
 - (a) that the reviewer is so minded and the reasons why; and
 - (b) that the applicant, or someone acting on his behalf, may make representations to the reviewer orally or in writing or both orally and in writing.

Rimer LJ stated that this was a mandatory obligation on the part of the reviewing officer and not a discretionary power. Moreover the regulation provided the applicant with the ability to make representations and seek to persuade a reviewing officer that the decision that the reviewing officer was “minded to take” was in fact wrong. This was a procedural safeguard which could not be ignored by the authority.

Women’s refuges

Manchester City Council v Moran [2008] EWCA 378 [judgment](#)

In Moran the CA considered the question as to whether women’s refuges were accommodation that was reasonable to continue to occupy. The homeless applicant had been found to be intentionally homeless having lost accommodation in a refuge. The question to be determined was whether she could in fact be intentionally homeless given the Code of Guidance and the case of *R v. London Borough of Ealing Ex p. Sidhu* (1982) 2 HLR 48 which stated that refuges could not be accommodation. The Court overruled Sidhu and recommended that the Code of Guidance be amended as regards refuges. This decision was largely based upon the facts as set out within the judgment. However the Court recommended that if an authority were to consider this question in the future they would need to make inquiries and findings as to the following issues:

49. The *general* matters which fall to be considered include:
 - (a) the size, type and quality of the accommodation made available to the woman, including the extent of her need to share its facilities;
 - (b) the terms of the agreement by which it is made available to her;
 - (c) her ability to afford it;
 - (d) the appropriateness of its location for her and her child (if any);
 - (e) the extent of its facilities for her child;
 - (f) its appropriateness for her and her child in the light of any particular characteristics (including as to health) which each may have;

- (g) the length of time for which they have already occupied it;
- (h) the state of their physical and emotional health while in occupation of it; and
- (i) the length of time for which, unless accepted as homeless, they might expect to continue to occupy it.

50. The *particular* matters which additionally fall to be considered by virtue of the fact that the accommodation is a refuge include:

- (a) the nature of the refuge;
- (b) the scale of support which the refuge aspires to provide to the woman;
- (c) in particular, whether reflected in the terms of the licence agreement, in its published material or otherwise, the length of the period for which the refuge expects her to remain in occupation of it;
- (d) the length of the period for which women generally occupy it;
- (e) the extent to which, during her occupation, the refuge has been full;
- (f) any evidence that her occupation may have prevented, and in particular the extent of the risk that any continued occupation on her part may in the future prevent, the refuge from offering accommodation to another victim of domestic violence in an emergency;
- (g) the extent to which any conditions of the licence agreement, by way, for example, of the prohibition of visitors or of dissemination of the address of the refuge, make it reasonable or otherwise for her, in the light of the length of her occupation to date, to continue to occupy it; and
- (h) the extent of her need, and of her ability to accept, such physical and emotional support as the refuge may offer to her.

As can be seen this is a comprehensive checklist that an authority will need to rigorously examine before reaching such a decision.

Alex Durance, 2nd July 2008