

the Court would not have given effect to such a claim, notwithstanding that there was no defence to the possession claim under the housing legislation. On the facts, that issue did not arise.

Clearly, the battle was between a liberal interpretation of discrimination legislation as adopted by the majority of the Court of Appeal (Toulson LJ dissenting in part) and a narrower interpretation as adopted by the majority in the House of Lords (Baroness Hale dissenting in part). As Lord Neuberger put it, the choice was between two interpretations of the definition of discrimination in s.24, one of which would give the anti-discrimination provisions in s.22 “an unattractively restrictive effect” and the other of which would give those provisions “an extraordinarily far-reaching scope”.



In the end, the House of Lords adopted the restrictive interpretation and overturned the decision of the Court of Appeal. The result is that, in the absence of statutory intervention

(which Baroness Hale seemed to invite), a tenant’s ability to rely on the Act as a defence to possession proceedings and other alleged discriminatory treatment will be far more limited than it has been in the past and is likely to be effectively reduced to those cases in which there is evidence of direct discrimination by a landlord.

#### 4. One Day Property Law Conference

We would like to thank those of you who have booked a place at this year’s Property Law Conference, which has been organised by the Chancery and Commercial Group at Atlantic Chambers and is due to take place on 15th October 2008. We are also grateful to our guest speakers who will be giving up their time to address us, namely Chancery District Judge Heyworth, Rachel Watkin (partner at Halliwells Solicitors) and Charles Hubbard (partner at Edmund Kirby Surveyors).

We have been delighted by the response to the event which is sponsored by Property Law Journal, the specialist fortnightly digest from Legalease. The event is now fully booked up.

For those of you who are coming along, we look forward to seeing you there.

For those of you who have tried unsuccessfully to book a place, please note that we fully intend to hold a similar event next year; we intend to book a larger venue due to the evident great demand for places.

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Mr. Liam Grundy  
Miss C. Hughes-Deane  
Mr. Donald Fraser  
Mr. Hugh Derbyshire

#### Chancery & Commercial Clerk:

Mr. Gary Quinn (0151) 242 0203

gary@atlanticchambers.co.uk

Editor:- Donald Fraser

ATLANTIC CHAMBERS

# CHANCERY & COMMERCIAL GROUP NEWSLETTER

Autumn 2008

#### 1. Proprietary Estoppel: Andrew Williams

The summer was an important time for the development of the law in this area.

##### *Thorner v Curtis*

First of all, on 2nd July 2008 the Court of Appeal handed down judgment in *Thorner v Curtis* [2008] EWCA Civ. 732. The first instance decision had surprised practitioners. The claim was brought by Mr Thorner who relied upon the doctrine of proprietary estoppel in arguing that he should be entitled to a farm. He had worked unpaid on the farm for the farm owner for 30 years; the farm owner at no stage stated to Mr Thorner that he would inherit his farm. The most Mr Thorner could establish by way of such a representation was an occasion on which the farm owner handed to him a notice relating to life assurance policies “for death duties”. When the farm owner died, Mr Thorner discovered that he took no interest in the farm on the farm owner’s intestacy.

The High Court found ([2007] EWHC 2422(Ch)) that although the farm owner had never told Mr Thorner that he would inherit the farm, the actions which Mr Thorner took in working on the farm for 30 years were so detrimental to him that he should still be entitled to the farm under the doctrine of proprietary estoppel.

The Court of Appeal took a totally different view, restating the previous law. The farm owner had made no promise to Mr Thorner. As a result, a constituent part of what is required to establish a proprietary estoppel claim (a representation) was missing. The Court of Appeal also noted that Mr Thorner could not rely upon having received the death duties notice, for – whether or not this amounted to some kind of implied representation – he merely continued to act afterwards in the same way as beforehand by continuing to work on the farm.



##### *Yeoman’s Row Management Ltd. v Cobbe*

The second case was arguably more important. On 30th July 2008 the House of Lords handed down judgment in *Yeoman’s Row Management Ltd. v Cobbe* [2008] UKHL 55. In that case the owner of land orally agreed with Mr Cobbe that Mr Cobbe would apply for planning permission in respect of the land and that, if planning permission were granted, the owner would sell the land to Mr Cobbe at an agreed price (with further terms allowing the owner to ‘claw back’ a proportion of development profit also being orally agreed). Due to s.2 Law of Property (Miscellaneous Provisions) Act 1989 this oral agreement was unenforceable, and both sides were aware that it was binding in “honour only”. Mr Cobbe then devoted considerable time and money in applying for and obtaining planning permission. Once planning permission had been obtained, the owner sought to renegotiate the original oral agreement.

Mr Cobbe relied on the doctrine of proprietary estoppel in seeking relief. The Court of Appeal made a finding along these lines.

Yet the House of Lords took a different view. It noted that Mr Cobbe had spent his time and money obtaining planning permission despite knowing that the arrangement was speculative, because there was no enforceable contract in place. Lord Scott of Foscote emphasised, at paragraphs 14 to 20 of his judgment, that (a) a party asserting proprietary estoppel must have expected some sufficiently “certain interest in land”, but Mr Cobbe failed to identify any such certain interest that he had expected to get: rather, his expectation had been that a formal contract would be concluded (para.20) and (b) that he could not discern any answer to the question “..what is it that the [owner] is estopped from asserting or denying?” (para. 15). The House of Lords did not consider that the doctrine of proprietary estoppel applied.

Rather, their Lordships held that the owner of the land had been unjustly enriched by Mr Cobbe’s services. It was therefore held that Mr Cobbe was entitled to a restitutionary remedy, namely the return of the money spent in obtaining planning permission and a “fee” for his services.

## 2. Bats, newts and Europe: toil and trouble

*Hansard, 23 June 2008, Column 155, 3.35pm.*

Under the ten-minute rule, Mr Andrew Robathan (Hon. Member for Blaby) (Con) spoke about problems with newts – and bats – and recounted to the Commons the following tale:

*“..last summer Mr. and Mrs. Histed, who live near Chippenham in Wiltshire, were flooded out of their house by 3 ft of water when a ditch blocked. Repairs to the house cost a quarter of a million pounds and, not unreasonably, they wished to unblock the ditch. However, they were refused permission by the Environment Agency, which ordered a “newt search”, forcing this pensioner couple to remain in a caravan..”.*

Mr Robathan also referred to the 14th century church of St. Nicholas at Stanford on Avon, the ancient treasures inside which are being damaged by copious bat droppings. Bats, like newts, are ‘European Protected Species’, with protection under the European habitats directive. One branch of UK government is

required to police those who might disturb the bats; through other branches of government, the taxpayer contributes in part to the cleaning of St. Nicholas church.



Mr Robathan, expressing his opinion that “..this ridiculous situation is all down to the wicked European Union..”, presented “..a Bill to permit the disturbance of bats and newts for specified purposes..”. The Bill will receive its second reading on 17th October 2008.

## 3. Malcolm in the middle: David Green

Mr Malcolm, a former local authority tenant suffering from schizophrenia, found himself at the centre of a legal battle at the highest level recently, with first the Court of Appeal (*Lewisham LBC v Malcolm* [2007] EWCA Civ 763) and then the House of Lords ([2008] UKHL 43) seeking to determine the proper scope of disability discrimination under the **Disability Discrimination Act 1995**.

Mr Malcolm had been a tenant under a secure tenancy. He had sublet the flat in breach of the tenancy agreement and moved out, thereby losing his security of tenure because he ceased to occupy the flat as his only or principal home. As a result, he had no defence to possession proceedings, other than potential reliance on alleged disability discrimination. His case was that his schizophrenia led him to sublet because it caused him to make irrational decisions. At first instance, the trial judge found against Mr Malcolm, holding that his schizophrenia did not qualify him as

a disabled person under the Act but, in any event, possession had not been sought “for a reason which relates to the disabled person’s disability” under **s.24(1)(a)** and that Lewisham could not have discriminated against Mr Malcolm without having knowledge of his disability.

The Court of Appeal had no difficulty in finding that Mr Malcolm’s schizophrenia did qualify him as a disabled person under the Act, a decision that the House of Lords did not question. Accordingly, the issue in both appellate courts was whether there had been discrimination by Lewisham within the meaning of the Act.

### *The Court of Appeal*

In the Court of Appeal the decision went against Lewisham on the following grounds:

- Although the Act did not expressly provide a defence to a possession claim, it was unlawful to discriminate under **s.22** so that if the Court found that there had been unlawful discrimination, it would not lend assistance to it and would dismiss the possession proceedings (and the notice to quit would be invalid), notwithstanding that this would otherwise be a case in which the court had no discretion not to make a possession order.
- A reason “relates to” a person’s disability under **s.24** if there is an appropriate relationship between the reason (in this case, the subletting) and the disability; the disability need not be the sole cause of the action nor a matter without which the action would not have occurred.
- Where the reason “relates to” the disability, the disabled person is bound to be able to satisfy the requirement of showing that the treatment is less favourable than it would be to others to whom the reason for his treatment did not apply. Accordingly, as the subletting related to Mr Malcolm’s schizophrenia, his treatment was less favourable than the treatment of Lewisham to comparable tenants to whom the reason did not apply (i.e. those who had not sublet) and so was discriminatory.

• A landlord can discriminate against a disabled person in accordance with **s.24** of the Act even though he has no knowledge of the disabled person’s disability or the facts which make him disabled. Accordingly, it did not matter that Lewisham was unaware of Mr Malcolm’s schizophrenia.

### *The House of Lords*

The House of Lords adopted the more restrictive (and, in my view, more natural) interpretation of discrimination under the Act and allowed Lewisham’s appeal on the following basis:

- Under **s.24** a reason for the landlord’s treatment had to relate to the disability; this required some relationship or connection between the two, not necessarily close or strictly causal, but it did mean that the disability had to play at least some motivating part in the decision to subject the disabled person to the treatment complained of. The majority of the House of Lords took the view that there was an insufficient relationship between Mr Malcolm’s disability and Lewisham’s decision to take possession proceedings by reason of subletting.
- More importantly it was held that, when considering **s.24**, whether the treatment was less favourable than the alleged discriminator treats or would treat others to whom the reason did not apply, the appropriate comparator was a person without the disability who breached the tenancy in the same way (i.e. sublet the premises). As such a person would have been treated by Lewisham no differently to Mr Malcolm, there was no discrimination.
- The House of Lords also held that the alleged discriminator under the Act must have knowledge, or at least imputed knowledge, of the disability, otherwise it could have played no part in the decision making process. As Lewisham had no knowledge of Mr Malcolm’s schizophrenia, there could be no question of it having discriminated under **s.24**.
- Finally, the House of Lords, in agreement with the Court of Appeal, accepted that if there had been discrimination under the Act so as to render the claim for possession unlawful under **s.22**,