



# Access for all?

Bill Chandler considers a recent Court of Appeal decision on wheelchair access which has potentially far-reaching and costly implications for many commercial properties.

Do you run a business or provide a service? If so, how do you ensure that disabled customers enjoy the same opportunities as their able-bodied counterparts?

The Disability Discrimination Act 1995 (as subsequently amended) contains wide-ranging provisions designed to protect disabled persons from discrimination and harassment in most areas of life, including employment and also the provision of services. In particular, the Act requires service providers to take reasonable steps to remove or alter physical barriers preventing entry to buildings.

It is only right that new buildings should be fully accessible, and this is required by Part M of current building regulations, but to what extent must older buildings be physically altered? Many service providers rely on alternative means of providing the service, such as the service provider going to the customer rather than vice versa, but a recent case suggests that in some situations this may no longer be sufficient to satisfy the statutory duty.

The Court of Appeal has recently decided that the Royal Bank of Scotland had breached their legal duty by failing to install a lift at their main branch in Sheffield, even though the lift would cost £200,000 and the bank would also lose an interview room

to accommodate it. The branch in question is a nineteenth century listed building, accessible only by stone steps.

Despite suggesting to a wheelchair-bound customer a combination of internet banking, telephone banking and the use of other branches, in January 2009 RBS became the first business to be forced under the Act to make physical alterations to a building to facilitate access by a disabled person. And, on 20 November 2009, the Court of Appeal upheld that decision and refused leave to appeal to the Supreme Court.

This decision affects you. And if the courts have discovered a willingness to grant injunctions requiring physical alterations to buildings to protect customers from discrimination then they are also more likely to adopt a similar approach towards the duty to make adjustments under other parts of the Act, including for example the duty owed to disabled employees.

So, whilst occupiers of smart new fully accessible buildings may sleep easy, any businesses operating out of older buildings should urgently review their arrangements for disabled customers and disabled employees in light of this decision.

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## Welcome

Welcome to the spring 2010 edition of Hill Dickinson's commercial property newsletter. This issue features articles on a range of topical commercial property issues which we hope you will find of interest.

### Did you know...

Hill Dickinson lawyers do not only write for this newsletter. Ralph Bullivant's article on page 6 concerning the administration of landlords has appeared in a recent edition of the Property Law Journal, whilst Bill Chandler's front page article on the Disability Discrimination Act appeared in the Liverpool Daily Post. You may also have seen articles by Bill Chandler and John Holmes in recent editions of the Estates Gazette.

Articles written by the Hill Dickinson property and construction team can be found on the property and construction page of our new-look website, [www.hilldickinson.com](http://www.hilldickinson.com), which we would encourage you to visit. The website also contains details of forthcoming events, as referred to on the back page of this newsletter.

This edition also features articles by Alison Smullen on further restrictions on tobacco sales being brought in under the Health Act 2009, and by Julia Stansfield on the problems encountered on mixed-use developments as a result of the right of pre-emption given to certain residential tenants by the Landlord and Tenant Act 1987.

Finally, we are pleased to welcome two new recruits to the team. Gareth Foulkes has joined the construction team as a solicitor, whilst Stephanie Ellis-Hobbs has joined the property team as a paralegal.

If you have any queries relating to the issues raised in this newsletter, please contact the relevant author, or your usual Hill Dickinson contact. If you have any comments on the newsletter in general, please contact our editor Bill Chandler at [bill.chandler@hilldickinson.com](mailto:bill.chandler@hilldickinson.com)

### Stop press...

We are proud to announce Hill Dickinson was awarded 'National law firm of the year' at the prestigious Legal Business Awards in February. Our thanks go to our clients for their continued support as we continue to strive to develop our business for the benefit of our clients.

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In our May 2007 edition we considered the property implications of the smoking ban imposed by the Health Act 2006. Since then there has been a further crackdown on smoking with the introduction of the Health Act 2009, which gained Royal Assent on 12 November last year. Alison Smullen now explores the property implications of this recent Health Act, which anyone who sells tobacco products needs to be aware of.

### Background

The Government's policy is to reduce the number of deaths caused by tobacco and to reduce the number of young people taking up smoking. It has tried to do this through numerous pieces of legislation including the Tobacco Advertising and Promotion Act 2002, which aimed to largely ban the advertising and promotion (including sponsorship) of tobacco products, and the Health

Act 2006, which created a 'Smoke Free England'.

Despite these enactments, smoking remained (and still does remain) the main cause of preventable death - it killed 87,000 people in England alone in 2007. The Health Act 2009 ('the Act') was therefore introduced to widen the scope of the Government's control over tobacco retailers in order to crackdown on smoking.



## Health Act 2009

The Act implements, amongst other things, the recommendations of the World Health Organisation's Framework Convention on Tobacco Control relating to tobacco displays and tobacco vending machines.

Controls over tobacco displays and machines can be found in sections 20 - 24 and Schedule 4 of the Act. These provisions, in brief:

- Will make it an offence for a person to display, or cause to be displayed, tobacco products in the course of a business. Only specialist tobacconists will be permitted to display such products, provided that the display is only accessible to persons who are employed by them. Display to an adult following a particular request by that adult to purchase a tobacco product, or for information about a tobacco product, will also be permitted.
- Provide for regulations to be made which allow specialist tobacconists to publish tobacco advertisements so long as those advertisements are, for example, in or fixed to the outside of a specialist tobacconist shop and are not for cigarettes or hand-rolling tobacco.
- Provide for regulations to be implemented to control the display of prices of tobacco products.
- Provide for regulations to be made which prohibit or restrict the sale of tobacco from vending machines.

'Display', for these purposes, includes a display on a website where tobacco products are offered for sale.

## Practicalities

In practice, retailers can carry on selling tobacco; they just cannot have any cigarette packets permanently on show. All tobacco must be placed under the counter and displays must be covered up in a way which best suits the particular retailer provided that the regulations are complied with.



Retailers selling tobacco in vending machines will need to consult and comply with any regulations made, which will ultimately ban the sale of tobacco from vending machines.

## Concerns

The cost of covering up displays is undoubtedly going to be a concern for many retailers, particularly small ones. However the Department of Health assures us that covering displays does not have to be costly. For example, 4 Solutions Display Corporation, which represents 85% of the Canadian market for covered tobacco displays, has estimated that professional covers could cost as little as £120 in the UK for an area measuring 1 metre by 1.3 metres.

The Department of Health is also working with stakeholders such as the Association of Convenience Stores to ensure that any regulations made take into account small businesses.

A second concern for many small retailers, such as newsagents and corner shops, is that the Act will cause them to go out of business. This is because small shops rely on cigarettes to bring in customers and such shops therefore generate about a third of their sales from tobacco, according to the Tobacco Retailers Alliance.

However, although retailers cannot display tobacco they can display price lists and lists of what is in stock. The Department of Health insists that smokers will carry on buying their favourite brand of cigarettes even

when they are out of sight, so small retailers should not be worried about a huge loss of sales, although if the Government's strategy succeeds and fewer young people take up smoking this will inevitably affect tobacco income in the longer term.

## Timing

The Government has advised that regulations implementing the prohibition on tobacco displays will not come into force until 2011 for large retailers and 2013 for smaller retailers, whilst the prohibition on vending machines is likely to commence in 2011. This lead-in time should ease the burden upon retailers of trying to comply with the regulations.

## Conclusions

Retailers are advised to familiarise themselves with the new obligations and to prepare themselves, their properties and their staff to comply with the new legislation.

Compliance with the new legislation does not necessarily have to be costly and just because tobacco is out of sight does not mean it is out of mind!

If you require any advice or assistance on the implications of the Health Act 2009 or any other property matters then please do not hesitate to contact us.

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# Landlord and Tenant Act 1987: Tenants' right of first refusal

Julia Stansfield discusses the implications of the Landlord and Tenant Act 1987 for landlords of mixed-use developments and warns that careful consideration of the Act is essential, even when dealing just with the commercial units, given the serious penalties for non-compliance.

Mixed-use developments with commercial units on the ground floor and residential apartments above are increasingly commonplace. If the landlord decides to dispose of the development in whole or part, or even just the commercial units, then they may be caught by Part 1 of the Landlord and Tenant Act 1987 which grants qualifying residential tenants a right of first refusal.

Section 1(1) of the Act prohibits a landlord from making a relevant disposal affecting any premises to which the Act applies unless the landlord has previously served notice on the qualifying tenants of those premises, and unless the disposal is made in accordance with the requirements of sections 6 to 10 of the Act. If the procedure is not complied

with then the qualifying tenants have the right to buy the premises from the purchaser on the same terms.

## Does the Act apply?

A good starting point for landlords and their agents as to whether or not the Act will apply is to work out the internal area of the premises. The Act only applies to a disposal of the development (including the disposal of a commercial unit) if the internal area of the residential part of the premises represents 50% or more of the internal area of the premises as a whole. Common parts are not included in the calculation. If the commercial area represents 50.01% of the total area of the premises, it will fall outside of the Act so detailed measurement may be worthwhile.

If the measurements indicate that the premises are caught by the Act then the rest of the Act and its implications will need to be considered - there may still be reasons why the Act does not apply. Its application depends on a variety of factors including who the landlord is, the type of disposal and whether the tenants actually qualify for the right of first refusal (which in turn depends on the number of tenants and the nature and length of their tenancies).

The various complexities of these distinct elements are outside the scope of this article, but it is essential that the landlord takes legal advice as to whether the Act applies at the earliest opportunity and even before the property is marketed.

## What is the notice procedure?

Presuming that the Act is found to apply then, essentially, the landlord cannot dispose of the development (or the commercial premises, as appropriate) unless they have served the correct offer notice upon the qualifying tenants of the residential flats. The notice will set out the basic terms upon which the landlord is proposing to dispose of the premises and gives the qualifying tenants at least two months in which to either accept or reject that offer. Whilst there is no prescribed form of notice it must be in writing and contain all the information required by the Act.

The information required by the Act depends upon the type of disposal; for example a notice in respect of a sale at public auction will require different information to a notice for a contract to create or transfer an interest in land. Complying with the Act takes time - months rather than weeks - so getting



the process started as soon as possible will mean that the transaction can be moved along more quickly.

In addition to the qualifying tenants' right to purchase the premises on the same terms, failure to comply could mean that the landlord faces a civil action against them and even criminal prosecution, with the resulting fine and possible personal liability for company directors. Offences are prosecuted by the local housing authorities and although there are no statistics as to the number of prosecutions a general consensus seems to be that there haven't actually been any – yet.

### Are there any loopholes?

As compliance with the Act is such a lengthy process, there is a temptation to try and circumvent the delay. Would a conditional contract for example count as a disposal caught by the Act? The contract would be conditional upon the landlord complying with the Act and would be terminated if the tenants take up the offer.

Section 4A of the Act clarifies that the provisions of the Act apply to a contract to create or transfer an estate or interest in land - whether conditional or unconditional. The relevant disposal takes place once the contract is entered into and not upon completion. Accordingly a contract can only be entered into once the various notice periods prescribed by the Act have expired.

### What about leases?

Selling the property can count as a disposal, but is this the same for the grant of a lease? The short answer is yes. The Act applies to any disposal by the landlord of any legal or equitable estate or interest.

In respect of the grant of a 999 year lease at a premium, a landlord would no doubt accept that there is little distinction between this and the sale of the freehold. What is the situation however if the landlord wants to grant a ten year lease of a commercial unit, for no premium, at a rent of e.g. £45,000 per annum. Does this still count as a disposal? The Act specifically provides that the grant of

a lease of a single 'flat' is not caught by the Act, but there is no equivalent provision exempting the grant of a lease of purely commercial premises.

If the answer is yes then every time the landlord wants to grant a lease to a new commercial tenant then, presuming the Act applies of course, they would have to go through the notice procedure each time, with the resulting delay and cost. The delay could easily mean that deals fall through if a commercial tenant finds a quicker option.

There have been a number of cases that interpret what is meant by the extent of the building containing the premises to be disposed of. As a result of those cases, landlords have typically entered into leases of commercial units without serving notices on qualifying tenants on the understanding that a lease of a commercial unit is not a relevant disposal if it does not include common parts used by residential tenants.

The case of Dartmouth Court Blackheath Ltd -v- Berisworth Ltd (Chancery Division of the High Court, February 2008) threw this understanding into doubt. Mr Justice Warren presided over a case where there had been a number of transfers and leases and no notices were served on the tenants. The tenants considered the transactions to be disposals caught by the Act and so applied to the court for a ruling that there should be onward disposals to themselves.

The leases in those instances were of basement rooms, an area of garden above the basement rooms, a light well and the airspace above the roof of the main building (the acknowledged intention of the landlord was to facilitate the development of the roof by adding another tier of flats).

Warren J concluded that all of the leases were found to have demised premises caught by the Act and so the qualifying tenants were entitled to call for an assignment of those leases. Despite the fact that the tenants had no right to go on the roof, the landlord needed to do so in order to access water tanks on the roof. The purpose of the Act is to enable tenants to have



control of the management of the building, which would be frustrated if the lease of the airspace was granted.

This interpretation of the Act indicates that a disposal of part of a property can be a disposal that affects the whole of the property. (The Act applies to disposals "affecting" premises, not "of" premises"). The qualifying tenants must therefore be given the opportunity to take the disposal, despite the fact that it does not relate to the residential areas of the premises.

### Conclusion

It is clear that compliance with the Act is time consuming and the process of service of notices cumbersome. It can be frustrating for landlords because, in reality, how many qualifying tenants would have any interest in the lease of a commercial unit? Landlords may be willing to take a chance on the likelihood of prosecution but would anyone else involved in the transaction want to run the risk of being caught up in a prosecution?

The most prudent way to approach the issue is through careful consideration of all the details of the proposed transaction, which means seeking advice early on when you are planning on disposing of commercial units in a mixed-use development.

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# Supermarket sweep

Ralph Bullivant, head of property litigation, reviews a recent case where the court was, somewhat unusually, faced with problems resulting from the administration of a landlord rather than a tenant. Ralph acted for the tenant in this case.



Administration has been one of the big news stories of the past year. The retail sector has been hit particularly hard, with a large number of casualties on the high street ranging from major household names such as Woolworths through to smaller local operators.

## The moratorium

The particular feature of the administration procedure which can cause the most difficulties for those parties who have a business relationship with the insolvent company is the moratorium which applies whilst the company is in administration. The intention of the moratorium is to give the company a breathing space, ideally in the hope that this will enable the company to be rescued, or at least to secure a better outcome for the creditors of the insolvent company. The moratorium arises by virtue of paragraph 43(6) of Schedule B1 to the Insolvency Act 1986 (inserted by The Enterprise Act 2002), which provides:

“(6) No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except -

- (a) with the consent of the administrator; or
- (b) with the permission of the court”

Schedule B1 contains similar restrictions on enforcing security against the company, repossessing goods under hire purchase agreements and forfeiting leases by peaceable re-entry.

The administrator is unlikely to consent in most situations, and if an application is made to court then the court will have to carry out the balancing exercise enunciated by the Court of Appeal in the re Atlantic Computer Systems plc case in 1992, weighing up the prejudice to the claimant if he is not allowed to pursue the insolvent company against the potential prejudice to the objectives of the administration if the claimant is allowed to proceed.

## The Somerfield case

The problems facing landlords, who will experience difficulties in obtaining payment of rents and in forfeiting leases where tenants have entered into administration, have been well documented.

A much less common scenario, however, is that of a tenant experiencing difficulties because of their landlord going into administration, but that is exactly what the court was faced with in the recently decided case of Somerfield Stores Limited -v- Spring (Sutton Coldfield) Limited, a case in which Hill Dickinson acted for the tenant.

Put simply, the case concerned a lease renewal. The tenant, Somerfield, wished to renew the lease of its successful trading store in Sutton Coldfield pursuant to the statutory rights of renewal available to business tenants under Part II of the Landlord and Tenant Act 1954 (“the 1954 Act”). Somerfield had accordingly served a notice under section 26 of the 1954 Act requesting a new tenancy.

The landlord, on the other hand, wished to redevelop the property and had served a hostile counter-notice to Somerfield’s section 26 notice, objecting to the renewal of the lease on the grounds of the proposed redevelopment of the property, being a potentially valid reason for refusing renewal.

Somerfield then made application to the court for a new tenancy and directions were ordered for the landlord’s objection to a new lease to be dealt with as a preliminary issue.

But the landlord, Spring (Sutton Coldfield) Limited, was a subsidiary of Castlemore Securities Limited. When Castlemore became one of the most high profile casualties of the credit crunch, Spring joined Castlemore and three other subsidiary companies in entering into administration on 27 February 2009, to be followed shortly after by a further eleven subsidiaries.

Had the landlord been solvent, the tenant would pursue lease renewal



proceedings through the courts and the landlord would, as part of those proceedings, have to prove its intention to redevelop in order to resist the tenant's application. Somerfield's problem in this case was that lease renewal proceedings are still proceedings, requiring the consent of the administrator or leave of the court before they could be pursued.

The administrators refused consent. They knew that the financial status of the landlord meant that they could not hope to persuade a court that they had a genuine intention to redevelop the property. But if they could use the moratorium to delay that particular battle until perhaps six or even twelve months later then circumstances might have changed.

The evidence before the court suggested that a viable development scheme, which could only be achieved if Somerfield's request for a new lease was successfully opposed, could have increased the value of the property from around £4 million to more than £6 million.

### The decision

The case was heard before His Honour Judge Purle QC in the Birmingham District Registry of the High Court on Friday 12 June 2009, and the learned judge duly granted leave for Somerfield to pursue their lease renewal proceedings against their landlord.

In reaching his decision, the judge carried out the balancing exercise required by the Atlantic Computer Systems plc case but considered that the prejudice to the tenant outweighed the prejudice to the landlord and its creditors. The judge said he viewed the tenant's rights under the 1954 Act as "the equivalent of a proprietary right", which could be overreached to achieve the objective of administration, but not simply to improve the position of a secured creditor. He concluded:

"The claimant [Somerfield] is presently in a state of continuing uncertainty in relation to a store that it wishes to refurbish. It is wrong for that

uncertainty to continue ... It would be wrong of this court to improve the position of the defendant or the bank to the prejudice of the claimant, which has a right to have its proceedings heard without undue delay."

The judge also took into account the fact that the purpose of the administration was only really to benefit the landlord's bank.

Finally the judge observed that, even if the landlord was not able to prove an intention to redevelop on the matter coming before the court, it is quite possible that the court would grant the tenant either a short tenancy or a tenancy containing a break clause.

### Significance

The decision is interesting for several reasons.

As already mentioned, it concerned unusual (although by no means unique) circumstances where the landlord rather than the tenant was in administration.

The case is also a rare example of a party benefitting from another's insolvency. Had the landlord remained solvent, it may well have been able to demonstrate sufficient intention to develop in order to defeat the tenant's application for a new tenancy. But, having entered into administration, the landlord suddenly became unable to prove any such intention and the moratorium became its only chance of frustrating the tenant.

The case is also of interest for clarifying the circumstances which the court needs to take into account in order to carry out the necessary balancing exercise in the context of lease renewal proceedings.

But, and perhaps most significantly, it shows that the courts will not automatically allow an administrator to rely on the moratorium, particularly in circumstances where it is apparent that the insolvent company cannot ultimately be saved and the administration is unlikely to benefit the creditors as a whole.

### But...

The decision is to be welcomed by tenants, who now have a useful

precedent for the proposition that leave should generally be given to pursue lease renewal proceedings against landlords in administration.

But, in any area of law where the decision turns on the facts and circumstances of each individual case, another court faced with different circumstances may reach a different outcome when the balancing exercise is applied, particularly if the administrators could convince the court that the delay would assist in the rescue of the insolvent company, thereby saving jobs and ensuring a better deal for creditors as a whole.

### A final word

This decision does not guarantee that the tenant will succeed, it simply allows the tenant to pursue the proceedings. The tenant will still need to argue at those proceedings as to why it should be granted the new lease requested and it will still be available to the landlord to sort itself out in the meantime and try to prove in those proceedings that it now has the requisite intention to redevelop. It remains to be seen, however, how a landlord will be able to do that whilst it is in administration.

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## STOP PRESS

### Administration - good news for landlords

In the December 2009 case of Goldacre (Offices) Ltd -v- Nortel Networks Ltd (in administration), another decision by his Honour Judge Purle QC, the High Court has confirmed that *full* rent is payable as an administration expense (i.e. before paying preferential and other creditors) if the administrators cause the insolvent company to use premises for the benefit of creditors.

## 2009 conference review

Did you know that the Hill Dickinson property and construction teams present regular seminars and conferences? In 2009 we had our busiest year yet, including:

- Our popular spring and autumn property updates. The 2009 events, each held over breakfast in our St. Paul's Square offices in Liverpool and at Lancashire County Cricket Club in Manchester, were presented jointly by Ralph Bullivant and Bill Chandler. Topical issues covered included dealing with administrators, lease renewals and the impending Carbon Reduction Commitment Energy Efficiency Scheme.
- The half-day developers conference held in July is now our largest single event. The 2009 event, held at Chester Zoo, was attended by over 150 guests and included speakers from our property, planning, construction, property litigation and insolvency teams. The afternoon talks were followed by a barbeque on the Oakfield Manor lawn and a unique opportunity to tour the zoo after the visitors had gone.
- A Retail Property Conference in June 2009, organised jointly with Place Northwest and the British Council for Shopping Centres, where our head of

planning John Holmes and several high-profile external speakers explored the changing retail landscape.

- Hosting a regional briefing for the Compulsory Purchase Association in September 2009.
- Seminars targeting specific sectors, including construction, the environment and the health service.
- We also provided speakers for several events arranged by professional bodies including the Law Society and the RICS.

We have assembled an even more ambitious events programme for 2010. Many of you will already have attended one or more of our events, but if you haven't yet then please come and join us at one of our 2010 events.

Recipients of this newsletter will automatically be invited to the spring and autumn property updates and the developers conference, together with other relevant events, but if you wish to keep an eye on all Hill Dickinson events (including those organised by other parts of the firm) then you should check out the events section of our new-look website which was launched in 2009: [www.hilldickinson.com](http://www.hilldickinson.com)



The developers conference, Chester Zoo. Alan Pugh (construction), Bill Chandler (property), Ralph Bullivant (property litigation) and John Holmes (planning) all spoke at Hill Dickinson events in 2009.

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### About Hill Dickinson

The Hill Dickinson Group offers a comprehensive range of legal services from offices in Liverpool, Manchester, London, Chester, Piraeus and Singapore. Collectively the firms have over 160 partners and a complement of more than 1,100 staff.

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