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Equality considerations in lending

KEY POINTS

- Under the Equality Act 2010 (EqA), when analysing what "service" a lender is providing in the context of a residential mortgage, one cannot disentangle the provision of a loan from a mortgage as they are inextricably linked. Whilst a lender might be the provider of many services to its customers generally, what matters when analysing whether a lender has discriminated against a disabled borrower is what services it was *actually* providing to that particular borrower.
- For the purposes of the EqA, the provision of a capital repayment mortgage constitutes a different service to the provision of an interest only mortgage (a distinction also to be found in the regulation of mortgages by the Financial Conduct Authority) as the two mortgages are fundamentally different in nature.
- Whilst lenders might not always be compelled by the EqA to change the nature of a mortgage provided to a disabled borrower to accommodate her needs, it would be prudent for them to put in place clear policies governing how they will handle requests made by disabled borrowers for "reasonable adjustments" so as to accommodate their disability. Lenders should ensure that they are in a position to justify any refusal with an evidence backed explanation.

This article analyses the Court of Appeal's landmark decision in *Green v Southern Pacific Mortgage Ltd & Equality & Human Rights Commission* [2018] EWCA Civ 854, where it held that a lender's failure to transmute a borrower's capital repayment mortgage to an interest only mortgage did not in the circumstances amount to disability discrimination.

INTRODUCTION

In *Green v Southern Pacific Mortgage Ltd & Equality & Human Rights Commission* [2018] EWCA Civ 854, the Court of Appeal considered the application of the old Disability Discrimination Act 1995 (DDA) and current Equality Act 2010 (EqA) to possession proceedings brought by a lender. The Court of Appeal was clear that there was no meaningful difference between the provisions of the EqA and the DDA material to this case (relying upon *Finnegan v Chief Constable of Northumbria Police*).[1]

In 1994, Ms Green bought a residential property in Bristol. In 2006 she re-mortgaged it with Southern Pacific Mortgage Limited (Southern) so as to allow her to pay for home improvements and pay off credit card debts. By 2009, she had developed severe depression (a disability, which is a "protected characteristic" under the EqA) following the death of a close friend. As a result of her disability, she was signed off work and could not keep up with her mortgage payments (after her mortgage insurance coverage ran out).

After complying with the pre-action protocol for possession proceedings, Southern issued proceedings. It was aware by then of Ms Green's disability. Shortly thereafter, a Citizen's Advice Bureau wrote to Southern on her behalf noting that it was assisting her to obtain mortgage interest payments from the Department for Work and Pensions and asked for her to be allowed to switch to an interest-only mortgage and capitalise the arrears that had accumulated. After having requested further information from Ms Green, Southern refused this request but it did not explain why this option was "not available" nor make any reference to her disability.

The essence of Ms Green's defence to the possession claim was that, in refusing to accede to her request, Southern breached the DDA. She repeated her request which this time elicited a response from Southern that she did not "meet our assessment criteria" (it later admitted to not having any such criteria). At first instance,[2] it was found that Southern had a practice/policy whereby it refused to allow any borrowers to convert repayment to interest-only mortgages, whether on a temporary or permanent basis (the "no conversions policy"). Southern's starting point in the proceedings was that a mortgagee is entitled to possession as of right "before the ink is dry on the mortgage unless by a term expressly or necessarily implied in the contract he has contracted himself out of that right".[3]

Ms Green had attempted to construct an argument on the basis of an interference with her rights under Art 8 of the European Convention of Human Rights but that had failed and no such argument was pursued on appeal.[4] The Recorder found as a fact that Ms Green's disability had caused the arrears but found that the bringing of possession proceedings did not relate to her disability as Southern would have brought such proceedings against any borrower with that level of arrears.

The Court of Appeal proceeded on the basis that this was the first case in which the EqA/DDA had been raised as a defence to a mortgagee's claim for possession. It characterised Ms Green's "novel" case as follows: following her non-payment of the agreed monthly instalments, the DDA obliged Southern to accede to her request to change the basis of the mortgage, and to give up both the agreed security (represented by the term requiring the repayment of the loan over the 20 years of the mortgage) and the right of possession, and replace it with a different arrangement altogether, pursuant to which there was no right of possession and the ultimate security for the loan would depend on variable factors such as the value and condition of the property in 2026 (at [30]).

THE DDA/EqA

Ms Green's defence rested on ss 19(1)(b) and 20(2) DDA[5] and ss 15, 19 and 21 EqA.[6] As summarised by Peter Jackson LJ (at [86]), the effect of s 19(1)(b) and 21(1) and (6) DDA is that it is unlawful for a provider of services (including financial services) to discriminate against a disabled person by failing to take reasonable steps to change a practice, policy or procedure that makes it impossible or unreasonably difficult for such persons to use a service which he provides, or is prepared to provide, to other members of the public, provided that this does not require him fundamentally to alter the nature of the service in question.

The EqA is structured differently to the DDA in that it first sets out the various forms of discrimination and then prohibits them in different contexts (for example, such as in employment (Pt 5)). Section 35(1) EqA provides an express statutory defence to a claim by a landlord for possession if the tenant can show that the claim is discriminatory so as to be unlawful. However, there is no equivalent provision in respect of a mortgagee's possession claim.

Part 3 of the EqA deals with "Services and Public Functions". Section 29(1) EqA provides that a person (a service-provider) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service. Section 15 EqA provides that a person discriminates against a disabled person by treating her unfavourably because of "some arising in consequence of" her disability. Section 19 EqA defines indirect discrimination as involving the application of a "provision, criterion or practice" which is discriminatory in relation to a protected characteristic. It will be discriminatory where it is applied to persons who are not disabled, it puts disabled people at a particular disadvantage and it cannot be shown to be a proportionate means of achieving a legitimate aim.

THE ISSUES

The Court of Appeal identified the following principal issues:

- Whether "service" in the EqA/DDA should have been defined by reference to the broad nature of the services offered by a lender (such services being subject to a detailed regulatory regime), not simply the service actually provided.
- Whether the proposed switch to an interest-only mortgage was a reasonable adjustment to its lending policy which Southern ought to have made (particularly given that it was required by Codes of Practice and other guidance to take flexible steps to assist existing mortgagors).
- Whether the proposed change to an interest-only arrangement was a fundamentally different thing to the repayment mortgage that had been agreed.

CAPITAL REPAYMENT MORTGAGES v INTEREST ONLY MORTGAGES

The difference in nature between these two types of mortgage was integral to Coulson LJ's reasoning. First, he noted the difference in nature of the security under repayment mortgages compared to interest only mortgages. In respect of the former, if the repayments are not made, the mortgagee can take possession of the property and sell it immediately, so as to redeem the value of the loan originally made. Such security is regarded as generally good because it is reasonably certain. In respect of the latter, any security is represented by the value of the property at the end of the term, which may or may not provide sufficient security for the loan. The mortgagee has no control over, or even knowledge of, the ultimate security which the property might represent. Yet it is the mortgagee who bears the risk that, at the end of the term, the property will not be adequate security for the loan.

DEFINING THE "SERVICE"

Southern identified the "service" in very restricted terms, arguing that, when analysing what service had been provided, the loan and the mortgage should be treated separately, and that what mattered was the loan. It maintained that the mortgage was merely the security for the loan. Further, it asserted that the service came to an end when Ms Green failed to pay the monthly repayments and it became entitled to possession. This approach was roundly rejected by the majority in the Court of Appeal with Coulson LJ stating at [36]:

> "The loan and the mortgage are inextricably linked and, taken together, form the service that was offered … To differentiate between the two parts of the transaction would be an uncommercial and artificial exercise."

He also held that the service had not come to an end by the time of the possession proceedings because some mortgage repayments (coming from the DWP) were being made (at [37]).

By contrast, Ms Green had argued that the "service" provided to her was the provision of a loan which allowed her to occupy her property. Further, she submitted that the service incorporated the whole regulatory regime relating to the provision of financial services. Coulson LJ considered that this formulation was designed to facilitate the submission that the service embraced all kinds of residential mortgage, including the repayment and interest only mortgages (at [38]). He rejected it on the basis that it over-states the significance of the occupation of the property, particularly given that Ms Green had occupied it long before entering into the mortgage and was not required to remain in occupation during the term of the mortgage (she could rent the property out) (at [40]). In analysing what service Southern was providing to Ms Green, Coulson LJ relied upon the Court of Appeal's decision in *Edwards v Flamingoland Ltd*,[7] where it had held that providing a take away food service was a fundamentally different matter from providing a sit-down service and observed that determining what service is being provided is a matter of interpretation and a question of law.

Coulson LJ (with whom Patten LJ agreed) held that the service is that which was *actually* provided by Southern to

Ms Green; that it should not be defined too broadly, otherwise the reasonable adjustment mechanism becomes too general and possibly too sweeping in its effect (at [39]). He therefore accepted Southern's alternative formulation that the service in question was a repayment mortgage which involved a single loan of a fixed sum, with the property as security and no facility to increase the amount of the loan (at [43]). He considered that this approach was consistent with the common law's characterisation of the true nature of a mortgage as a security for money lent, to be repaid over a fixed period of years.[8]

It followed that Ms Green's request for an interest-only mortgage amounted to a request for a different service, with a different loan and a different and uncertain security (at [45]). Coulson LJ was fortified in his conclusion that an interest only mortgage was different to what the parties had agreed by considering the financial services regulatory regime which repeatedly draws a distinction between the different types of mortgage that may be offered by a lender, with different regulations applying to different types of mortgage (at [46]).

Peter Jackson LJ dissented on this point. He rejected Coulson LJ's characterisation of the service, preferring to define it more broadly as "the provision of secured loans for home purchase" ([87]) and set out a number of factors supporting his decision ([89]). For example, he noted that just because Ms Green had not been offered an interest only mortgage did not mean that she was not entitled to one and that Southern did have the power, had it so wished, to convert the mortgage. He noted that the guidance, the regulatory framework and the pre-action protocol show that the two types of mortgage "sit cheek by jowl within the same service" (at [89]) and not as two different services. In his dissenting view, the provision of an interest-only mortgage would have been a fundamental alteration to the nature of the service for the reasons given by Coulson LJ but that it would nonetheless have been an alteration within the *same* service ([90]).

WAS SWITCHING MORTGAGE TYPES A REASONABLE ADJUSTMENT?

Having found that the only relevant identifiable policy or practice adopted by Southern was to refuse to convert a capital repayment mortgage to an interest only mortgage (at [50]), Coulson LJ held that this policy did not make it impossible or unreasonably difficult for Ms Green to access the service offered for two reasons ([51]). First, there was no service involving interest only mortgages. Second, and in any event, there was no evidence that it was impossible or unreasonably difficult for disabled people to access the service when compared to the access offered to other members of the public.[9]

Coulson LJ was well aware that there may be times when, in order to remove the barriers otherwise facing disabled people, it is necessary for there to be a degree of affirmative action in their favour (citing *Archibald v Fife Council*[10] and *Griffiths v Secretary of State for Work and Pensions*[11] as examples of the courts trying to ensure a pragmatic solution). However, he found that the reasonable adjustment provision did not apply at all here given that the no conversions policy applied to all and did not "bite harder" on a disabled borrower compared to a non-disabled borrower ([56]-[57]).

Nonetheless, for the sake of completeness, Coulson LJ went on to consider whether reasonable adjustments had to be made if one *assumed* that the policy did somehow restrict access for those with disabilities ([58]). He noted that, following *Finnigan*, once a potential reasonable adjustment has been identified by the claimant, the burden of proving that such an adjustment is not reasonable shifts to the defendant. The test is objective (*Allen v Royal Bank of Scotland Group PLC*[12]). He concluded that because of the different nature of the two kinds of mortgage it would not have been reasonable to adjust the no conversions policy for Ms Green (at [62]). This would have required Southern to accept a lesser form of security, and to give up the right to possession, in circumstances where that was not the way that it conducted its business (at [66]). He was not dissuaded of this conclusion by a wealth of guidance produced by Ms Green which stressed the need for lenders to be flexible ([68]-[69]). Indeed, he noted that entering into an interest-only mortgage with Ms Green would now constitute a breach of the Mortgage Conduct of Business rules (MCOB) 11.6.46 (at [70]).

Coulson LJ held that the provision of a repayment mortgage was different from a provision of an interest-only mortgage which was not a service which Southern offered to existing customers ([81]). He explained this by noting how, hypothetically, if Ms Green had switched to an interest-only mortgage it was not clear that at the end of the term she would be able to sell the property, repay the loan, and have enough left to buy a small house for herself. On the contrary, the Recorder had found that she would be unable to pay off the loan at the end of the term and been left homeless and destitute, whilst Southern's security would be "chancy and uncertain"; "[e]verything guaranteed by a repayment mortgage would be absent" ([81]).

CONCLUSION

It is clear that a borrower's disability will not automatically affect a lender's entitlement to possession. Nor will such a disability necessarily compel a lender to take any greater financial risks in respect of a disabled borrower. However, the way that proceedings played out in *Green v Southern Pacific* does remind lenders that they certainly need to be alive to their obligations under the EqA. The court was deeply unimpressed with the Southern's *ex-post facto* rationalisations of its decisions in circumstances where none of its contemporaneous documentation expressly acknowledged, let alone considered, Ms Green's disability.

It is clear that a lender should first take a sensible and realistic view as to whether a borrower is disabled within the meaning of the EqA and if necessary, sensitively ask the borrower for medical evidence of the same. When faced with a request for a reasonable adjustment, rather than refusing with empty statements (such as that this adjustment is

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"not available"), lenders should respond by explaining why the adjustment sought is not reasonable in the circumstances (bearing in mind that they might well be called upon to justify or provide evidence in support of this explanation at a later stage). By engaging properly with the issue, lenders might just be able to minimise the risk of what turned into a costly nine-year legal battle in *Green*. ■

1 [2013] EWCA Civ 1191; [2014] 1 WLR 445
2 [2015] EW Misc B42 (CC) (Recorder Rowlands).
3 *Fourmaids v Dudley Marshall Properties* [1957] 1 Ch 817 at 320 per Harman J.
4 Relying upon *McDonald v McDonald* [2014] EWCA Civ 1049 in which it was held that Art 8 ECHR offered no protection against a private landlord and that, in any event, possession would be proportionate. This decision has been upheld by the Supreme Court ([2016] UKSC 28; [2016] 3 WLR 45).
5 In *Lewisham v London Borough of Malcolm* [2008] UKHL 43, the House of Lords held that a claim for possession to which there is otherwise no defence can be defeated where the claim is shown to be discriminatory so as to be rendered unlawful by the DDA, since the courts cannot be required to give legal effect to acts proscribed as unlawful.
6 Any act of discrimination which occurred wholly before 1 October 2010, when the EqA came into force, must be considered under the DDA; where an act continues after that date and is also unlawful under EqA, proceedings should be brought under that Act.
7 [2013] EWCA Civ 801.
8 Relying on *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883.
9 At [53], relying on *FirstGroup Plc v Paulley* [2017] UKSC 4 at [94].
10 [2004] UKHL 32; [2004] 4 All ER 303; [2004] IRLR 651.
11 [2015] EWCA Civ 1265; [2017] ICR 160.
12 [2009] EWCA Civ 1213; 112 BMLR 30; [2010] 1 EGLR 13 at [40].

Further Reading:

- Priority and the indivisible transaction after *Scott v Southern Pacific* (2015) 4 JIBFL 194.
- The new MCOB "best interests" rule for residential mortgages: is it fair? (2015) 3 JIBFL 160.
- LexisPSL: Financial Services: Practice note: Mortgage Market Review – background and implementation.