Housing Law Practitioners' Association

Minutes of the Meeting held on 18 March 2015
University of Westminster

Community Care and Court of Protection

Speakers: **Bethan Harris, Garden Court Chambers**
Dominic Preston, Doughty Street Chambers

Chair: **Giles Peaker, Anthony Gold Solicitors**

Chair: Good evening everyone. My name is Giles Peaker, Anthony Gold Solicitors and Chair of HLPA and it gives me pleasure to welcome you all to this meeting on Community Care and the Court of Protection. Can I first ask if there are any corrections to the Minutes of the last meeting? If not, it gives me great pleasure to introduce two excellent speakers this evening: Bethan Harris of Garden Court Chambers and Dominic Preston of Doughty Street Chambers both of whom have immense front-line experience in dealing with community care and Court of Protection issues. The first speaker will be Bethan Harris who is speaking on the Care Act 2014 in force from 1 April which does make quite significant changes, I think, to the care regime that we have been used to. After that Dominic will speak on the housing and the court of protection.

Bethan Harris: I will talk for half an hour about the Care Act 2014 Part 1 by way of an overview but with a focus on the issues that relate to accommodation or housing. I know that some people in the room will already be quite familiar with the Act so apologies in advance to those people if I cover familiar territory but I hope there is something of use to everybody.

The introduction to this paper deals first of all with the policy aims of the Care Act 2014 Part 1. There are five parts to the Care Act and in terms of care and support ie the community care duties to individuals that we are familiar with dealing with in relation to our clients they are all in Part 1 which concerns care and support. So the policy underlying Part 1 comes from the Law Commission's report in 2011 on adult social care and the Dilnot report relating to the funding of care and support which were crystallised in a White Paper in 2012 and eventually became the Care Act. The purpose of this new legislation is to consolidate what we have currently which is several pieces of community care legislation and the kind of patchwork of legislation which is quite complex and quite outdated. It is consolidated into one Act and some new duties are introduced. Part 1 presents a new legal framework for community care duties for adult social care and concerns adults on the whole except for some provisions which relate to transition between children's services and adults' services but otherwise it is concerned with adults. As part of this new framework the terminology is very different, so the outmoded terminology that we found to date in the main pieces of legislation such as the National Assistance Act and the Chronically Sick and Disabled Persons Act is replaced by a whole new terminology which is based around the concept of care and support needs. So instead of terms like "chronically sick" or even "disabled" the references are made to adults in need of care and support and also instead of services what we have generally is meeting needs for care and support. The aim there is to try and move away from the idea of fitting the person to the service to a different idea of meeting a person's needs which would be based on a very individualised assessment of their needs, taking into account their wishes and feelings and their preferences. We will see all of that in a moment reflected in the Well-Being Principle which is in Section 1. But just to stay with the introductory part of this talk, territorial extent and application, it does not sound terribly exciting but basically there are two points here, one is that on the whole Part 1 just applies to England as Wales has its own Act which will commence in April 2016. In terms of consequential amendments and commencement and transitional provisions, that exciting area, first of all the commencement in the main will be on 1 April 2015, for the most part of Part 1 of the Care Act save for two important aspects. The cap on care costs is not coming in until April 2016 and a new appeals system in relation to community care, which is obviously something that makes us sit up as legal practitioners, which is also due to come in in April 2016 and which is subject to consultation currently as to what form and what scope it will have.

As you would imagine with a kind of whole-scale restructuring like this, there are many consequential amendments but the main ones, of course, are that the duties that we know so well will no longer apply in England, so Section 21, Section 29 of the National Assistance Act will be repealed insofar as they apply to England. Section 2 of the Chronically Sick and Disabled Persons Act will be repealed save insofar as those provisions apply to children because that is quite an important duty relating to children, being one of the few directly enforceable duties that there are in relation to children's needs, so it is important to remember that Section 2 of the 1970 Act will still apply in relation to children. Section 47 of the NHS and Community Care Act 1990, the duty to assess needs for community care services will cease to apply to English local authorities save in relation to Section 117 after-care services. I will come back to that because there is a slightly different status to other community care duties or services.

The transitional regulations are currently in draft and essentially what this draft says is that current care and care arrangements and arrangements for paying for care will be kept as they are with current legislation still in effect up to 31 March 2016. That seems to be what the transitional provisions amount to but currently just in draft.

What material will practitioners need, so what will we need to look at when we are dealing with the Care Act? Except for the Act itself you will need the statutory guidance which is very vast. I brought it to show you because it is many pages so it is quite a task just to download it. It is very detailed so it is obviously important to have the statutory guidance to hand. I have referred in my handout to the main eleven or twelve sets of regulations relating to the relevant areas. The Explanatory Notes are actually very useful as a guide to get to know the part of the Act. I have also noted there the Department of Health “Factsheets” which are available on the gov.uk website. They are updated every so often and they are just a very simple starting point. There is a factsheet for most of the main areas that the Care Act Part 1 covers so I recommend them if you are coming completely fresh to an area under Part 1.

So now I will move to what the Act actually says in Part 1. First of all I will deal with what are called the general responsibilities of Local Authorities, so these are the new issues in community care law. They are a little bit like the statement of principles at the beginning of the Mental Capacity Act and the first of the general responsibilities at Section 1 is the most talked about one, which is the well-being principle. This one stands apart from the others being referred to as the “guiding principle” of Part 1. So it is an umbrella principle that pervades the whole of Part 1 and the definition of well-being is in Section 1(2). It is defined by reference to nine factors which includes suitability of living accommodation. At Section 1(3) there are eight factors to which a local authority must have regard when exercising its functions under Part 1 as part of acting in accordance with the well-being principle. Then, of course, we have ample statutory guidance in the well-being principle and what it all amounts to and I have noted some of it on pages 4 and 5. For example, we see at 2.3 during the assessment process the local authority should explicitly consider the most relevant aspects of well-being to the individual concerned and assess how their needs impact on them. So the well-being principle is a guiding principle for the community care assessment process which does direct, of course, the person carrying out the assessment to look at the suitability of a person's accommodation amongst other factors, so that is useful. Expressly at 15.53 we have suitability of living accommodation, which is one of the matters local authorities must take into account as part of their duty to promote an individual's well-being. Then we also have what is perhaps a little surprising, tucked in at the end of the statutory guidance on the well-being principle there is a reference to the principle of independent living, which is a political principle open to varying interpretations in terms of its significance. The fact that it has been inserted in the guidance in this way perhaps implies that the Government is not attaching a huge amount of significance to it but others would disagree with that. The principle of independent living derives from the UN Convention on the Rights of People with Disabilities and what the statutory guidance tells us is that the well-being principle is intended to cover the core components of that principle. That principle is sometimes invoked in order to try to argue for people to have greater choice in the setting in which they are cared for, generally to be cared for in a more community based setting as opposed to an institutionalised setting. So that is an important one to bear in mind and maybe of assistance in arguing for greater choice in that sort of context at least, if nothing else.

Another useful point is one that has been pointed out in this very useful little book which I recommend by Tim Spencer-Lane, which is an annotated guide to the Act published by Sweet & Maxwell. It was brought out before the finalised statutory guidance and regulations, but it is actually excellent in its explanation of the Act. One of the points that he makes is that the well-being principle apparently was confirmed by the Government to incorporate consideration of pets, which is something that comes up quite a lot in housing. You may find that of some use in a case that it is now official that pets

contribute towards well-being and well-being is something that local authorities need to be concerned about.

So how useful will the well-being principle be? Well, I do not think it is a surprise to anybody that some scepticism has been expressed as to whether it really will be effective. It is a duty to promote, it is a duty to have regard to, it is not a concrete duty that is individually enforceable in the normal way like, say, Section 21 of the National Assistance Act. So it remains to be seen but it is there for us to use and to make what we can out of it, especially to try and use the statutory guidance for what it is worth and extract all there is in relation to the importance of suitable housing.

So I will now talk very briefly about the other general duties before I move on to what is the core individually enforceable duty in relation to community care services and the eligibility criteria. Just staying on these general duties, while No 2 is the duty to take steps to prevent needs for care and support so it is another general duty to prevent or delay or reduce needs. The statutory guidance gives examples of the range of services local authorities might provide or promote, such as befriending schemes, exercise classes, fall prevention clinics, adaptations to housing, handyman services, telecare services and intermediate care. The idea is that these are going to be provided by the local authorities, obviously they will be constrained by their budgets and, as you would imagine, there is considerable scepticism as to the extent to which this prevention duty will result in a great amount of additional provision in any locality, but the idea is that there is to be a tier of preventative services that are available for people regardless of satisfying eligibility criteria with a view to preventing, delaying and reducing people's needs for care and support. I flagged up in the handout that there is some useful guidance here on the role of housing in this regard. One phrase in particular which is good to hear at 2.13 on the handout is: “the links between living in cold and damp homes and poor health and well-being are well-evidenced.” I think we would agree with that and it is nice to see it made official in the statutory guidance.

Moving on to the next set of responsibilities, this all concerns integration and cooperation which are very much buzz words in this new regime. It is all about joined up services and about officers internally within local authorities acting in conjunction with each other with regard to care and support needs and duties. There are three types of duty under this heading, Section 3 is promoting integration of care and support with health services and health related services. It does not sound like it has anything to do with housing but actually housing is a health related service. So the aim is to provide joined up service. Integration is to take place at the commissioning level, planning level and assessment level. There is some statutory guidance there which I think is of some use, I have noted at 2.15 “A housing assessment should form part of any assessment process, in terms of suitability, access, safety, repair, heating and lighting” so that is flagging up housing fairly significantly in relation to the assessment process.

So that is Section 3 and then related to it we have got cooperation generally, this is cooperation in relation to care and support functions between relevant partners, such as a county council cooperating with a district council or a local authority cooperating with an NHS body in relation to people's care and support needs and then with such other persons as the local authority consider appropriate, which can include a private registered provider of social housing. Also internal cooperation which is cooperation between social services and housing departments essentially is included within that, so obviously that is all very welcome.

Then we have Section 7 which is called cooperation in specific cases. This is a slightly more specific in that the local authority can ask another body to help in relation to its care and support functions. For example, it might ask an NHS body to participate in an assessment process to provide expertise or to provide information or it might ask a housing authority, if that is a separate body, to participate in a community care assessment. This provision does not exclude a request for a specific service to actually be provided and then that other body must either comply or provide a reason why it is not going to comply based on it not being compatible with its own functions for it to comply with the request. So that is potentially quite useful, similar to Section 27 of the Children Act 1989 but not identical.

Those are not all the general responsibilities, I have noted the other two on pages 8 and 9 but I will not dwell on the general duties now because I am going to move to the new duty to meet needs for care and support. So this is the principal individually enforceable duty under the Care Act 2014; it is in Section 18 and basically what it says is a local authority, having made a determination under Section 13, that is a determination that a person has eligible needs, must meet the adult's needs for care and

support which meet the eligibility criteria. So that is the basic duty to provide for people's assessed eligible needs for care and support services. It reflects the Government's policy, after consideration of the Law Commission's proposals, for there to be one gateway or a single route to care and support. As you know, currently we have Section 2 of the Chronically Sick and Disabled Persons Act with a whole list of different types of services that can be provided and then we have Section 21 of the National Assistance Act and other pieces of legislation as well. Any community care assessment is essentially based around those, which are quite fragmented. The Law Commission suggested that Section 21, which of course is the right to have a residential accommodation provided as a community care service which can include ordinary accommodation, so that is the community care legislation that we as housing law practitioners have been most concerned with, might be kept as a kind of long-stop so that people did not fall outside the net. It was felt that Section 21 was picking up people who were somehow desperate but not qualifying but the Government rejected that idea and went with this idea of having one single gateway to care and support. So the eligibility criteria for community care service becomes key across the board because, of course, Section 21 had its own rules and was not dependent upon eligibility criteria as such. So we have the single route to care and support and the Government actually consulted with local authorities and authorities generally on whether it was thought that under the new regime people who currently qualify for Section 21 accommodation are going to lose out, because that was the fear. It seems that only local authorities responded to that aspect of the consultation and they said they did not think they would, so we do not know whether there will be people who would have qualified for Section 21 accommodation who under this new regime will not qualify for any services because they will not meet the eligibility criteria. There is a power to meet needs at Section 19 and that is important particularly in relation to a person with urgent needs, where a local authority can meet needs before it has carried out an assessment and regardless of whether the adult is ordinarily resident in its area, so that is a provision that we are familiar with from Section 47 (5) and (6) of the NHS and Community Care Act to obtain urgent services for our client.

What services can be provided to meet assessed needs? So if a person has eligible needs how will they be met? So now we have to look at Section 8, which provides a non-exhaustive list of examples of what may be provided to meet needs under Section 18. So perhaps the key term here is “non-exhaustive” because the policy of the Act is not to have any defined set of services but to leave it open to local authorities to decide the best way of meeting needs in any given case. So these are just examples of what a local authority might do and you will see that what is set out in Section 8 which appears on page 10 of the handout is really quite broad in itself and includes (a) accommodation in a care home or in premises of some other type, so that is really quite broad in terms of how accommodation might be the solution that is provided. In terms of how it could be provided, if you look at page 11 you will see that the provision that is made can be by arranging for a person other than the local authority to provide it, so somebody else can be brought in, providing the services itself by direct payments, which I am sure we are familiar with in relation mainly to domiciliary care that can be provided by way of a direct payment. So the idea is to keep it as open as possible as to what might be provided and Section 8 does not provide a closed list. One of the issues that does not appear in Section 8 is adaptations, which has been an important part of community care services where a person has eligible needs and the statutory guidance confirms, as I have noted at 4.2, that indeed adaptations can be provided as a community care service. I have noted at 4.3 established principles about considerations of personal preference and cost in the decision-making about how to meet needs are reflected in the statutory guidance. So that, perhaps, does not seem very well expressed or very clear but in terms of the principles as to what a local authority has to do once it has identified that a person has eligible needs those principles will essentially be the same as they have been to date. So the fact that we have the well-being principle is obviously extremely useful and local authorities have to infuse their decision-making and their processes with the well-being principle. But ultimately the duty is the duty in Section 18 and that is the duty to meet needs. When those needs are met local authorities, as they have always been required to do, have to take into account people's preferences but they are also entitled to take into account their own budget and so cost is going to be a relevant factor. That is a reality and how one puts that principle is a very delicate matter and nobody ever really wants to formulate it in too concrete a way because, obviously, there are a lot of factors that have to be weighed up. But it is not actually put too badly and too unhelpfully in the statutory guidance itself and I have noted the relevant passages at 4.3 in the handout where the statutory guidance deals with preferences and deals with cost as a factor when a local authority decides how it is going to meet a person's needs; whether it opts for one thing or another in terms of a service decision where one service is cheaper than the other. Of course local authorities are inclined to opt for the cheaper service but of course the decision-making process has to be more sophisticated than simply that.

Moving on to the new national eligibility criteria, this is now obviously absolutely key because we do not have Section 21 of the National Assistance Act any more so it all depends on whether you satisfy the eligibility criteria, which is now very different from what we have had to date. It is nothing like the FACS criteria that we are used to working with. However, the first point to make is that the eligibility criteria is now national not local. What we have had to date is various bands, critical, substantial, moderate and low needs, and means of identifying those needs set out in the fact criteria so local authorities have been able to decide how far they are going to go. Most local authorities decided that they will meet all substantial needs; some local authorities still meet moderate needs and a few local authorities say they will only meet critical needs. So that is how things stand currently but that local policy is going and all local authorities will have to use the national eligibility criteria which is set out in the regulations. So we have to look now at the care and support eligibility regulations, which are intended to have the effect of people having substantial needs met. It has been tested out, apparently, in order to see whether that is how it pans out and apparently the Government was satisfied that it did, that it was the same as substantial. Whether that is or is not the case obviously remains for us to see.

So how does this work? Well, obviously eventually we will all be looking at cases and we will be looking at the eligibility criteria and we will become very familiar with these rules so just briefly there are two aspects to the test. First of all there are limbs that have to be satisfied and they have reference to a list of outcomes so it is three limbs and then two outcomes have to be satisfied so it is a three limb, two outcome test. I have written the key provisions on page 12 of the handout and it is very different from what we have had to date. So first of all one has to ask whether the adult's needs arise from or are related to a physical or mental impairment or illness. Then, as a result of the adult's needs, is the adult unable to achieve two or more of the specified outcomes, listed further down the page. As a consequence of being unable to achieve those outcomes is there likely to be or is there a significant impact on the adult's well-being? So those are the three main aspects of the test. Then one has to look at what the outcomes are, because the adult has to be unable to achieve two or more of those outcomes which are quite specific and it is not obvious in many cases how your client who you will have assumed to date is clearly eligible for community care services will still be eligible. But I think one has to look quite widely at it because it is not being suggested that the intention is a narrowing of eligibility although it is a restructuring. One also has to bear in mind that there is a very wide definition of unable to achieve an outcome and that is at regulation 2(3). If you need help with anything or you have difficulty doing it then you are regarded as being unable to achieve an outcome, so that is the important thing to bear in mind. Also, the statutory guidance implies that when considering whether a person has a physical or mental impairment that too has to be looked at fairly widely and with a fairly broad construction.

I will leave the eligibility criteria and skim through the rest of the handout. There is a duty to assess so obviously to date we have had Section 47, community care needs in Section 47, the NHS and Community Care Act. The duty to assess is very similar and it is in Section 9. When a decision is made on whether a person has eligible needs they are given notice of it in writing. Section 11 is quite an important one, if a person refuses to be assessed that has always been an area of tension. It appears under current legislation that if a person refuses to be assessed the local authority may still have a duty to conduct an assessment and sometimes that is quite useful in practice. However, Section 11 only provides for the duty to continue in certain circumstances if a person refuses to consent to assess.

There is a passage on the provision of accommodation as a means to meeting a care and support need on pages 14, 15 and 16 of the handout which might not seem terribly inviting at this stage, but what that is about just very briefly is the fact that Section 23 says that a local authority cannot do anything to meet a care and support need which a local authority is required to do under the Housing Act 1996, so it is about the delineation between meeting care and support needs and providing housing under housing duties which is not old but is is the current formulation of that rule in this context. It is not quite the same as it has been to date and there is a good argument that it is pretty narrow and I have commented insofar as I can on what I think that all amounts to in the handout. But essentially what is very clear, and it is underlined in the statutory guidance, and it is really clear from the Act itself, is that accommodation can be provided it seems in all sorts of different ways, potentially, by local authorities as a means of meeting needs for care and support.

Next we have the “destitution-plus test”, which we are familiar with in terms of persons subject to immigration control not being entitled to community care services. Section 21(1)A of the National Assistance Act 1948 at the moment and also Schedule 3 of the Nationality, Immigration and Asylum

Act 2002; first of all Section 21(1)A of the 1948 National Assistance Act is replaced by Section 21 and it is also Section 21 in the Care Act and also there is an amendment to Schedule 3 which incorporates the Care Act into Schedule 3 in the 2002 Act.

Choice of accommodation; the right to choose accommodation if it is no more expensive and will meet your needs or, if it is more expensive, you can pay a top-up. That, to date, has been in the choice of accommodation directions and that is re-enacted in Section 30 of the Act and applies, you will note, to shared life-schemes and supported living accommodation as well as care homes and will also apply now in relation to Section 117. Then amendments to Section 117, bringing in ordinary residence rules, so this is the after-care duty under the Mental Health Act which is not incorporated into the care and support scheme so these are just amendments to Section 117. It is still free as a service so no charging but you can pay a top-up if you exercise your right to choose alternative and more expensive accommodation. A new very useful definition of after-care services. Other areas very briefly, the duty to carers is a whole new duty. Up to date there has only been a power to provide for the needs of carers and these are now duties with their own eligibility criteria in Section 20. Charging, there is a power to charge for local authorities. Of course they will charge even though they are not obliged to so things will carry on pretty much as before except that we will have the cap from April 2016, which is a major change. Obviously it is not coming in straight away but it means that the amount that people are required to pay towards their own costs will be capped at £72,000. There are all sorts of issues with that but obviously we are not dealing with that in detail today. Appeals I have mentioned. Prisoners, I have just flagged that up, Section 76. This is what would appear to local authorities to be a fairly drastic provision which establishes that they are responsible for the community care needs for people living in prisons in their areas, to assess prisoners and to provide services in prison. There is a considerable amount in the statutory guidance about that. Finally, there is a new framework for safeguarding vulnerable adults, Sections 42 to 47.

Dominic Preston: A quick show of hands first, has anybody stepped into the Court of Protection who might also be in this room? Has nobody gone to the Court of Protection at all? A few. For those of you who are used to this my apologies, it will be a trip down memory-lane. For the rest of you I hope to give you an overview on quite a large topic and what I have done is I have split it into two parts. Firstly an overview and secondly to try and give you a practical example of where you might be able to use the Court of Protection for your clients and you will see my sub-heading Strategies for Hoarder Cases. Now there are many other cases you can use the Court of Protection for but this is one obvious example and I hope to show you a practical way of using the Court for your clients.

So Part 1, the Court of Protection itself. The main purpose of the Court of Protection is to adjudicate on disputes about what an adult should do where that adult does not have capacity to make a particular decision themselves. So if you break that down a little bit it requires firstly a lack of capacity to decide a particular issue and, secondly, it requires a dispute to be resolved. I know that may sound obvious but it is not always the case when social workers are involved. The essence of the Court of Protection is making choices between different options but the Court of Protection cannot create choices of itself; it does not have powers to say you will provide this community care and I have decided that a duty is owed. On the other hand it has very powerful investigative powers; it can require evidence from the parties, notably local authorities, it can put them in the witness box and it can make them explain why something has not been done. So there is a slight tension. I think in fact there is a Court of Appeal case coming up quite soon on this tension but there is a tension between what the Court of Protection cannot do and what it can and you will appreciate that most judges like to strive to get as many options as possible available. So that is the essence of the Court of Protection.

Let us look at the structure of the Act. The Court is governed, effectively, by the Mental Capacity Act 2005 and I am going to highlight six sections, Sections 1 to 4, 15 and 16. There are many other sections as well but I hope that I can give you a simple structure so that when you pick up the Act it makes a little sense. First we have the principles, what I think of as the over-riding principles, there in Section 1. Then you have the jurisdictional issue, the Court only really has jurisdiction if there is lack of capacity and that requires some definitions. Section 2 has the definition of who lacks capacity and Section 3 has the definition of one of the sub-parts of who lacks capacity, the inability to make decisions. So those are what I think of as the jurisdictional Sections. Then we have the principles and the powers governing the making of decisions for P and one of the new things that you will learn if you go into this field is that P is the person lacking capacity and is referred to ad infinitum. So Section 4 governs the best interest principle and tells you what that means. Again I will come to that in a moment. Sections 15 and 16 are, as it were, the principle powers of the Court, the power to make declarations and the power to make decisions or appoint a deputy to make decisions. So that is the

overall structure of the Act although there are many other parts to it and many Schedules but if you imagine what is the Court trying to do, it is trying to determine whether somebody has capacity, jurisdictional issue, it is then trying to act in his best interests and it is then trying to make decisions on his behalf.

So are there any other important provisions before I go into those a little bit? I would like to point out two, interim orders and directions, Section 48. Section 50 tells you who can apply. Section 50 tells you who can make applications. The first point is that you need permission to make an application to the Court of Protection; there are exceptions, the obvious being deprivation of liberty, but that Section tells you how you are going to apply and who might be able to apply. In particular the applicant needs a connection to P. If I just pause there a moment, that can include a local society, they want to assist with his care, it might be a hospital, they want to assist with his medical needs, it might be a landlord, they want a decision made about something to do with property. It might be a family member and I could go on. So the applicant has to have a connection with P but actually that is quite broad. You have to persuade the Court the reasons for the application, that there is a benefit to P and the application being sought and that there is no alternative means of achieving that benefit. Now all of those concepts do go into best interests and other matters. In other words, they are just precursors to what you are effectively asking the Court and they will be governed by a number of matters. The Act itself, the Code of Guidance, the Court of Protection rules themselves so those are probably the three sets of materials that you will want when and if you ever venture into the Court of Protection. You will want the Act, you will want the Code of Guidance and you will want the Court of Protection rules including practice directions.

Let me take you to the original section, Section 1, and take you back to the sections I highlighted. Section 1 contains five principles and they are at the heart of this jurisdiction. The first one is a person must be assumed to have capacity unless it is established that he lacks capacity. Second, a person is not to be treated as unable to make a decision unless all practical steps to help him to do so have been taken without success. Third, and one that I am particularly keen on, a person is not to be treated as unable to make a decision merely because he makes an unwise decision or, in my case, his children think he constantly makes unwise decisions. Fourth, an act done or a decision made on behalf of P must be done or made in his best interests. Fifth, before the act is done or the decision is made, regard must be had as to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedoms of action. Something we are probably used to bearing in mind, our need to think about proportionality. So, with those five principles in mind, let us go to the jurisdictional issue establishing lack of capacity which obviously comes from the first principle. Well, there is a test, it is in two parts and the first part of the limb is P must be unable to make a decision for himself in relation to a matter. Now I have highlighted two aspects of that sentence. The first is must be unable to make a decision; that is dealt with in Section 3 and, secondly, it must be in relation to a matter. Capacity is issue specific. Now I will elaborate on that in a moment. It must be, secondly, because of an impairment of or a disturbance in the functioning of the mind or brain. That, obviously, will require psychiatric evidence and most psychiatrists will refer to the different categories that we get in all the psychiatric definitions that are set out in the various provisions they look at. It is irrelevant whether the impairment is temporary or permanent. Now that issue does become relevant in terms of best interests but in terms of establishing whether or not somebody has capacity it is irrelevant whether the impairment is temporary or permanent. It cannot be determined by mere reference to age, appearance or a condition or aspect of P which might lead others to make unjustified assumptions about his capacity. You cannot use your prejudices, straightforward. The burden is the balance of probabilities and it only applies to adults. Now adults in this context means anybody who is 17 or over. There are occasions when somebody is a child and it is pretty obvious that when they become an adult they will need to have intervention; somebody making decisions for them or whatever it might be and those anticipatory decisions can be made as well if it is Section 18(3).

So what about the question of unable to make a decision in that first limb of the test? That is dealt with in Section 3 and the test is, or the question that the Court has to ask itself, is whether P can make a decision for himself. He cannot make a decision for himself if firstly, he is unable to understand the information relevant to the decision. That is a fairly obvious one, I would have thought. Alternatively, if he is unable to retain that information, now retain does not mean, you can retain it for a short period of time, that does not mean that you do not have capacity, what it means is that you are unable to retain it sufficiently to keep it, to use the expression “on-line” during the decision-making process. So you have to be able to hold that information in your mind for the period that you are required to make a decision. If it takes two hours to make a decision in confidence with your legal advisors I can be slow

in confidence. Then there might be a need to keep that information in your mind for at least the whole of those two hours. But it does not matter if you have forgotten it by the following week so long as you can be told it again when the need arises. Alternatively, if you are unable to use or weigh the information as part of a process of making a decision, bearing in mind that the second part of my talk is about hoarders, that is usually the case when it comes to hoarders, there is something that prevents them using the information, using the knowledge that they have, the intelligence very often that they have, to make a decision about a particular topic in their case, having loads of stuff in their house and the fire risk that it means and the lack of sanitation, etc. That tends to be what it is about and psychiatrists will give it all sorts of names, usually some kind of disorder, but that tends to be the limb under which capacity is looked at when dealing with hoarders.

The last alternative is that P is unable to communicate his decision whether by talking, using sign-language or any other means. A note relevant to that includes information about the reasonably foreseeable consequences of making a choice or, and this is important, making no decision at all; something that very often happens with those of my clients who have capacity. That case law which is in the handout deals with the capacity to litigate and it is useful to look at as an example of one of the issues of how one of the issues is dealt with and you can correlate it into other areas. Those three cases should be quite useful and I have given the passage references as well.

So, the Court has decided that P does not have capacity, how does it go about making a decision or using its powers? Well first of all you have the best interest principle, the third or fourth principle in Section 1, and Section 4 tells you how you are going to go about making a best interest decision or how the Court is or how the local authority is for your client. The first two criteria are fairly obvious, number one, if you read it, is forget about your prejudices. Number two is you must consider all relevant circumstances; relatively straight forward. Then there are some issues which must be considered in any event, the first is that you must consider the likelihood of regaining capacity and if so, when is that likely to happen. Capacity is a moving feast; medication can help, someone who has stopped taking their medication, they get out of capacity again, they take it, they get the intervention they need and they go back. But it is a moving feast and that is one of the elements of this area of law that can be problematic.

Next the Court must consider or must encourage P's participation as fully as possible in the decision-making process. The Court will want to see that P's thoughts, beliefs, and I will list them in the next set of issues that need to be considered, that there has been an opportunity for P to tell you what his wishes are, to tell you his feelings to see whether there was any prior capacity, written statements to have a regard to his beliefs, his values and to any other matter which he might have wanted to consider himself. So you have to involve him and you have to think about who and what he stands for. Two other matters, you have to consider the views and that means ascertaining the views of anyone P has indicated should be consulted. Now very often P will have a very good friend who is very supportive and that person is probably somebody you should ask. You have to ask the views of anyone engaged in caring for or interested in his welfare and you have to ask the views of anyone who has been granted a lasting power of attorney and any deputies who have been appointed by the Court. Completely irrelevantly for our purposes, you also have to ensure that where a decision is about life-saving treatment the decision must not be motivated to bring about his death; something that strikes me as being astonishing that it even needed to be in the Act.

Let us deal with the Court's powers so the Court knows what his best interests or duties are. It then has two sets of powers, one it has declarations and second it has orders and this is an area of law where declarations are as important, I would have said, as orders. The first two are jurisdictional, the power to make declarations about capacity or lack of capacity about a particular decision. Secondly, the power to make declarations about capacity or lack of capacity about particular issues, a slightly wider, broader concept. Thirdly, quite important for most people working in this area, the lawfulness or otherwise of any act or omission done or yet to be done in relation to P. Now without that, taking a landlord and tenant situation, imagine a landlord is told by the Court that they are allowed to go in and remove a whole load of paper that is in the living room because it is a fire risk. That would be a trespass but this power allows the Court to declare that it is not a trespass and you will find even if the order you have drafted, the substantive part of the order, feels as though that permission has been given you will find NHS bodies, local authorities, anybody who is going to intervene in that way will want a declaration saying that is fine. They do not want the liability coming back to them and that is one of the main provisions there. So that is the declarations.

Let us deal with the power to make decisions, the power to make orders and to make decisions on his

behalf, on P's behalf. Well, the Court can only make an order if P lacks capacity in relation to a matter concerning personal welfare, property and affairs and break that down; he can only make a decision in relation to a matter in which he lacks capacity and secondly, only if that matter relates to personal welfare or property and affairs. Secondly, by order so this is really how it works in practical terms, the order will make that decision in his stead and only, of course, in relation to those matters. In the alternative, the Court can appoint a deputy to make the decisions usually in a particular area. But it has to have regard to two propositions; the first is the general proposition that it is better for the Court to make a decision than a deputy, very good for lawyers, and secondly, that the Court has limited the deputy's powers in scope and duration to that which is reasonably practical in the circumstances. The order will need to delineate the boundaries of the power being exercised by the deputy.

I would like to just look a little at personal welfare and property affairs, which I have highlighted in bold in the handout. Section 17 governs the personal welfare decisions. Now bearing in mind the second part of my talk is about hoarders one of the decisions that can be made is is deciding where P lives. There are a number of others, deciding what contact P should have with another, preventing another person having contact with P, giving or refusing consent to carry out or continue treatment and giving a direction about who should be responsible for medical care. But the main one we are concerned with is deciding where P lives. Section 18 deals with the powers in relation to property and effects. The second section specifies the powers a Court has and, most importantly it includes a power to make decisions about the control and management of P's property. So those are the two main powers that the Court has. In this case the other provisions are probably more relevant than in Section 17. It includes the power to deal with sale, exchange, charging gifts or other disposition of his property, acquisition of property in P's name or on his behalf, discharge of P's debts and obligations. Now if you take three and four, very often, just take the hoarder as an example for a moment, what a hoarder does is he takes his money from benefits or even from his pension or even from the work that he might do and he goes out into the shop and he spends it. One of the ways of preventing a hoarder from doing that is to control his money and that is three and four. Exercise any power invested in P, the conduct of legal proceedings in his name. So those Sections 16, 17 and 18 are particularly important about what the Court can do and interfere with.

Just a quick word on Legal Aid costs before I finish with the overview of the Court of Protection. Firstly, inter partes, there are no less than five rules on this but the general rule is there is no order for costs unless the other party has acted particularly poorly, you will not get inter partes cost so what about Legal Aid? Well, Legal Aid, it is generally in scope. What the Government gives with one hand it takes away with the other so that is Schedule 1, let us move to Schedule 2. Legal Aid is only available for advocacy in the Court of Protection to the extent that the proceedings concern a person's right to life, a person's liberty or physical safety, the person's medical treatment, the person's right to marry and enter into sexual relations and a person's right to family life. At liberty and physical safety, again I am just picking orders as an example because I might as well put it in context, liberty and physical safety are the main ones. There are slightly different Legal Aid rules for that when you are dealing with a person's liberty, in particular you do not have to go chasing for what their income might be which is very useful, and sometimes a person's right to family life comes into play so if they are having to live somewhere else but actually they are leaving somebody behind that it interfering with somebody's family life. So you need to be aware that Legal Aid does not cover all proceedings in the Court of Protection. The merits criteria is played around a little bit and more or less the same but slightly different, but you may want to look at paragraph 52 of the Civil Legal Aid merits criteria. So that is Part 1, a general overview.

Part 2, a practical example. Hoarders strategies and protection benefits under the Court of Protection. I want to show you how the Court of Protection might be very useful in this context so taking an example of what a landlord might be thinking, what common themes might be in a hoarder's case. So what are the landlord's concerns, what is the landlord going to want to achieve, what is the legitimate aim that they are trying to achieve? Well, usually they are worried about fire, health, damage to property, nuisance to others. Now if your hoarder lives in a bungalow there is usually not much nuisance to others if all he is doing is piling seven feet of stacks of papers all around the living room so that he has a nice little corridor that leads to the bathroom and nowhere to sit. An example of a case. It does not necessarily matter to the neighbours, because he cannot get to it, the bathroom is in an appalling, appalling state. But it will matter to the landlord about the state of the property. Very often if there are piles of paper absolutely everywhere, you cannot get to the gas boiler, you cannot service it or whatever is happening, and the gas boiler gets switched off by the landlord. So that affects health, that affects their property and they get rather uppity about it and they are fed up with you. So the quick fix the landlord always thinks about is number one, an injunction and number two, possession

orders. Well, one of the common themes of hoarders is that you have very, very vulnerable clients and you have very intransigent clients, unbelievably intransigent clients. They absolutely love this stuff in their living room; they will not let it go come what may. The landlord's first step is usually injunctions; they recognise it is not necessarily a threat to everybody else so they say we are going to be reasonable with you and go for an injunction. But the conundrums for the legal advisor are that you have to act on instructions. "I am not moving anything"; that is your instructions. You obviously need to be aware that when you have hoarders you are usually going to be worried about your client's capacity but that does not mean, given the presumption, that he lacks capacity. You also have to act in the client's best interest and all three of those tend to conflict in different situations. So there are a lot of conundrums for you to think about as you are faced with this hoarder so what can you do about it? Well, just quickly looking at the overview of the issues, types of injunctions, they tend to be access requiring tenants to do the works, take action. It tends to be a prelude to possession. Why? Because usually there is massive evidence of hoarding. Your client refuses or does not have the ability to comply. If he refuses you are in trouble, if he does not have the ability there is no injunction so the landlord is thinking what is the next step? If you agree to an injunction on his behalf are you just setting him up to fail? In my experience it tends to lead to possession.

Just setting out three cases of importance, these are in the first handout that is with you and the references are there. To make an injunction against your client, they may not have capacity but if actually they can comply with the injunction that is enough, the Court will make an order and the two are not necessarily synonymous. Possession, what are we usually talking about, just a quick overview? I know you are all housing lawyers but forgive me for doing this. In discretion cases you have to show a breach, show it is reasonable to make an order, reasonable to suspend and if it is ASB you will not get a suspension, it is more likely you will get a cessation. What about as right cases? What are the defences there? Well we probably all know them, I will set them out relatively quickly but let us just look at the strategies that you will be thinking about. What are you in practical terms, in evidential terms, want to do? Well you will want to say this is not an ASB for a start. You will want to show, if you possibly can, this is not affecting anyone else; it is just you and your property rights. That is what you want to be able to say to the landlord. Why? Because that gets rid of that Higgins hurdle that if you cannot solve it you do not stay. You want to show, if you possibly can, as a matter of strategy that it is going to come to an end and that might have all sorts of ways you can do that. There might be a voluntary change of behaviour, it could happen. There might be a medical problem and a medical intervention might solve that. It might be a good prognosis, you need an expert, you need someone to intervene, CMHT might come in, a GP might come in, counselling, whatever. It might be a social problem, you just need assistance trying to do it, you just cannot get over that hurdle. Social services intervention might help there. It might be family support, voluntary groups sometimes help. You need the tenant's consent and sometimes a tenant will say, "well, I can't get rid of all of this, I am 78 years of age, can you find somebody to help?" So you may have to go out and get the funding somehow.

Those are the sorts of thing strategy-wise that you might want to do to try and change what is happening. In legal terms the last ditch defence is, of course, "well, if I am not going to stop here you need to provide me with suitable alternative accommodation." That is going to be one of your strategies as well. If you think about what the legal props to those strategies are they are the HRA, Article 8 proportionality, it does not really make too much difference for remorse cases but it will in other cases. Disability discrimination, we have the new case of *Akerman v Livingstone* which tells us proportionality is not the same as proportionality in *Pinnock*, but you need to show causation, you need to show a link between what is happening on the ground and your client's medical condition. But that is quite a useful, I would say probably, the main issue. You have got the public sector equality duty, does it add very much? I will let you think about that but I mention it of course. As a right, possession defences are all going to be pretty much the same, your standard HRA, your JR, your public sector equality duty, are they going to be particularly strong? No. If you have got a policy out there that you can use they might be but what we do have now, and I think it really is important following *Akerman* is disability discrimination. Now we all knew it was there but we were not quite sure how strong it was and I think it probably is now. A good hook in these situations because the structured approach that is required in proportionality includes, is there a better alternative and easier solution than the sledgehammer of evicting your client? Now I think that is quite important because what I want to be able to show you is that although there are alternatives the Court of Protection might be a useful way. Let us consider a situation in which the Court of Protection is not something that you can use. What are the proportionate alternatives as you are running either your reasonableness or your discrimination defence, what are the proportionate alternatives where your client does have capacity in a hoarder case but refuses point blank to alter behaviour? Well, there are some alternatives that the landlord can use, the first is Public Health Act 1936, Sections 83 and 287 to clear

filthy and verminous premises but it is a duty on the local authority, it has a number of hurdles. The Public Health Act Section 36 would allow the local authority, I think they have to go to the magistrate's court, to remove your client whilst that work is undertaken. They are not easy provisions but they are a potential an alternative. Until 1 April the National Assistance Act Sections 21 and 47, an assessment, what do you do need? Do you need alternative accommodation for a period whilst they get on with the Section 83 clear out? Difficult but possible. There are some real conundrums though, if your client does have capacity. The first is that the pre-conditions may not fit your facts, it might not be the local authority who is the landlord. How are you going to get the local authority involved if it is an RSL or private landlord and, thirdly, you cannot advance those other things against your client's instructions. So what you have to do is somehow persuade the court that it needs to raise the issue on itself and invite you to consider the issue whether your client likes it or not and what you hope is the judge will come to lectures like this and take a note.

Why is the lack of capacity a benefit, which I think it is? I hope to show you this is why, proportionality if your client lacks capacity. Well, firstly you take your instructions from a litigation friend and that the client's wishes are irrelevant but the client's best interests are key. Secondly, the Court of Protection jurisdiction is available; it is much more nuance, the Court can say we will write a letter asking him to leave first then we will turn up at his door and knock on the door and ask him to leave and then after that we will turn up with the police and say this is your last chance, and then on such and such a date you turn up with the police and you ask him to move or maybe even with somebody who is a doctor or whatever. But you can structure it in any way you want in a way that might give the client a chance to move of his own accord.

If you think of the disability discrimination defence it is not proportionate because there is this better option, the Court of Protection. What would you be doing in the county court while you go off to the Court of Protection? Well you would stay the proceedings whilst the Court of Protection gets on with it. You could ask, you cannot do it in London because the Court of Protection in London is not dual-ticketed but in the outreaches, in Brighton and other places you very often end up with judges who are sitting as circuit judges and Court of Protection judges and you could have a dual-ticketed judge. What you are trying to do is to turn to them and say, oh for goodness sake, you could do this alternative, judge, you are a Court of Protection judge, don't you think they should be going down this route, we should stay these proceedings and get on with the Court of Protection and do this the right way. That is what you are trying to do. Just the caveat, capacity if a moving feast but with any luck that does not get in the way.

So how would you actually go about using the Court of Protection? Well, you would want expert evidence on capacity, you would need to provide that. You would like to persuade using the county court judge that somebody else should make the application. Why? Because your litigation friend is not going to make that application, if it is the family member they probably will not have any money and if it is the OS they just will not do it. And how do you do that? Well, the judges stay the proceedings in the county court, if you want to solve this problem get on with it and go to the Curt of Protection. That is how you do it.

What might the final order look like, let us leave aside the entering orders for a moment? Well you are going to have a declaration on capacity, you are going to have an order moving P to temporary accommodation, you are going to have the local authority provide that temporary accommodation because the local authority would have been asked to provide evidence about how they are going to do it and they will be so shamed into doing it that that is what they are going to do. That might work. You are going to have an order or a declaration giving the landlord or local authority power to enter, carry out works and dispose of belongings and you are going to have an order then moving P back into the home and then you are going to have safeguards. For each of the above steps or each of those steps making sure that there is always an opportunity for the client to change his mind so that actually he is not carted off in a straightjacket, I am exaggerating, he is actually given the opportunity to make that decision when he sees the inevitable and some of them will change their minds. So that is what you are doing in the Court of Protection and my purpose today, I do not know if I have succeeded, is to persuade you that it is one of the tools that you as housing lawyers can use to prevent your client losing their home.

Chair: Are there any questions for either or both of our Speakers?

Contributor: How long does it take to get an order from the Court of Protection?

Dominic Preston: I stayed something back in July and we have had several listings in the Court of Protection, all of which have been adjourned, partly because counsel on the other side is also in my chambers, and so we are still going back and that is something like 10 months. However, it can work quite quickly. If the landlord is quite clued up, works out that they are just not going to get that possession order, works out that they can make the application, relies on the local authority to provide the medical evidence that there is no capacity and in reality there is no real dispute, then you would go to the Court with, effectively, a joint order. The reason why you still have to go to the Court is that in the order that I have suggested, there is a deprivation of liberty and it involves a conveyance which will require you to go to the Court of Protection to authorise that. So it can be quite quick; if you talk to the OS they have got examples of it happening in three or four months. I just have not come across that myself. Three or four months is pretty quick for the Court of Protection for most statements.

Nik Nicol, I Pump Court Chambers: Dominic, you were saying that capacity relates to particular issues. Could you not have a client who has capacity to conduct litigation but does not have the capacity to get rid of what they are hoarding? In those circumstances what would you do?

Dominic Preston: So this is one of my personal bugbears against the courts who come back on this. If you think about hoarders and usually they have got a personality disorder, they might have brain-damage which creates that personality disorder but usually what you get is a fixation on a single issue. I am just not able to move my stuff out; I cannot make that decision. There is nothing that you can do to that is going to make me make that decision. You do not get that phraseology from the client; what you get is, ah, but you know what, last week it was really raining quite heavily, they will just void it. Now every client is different; but in most cases there is a fixation about that one issue. If you think about what the proceedings are about they are about taking instructions. If you do not make this decision you will be evicted, do you understand that? Yes. Are you able to make a decision about it? Now in my view, if the psychiatrist says, "cannot make a decision about whether or not to clear the property," and the proceedings are precisely about that point, it should follow that on both issues there is no capacity. You do get reports where that is not the case and they say, oh it is just bad judgement but actually it is still positive and all the rest of it and certainly on one occasion I have cross-examined and come out with that obvious point. So I think you go back with questions to the expert. It is possible that if you think about the reality of the hoarder situation and this does happen in other areas, it is unlikely.

Michael Paget, Cornerstone Barristers: Just following up from Nik there is a case called *QR* where they could terminate the tenancy, they did not have the capacity to terminate the tenancy but they did find capacity to litigate but the Court of Protection did not have a problem with that.

Bethan Harris: That was a case in which I appeared for the person who was held to have litigation capacity but to lack capacity in relation to the substance of the matter and it was an unusual case which in line with what Dominic has said. It just goes to show that there is not a completely definite rule that you cannot have the situation where a person retains litigation capacity whilst lacking capacity in relation to the subject matter, so one is litigation capacity and the other is called subject matter capacity. That was a case in which the person concerned was very able in many aspects of her life but lacked capacity in relation to decisions concerning where to reside, because she lacked insight into the consequences and the implications of her medical condition. But it was unusual because she was so able in all other aspects of her life and able to give instructions. So the case law does not give you a sort of definitive answer on that point but I do agree very much with Dominic that it is an odd situation because of course if the subject of the litigation is the issue of residence then it would in the normal course of things follow, as it would in a hoarding case if the subject of the litigation is your ability to make decisions as to whether to get rid of your stuff. In the normal course it would follow that you lacked capacity in relation to that litigation but not necessarily. In that particular case my client really wanted to press home the fact that she had capacity across the board and having fought that through a hearing the outcome was that she did retain litigation capacity. It was very important to her that she retained litigation capacity in that her decision-making in the proceedings was not taken over by another person. So perhaps there is a point there about how retaining capacity is something that can be very important to people because it is a civil liberty that is at stake. People want to make decisions for themselves in many cases.

Dominic Preston: I raised *Q* the other day, it was District Judge Elderer, and there seems to be a split on their view of that case, I do not know whether it is a capacity to litigate or the capacity to manage tenancy but he was almost pushing me down a road which said, I would really like to make another decision on that issue. So I am not quite sure what the judges think about that particular

decision.

Chair: Can I ask Bethan a question about the Care Act? You mentioned that care can be charged and you touched on charging just at the end and I just want to ask you a question about that. Under the Care Act they have done away with the ability of local authorities to put a land charge on immediately and they have to go through the courts now which appears to make it a little bit more complicated, the rationale behind the Care Act is to, as you say, consolidate and simplify. Why do you think they have done that?

Bethan Harris: I do not know the answer to that I am afraid. I really do not know why they have done that, what is the policy behind that? I can see that that is a big bugbear for local authorities but thanks for raising it and yes, maybe someone else can offer us some enlightenment on it.

Chair: Do you think, we touched on the Equality Act and have due regard and do you think there is any difference under the Care Act to just have regard to the well-being principle and does that make it watered down? Do you think there is actually a difference in substance there?

Bethan Harris: I think these things are going to have to be worked out really. I think the point that we have to take away is that the well-being principle has clearly got to mean something. It has been flagged up as such a major part of this new scheme and the statutory guidance has so much to say about the extent to which it has to be taken into account at all levels that for it to amount to nothing in the way that decisions are made would really fly in the face of all that. Whether it comes down to the wording of due regard or have regard I am not sure whether those are the issues that are solely going to make the difference. It may be that there are arguments around those issues but I think that it does fall to us to make sure that we really know what the statutory guidance says and that we really do press home the points that can be made about the well-being principle and how it is supposed to incorporate the importance of people's wishes and feelings and that their preferences in the way that decisions are made, so that care packages do not just reflect a meeting of needs in a crude sense but actually are built towards reflecting well-being. And, of course, where local authorities are inevitably looking for the cheap options the actual result in terms of the well-being of the individual at the end of it all can get lost and that is obviously what legislation is saying is not supposed to happen. So that is not a very analytical answer but I am sure that is going to come up and we will find out more about it and no doubt come back to it.

Dominic Preston: One of the things that will be intriguing is what the new forms, I have not seen them and there must be, presumably, drafts already but local authorities tend to use these things so we are quite used to seeing faxed forms and all the rest of it. It will be interesting whether there is a tick box. I would consider that, or whether actually it goes more into the detail that they put into the main boxes.

Katie Brown, T V Edwards Solicitors: On the Care Act do you think the physical and mental impairment is going to include pregnancy?

Bethan Harris: I cannot say I have any thoughts, that is a really interesting question.

Katie Brown, T V Edwards Solicitors: At the moment we have the Section 21 help for pregnant women. Even though it is quite broad at the moment I was just looking at how difficult it would be to fit that in but maybe we can?

Dominic Preston: You have the 3:2 test so yes, you are asking about one of the pre-conditions but the answer I suspect when they looked at it in court cases is whether you ever get situations which includes the two outcomes.

Bethan Harris: Thanks for raising that, it is very interesting. Obviously you have got to have a mental or physical impairment. I am not sure it does fit that comfortably into the idea of impairment. There is a power to meet needs as well that are not eligible needs and there are preventative duties, there are supposed to be facilities and resources that are put in to preventing eligible needs from arising so I am not hugely optimistic but no-one ever wants to close a door so it all there to be argued.

Chair: Thank you to both of our speakers, it has been a fascinating evening. The next meeting is the Homelessness Update on 20 May.

HOUSING LAW PRACTITIONERS ASSOCIATION

18 MARCH 2015

Bethan Harris, Garden Court Chambers

The Care Act 2014, Part 1: An overview focusing on accommodation issues

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1. Introduction

1.1. The policy aim of the Care Act 2014 Part 1

The Care Act 2014 Part 1 is intended to give effect to the policies of the White Paper, *Caring for our future: reforming care and support* (Cm 8378, July 2012), following the recommendations of the Law Commission in its May 2011 report on Adult Social Care, and to implement changes put forward by the Commission on the Funding of Care and support, chaired by Andrew Dilnot.

It consolidates a number of pieces of legislation that make up current adult community care law in one Act. The Act imposes some new duties on local authorities and provides a new framework for adult community care law. Outmoded terminology is replaced by terminology centred on the concept of meeting needs for care and support.

1.2. Territorial extent and application

The Care Act 2014 Part 1 applies in general to local authorities in England only. Wales has passed its own legislation in this area, the Social Services and Well-being (Wales) Act 2014, which is intended to come into force in April 2016. A detailed explanation of territorial extent and application is given in the Explanatory Notes.

1.3. Commencement, consequential amendments and transitional provisions

For the most part, Part 1 will come into force on 1 April 2015. However, the cap on care costs (s 15) will not be in force until April 2016, and the proposed implementation date for a new appeals system is also April 2016. A consultation is currently underway in respect of both these subjects.

The consequential amendments to existing community care legislation are in the *draft Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015*. A schedule lists the many pieces of community care legislation which are amended in consequence of the new Act, largely with the effect of repealing existing duties in their application to local authorities in England. This includes that

- ss 21 and 29 National Assistance Act 1948 (NAA 1948) cease to apply to local authorities in England

- the duty under s 2 Chronically Sick and Disabled Persons Act 1970 (provision of welfare services) ceases to apply to local authorities in England (s 29 NAA 1948 having ceased to apply), save that the s 2 duty under the 1970 Act is preserved in relation to disabled children (an important provision in respect of children's services in that it is an individually enforceable duty);

- the s 47 NHS and Community Care Act 1990 duty to assess needs for community care services ceases to apply to English local authorities save in respect of s 117 MHA 1983 services.

There are transitional provisions in the *draft* reg 3: where support services are being provided or payments towards them are being made immediately before s 1 CA 2014 comes into force, those arrangements can continue in place and the old law will continue to have effect in relation to them, until at the latest 31 March 2016.

Consequential amendments to secondary legislation are made by the *Care Act 2014 (Consequential Amendments) (Secondary Legislation) Order 2015* (e.g to the Housing Benefit Regs 2006).

1.4. **What material will practitioners need when dealing with Care Act 2014 Part 1?**

- The Care and Support Statutory Guidance

  (Section 78 states that a local authority must act under the general guidance of the Secretary of State in the exercise of functions given to it under Part 1. The same terminology (in s 7 LASSA 1970) has been interpreted as meaning that the Secretary of State's guidance must be followed unless the local authority judges that there is a good reason not to do so which is articulated in the course of the decision-making process (*R v Islington LBC ex p Rixon (1996)1 CCLR 119*)).

- Any regulations made under Part 1 of the Act that are relevant to the subject-matter concerned

- as an aid to understanding the Act, the Explanatory Notes;

- also, as aids to understanding the policy behind the Act there is pre-legislative material (e.g. the Response to the consultation on draft regulations and guidance for implementation of Part 1 of the Care Act 2014 which

- DoH "Factsheets" provide a useful overview of each of the main subject areas in Part 1 and are a good starting point.

2. General Responsibilities of Local Authorities (Sections 1 – 7 Care Act 2014)

2.1. The first group of sections sets out general duties on local authorities, in contrast to the main individually enforceable duties to provide care and support in s 18 and support for carers in s 19.

2.2. **Section 1: Promoting individual well-being.** The first of the general duties has the most prominent role, being referred in the statutory guidance as the "*guiding principle*" in Part 1 (see para 1.2 of the statutory guidance).

> *Section 1(1) The general duty of a local authority, in exercising a function under this Part in the case of an individual, is to promote that individual's well-being*.

Section 1(2) – well-being is defined by reference to 9 factors which include physical and mental health and emotional well-being, protection from abuse and neglect, control by the individual over day-to-day life, social and economic well-being, and suitability of living accommodation. (This is not a complete list.)

Section 1(3) – lists 8 factors to which a local authority must have regard when exercising its functions under Part 1 in the case of an individual, including beginning with the assumption that a person is best placed to judge their well-being, their views, wishes, feelings and beliefs, the importance of preventing or delaying the development of needs for care and support. (This is not a complete list.)

2.3. The statutory guidance explains how the well-being principle fits with the concept in Part 1 of "meeting needs" – which is distinct from a model based on fitting people's needs to particular services: everyone's needs are different and personal to them; care and support can be provided in a number of ways, some aspects of wellbeing will be more relevant to some people than others (1.9 – 1.12 of the statutory guidance); "*During the assessment process the local authority should explicitly consider the most relevant aspects of wellbeing to the individual concerned, and assess how their needs impact on them"* (1.12).

At 1.15 the statutory guidance tells us that all of the matters listed in s 1(3) must be considered in relation to every individual when a local authority carries out a relevant function; also that "*the focus should be on supporting people to live as independently as possible for as long as possible*".

See also at 15.53, "*Suitability of living accommodation is one of the matters local authorities must take into account as part of their duty to promote an individual's wellbeing.*" See also 15.54 – 59 on housing and the wellbeing principle.

2.4. The general nature of the duty is made clear: "*Neither these principles, nor the requirement to promote wellbeing, require the local authority to undertake any particular action. ……their purpose is to set common expectations for how local authorities should approach and engage with people*. [1.17]

2.5. It is important to note that Chapter 1 of the statutory guidance on the wellbeing principle includes the heading "*Independent living*" and an explanation of how the wellbeing principle is intended to cover the core components of independent living as expressed in the *UN Convention on the Rights of People with Disabilities* (in particular Art 19). See paragraph 1.19.

2.6. It has been helpfully pointed out by one commentator, that when the Bill was considered in the House of Lords the Government confirmed that "*emotional wellbeing*" (s 1(2)(b)) incorporates consideration of pets.[1]

2.7. **How useful will the well-being principle be?** Concern has been expressed that it is "*too abstract to be effective"*. The government says it has incorporated reference to the wellbeing principles in the case studies in the statutory guidance to demonstrate how it works.[2] As practitioners this principle should provide a tool to help us to help our clients obtain assessments that engage fully with their individual circumstances and wishes and feelings, and genuinely enhance their well-being. (As to the legal duty to meet needs and decisions on how to meet them, see paragraphs 3 and 4 below.)

2.8. **Section 2: Preventing needs for care and support**

This is the second of the general duties –

Section 2(1) a local authority must provide or arrange for the provision of services, facilities or resources, or take other steps, which it considers will –

(a) contribute towards preventing or delaying the development by adults in its area of needs for care and support;

(b) contribute towards preventing or delaying the development by carers in its area of needs for support;

(c) reduce the needs for care and support of adults in its area;

(d) reduce the needs for support of carers in its area.

2.9. As made clear in the statutory guidance, services provided under this general duty are to be provided for people regardless of whether they satisfy eligibility criteria and even if they do not have any current support needs. The steps taken can be population- wide measures or targeted to individuals.

2.10. Examples of prevention measures that are given in the statutory guidance are the promotion of exercise classes or befriending schemes, fall prevention clinics, adaptations to housing, handyman services, telecare services, and intermediate care (a programme of care provided for a limited period of time to assist a person to maintain or regain the ability to live independently).

2.11. How will people know what prevention services are available? The duty to provide information and advice (s 4) includes that providing information and

[1] See T. Spencer-Lane's commentary in Care Act Manual, First Edition, Sweet and Maxwell

[2] Response to the consultation on draft regulations and guidance for implementation of Part 1 of the Care Act 2014 Part 1.

advice about preventative services, facilities and resources available locally (para 2.40 of the statutory guidance).

2.12. Local authorities have a power to charge for the steps they take under s 2, which is subject to the *Care and Support (Preventing Needs for Care and Support) Regs 2014*. There must be no charge

- to a carer for provision made under s 2(1) intended to delay or reduce the carer's needs, consisting in provision made directly to the adult needing care
- if the service is provision of an aid or minor adaptation to property (defined as costing £1,000 or less)
- for the first 6 weeks of intermediate care and reablement support services (services for specified period of time aimed to enable a person to maintain or regain the ability to live independently in their own home as defined in the regs).

2.13. Note paras 15.60 – 64 of the statutory guidance on "***Housing to support prevention needs***" on the importance of suitable housing in terms of well-being and prevention e.g. "*Housing and housing services can play a significant part in prevention, for example, from a design/physical perspective, accessibility….identifying a person who needs to be on the housing register….The links between living in cold and damp homes and poor health and wellbeing are well-evidenced*."

Passages such as the above do not of course in themselves give rise to specific enforceable duties for individuals. However they are useful material for practitioners to argue for solutions to meet clients' needs that involve better housing.

2.14. **Integration of services and co-operation: ss 3, 6 and 7**

Promoting integration of care and support with health services, etc. – s 3

Section 3(1) A local authority must exercise its functions under this Part with a view to ensuring the integration of care and support provision with health provision and ***health-related provision*** *where it considers that this would –*

(a) promote the well-being of adults in the area…….

……..

(5) For the purposes of this section, ***the provision of housing is health-related provision****.*

Co-operation generally – s 6

- a local authority must co-operate with its *relevant partners* (s 6(1)) defined in s 6(7) to include district councils, the local NHS body, police, probation services, the minister for prisons;

- a local authority must also co-operate, in the exercise of its functions under this Part, *with such other persons as it considers appropriate* who exercise functions, or are engaged in activities, in the authority's area relating to adults with need for care and support or relating to carers (s 6(2)). An example given of person with whom the local authority may consider it appropriate to co-operate is *a private registered provider of social housing* (s 6(3));

- **internal co-operation** - a local authority must make arrangements for ensuring co-operation between (a) its officers who exercise care and support functions or functions relating to carers, (b) *its officers exercising housing functions (insofar as relevant to care and support functions)*, (c) the Director of Children's Services (insofar as relevant to care and support functions which includes transition of children to adult care) and (d) the authority's director of public health (s 6 (4));

- Section 6(6) sets out the 5 aims of co-operation between partners: promoting well-being, improving the quality of care and support, smoothing the transition to adult services for children, protecting from abuse and neglect; and identifying and learning lessons in cases of serious abuse and neglect.

Co-operating in specific cases – s 7

This section supplements the general duty to co-operate with **a specific duty**: the local authority may request co-operation from a relevant partner in relation to the case of an individual adult or carer, and the relevant partner must co-operate as requested unless doing so would be incompatible with the relevant partner's own functions or duties or would otherwise have an adverse effect on the exercise of its function. Subsection (2) creates the same duty but in reverse, with the request made by the relevant partner to the local authority.

If the partner that is asked to co-operate decides not to do so, it must provide written reasons (s 7(3)).

The duty in s 7 is similar to the duty in Children Act 1989 s 27.

This duty may be of particular assistance in relation to the input of other bodies into assessments, by provision of information or specialist input.

2.15. There is quite extensive statutory guidance on these duties at Chapter 15 of the statutory guidance.

It includes, in respect of the integration duty:

"*A local authority **must** promote integration between care and support provision, health and health related services, with the aim of joining up services*" (15.7).

There are different levels for the mechanisms for integration of services - planning and commissioning, and at the individual level of assessment, information and advice, and delivery of care and support,

"*this may include integrating an assessment with information and advice about housing options on where to live, and adaptations to the home….A housing assessment should form part of any assessment process, in terms of suitability, access, safety, repair, heating and lighting*…(para 15.7 (c)-(d)).

In respect of the general co-operation duty which requires internal co-operation within local authorities (s 6(4)) see paras 15.23 – 24 – "*it is important that local authority officers responsible for housing work in co-operation with adult care and support given that housing and suitability of living accommodation play a significant role in supporting a person to meet their needs and can help and delay that person's deterioration….*"

2.16. **Providing information and advice - s 4**

Under this section a local authority must establish and maintain a service for providing people in its area with information and advice relating to care and support for adults and support for carers.

The statutory guidance states at para 15.65 "…*this must include advice on relevant housing and housing services which meet care and support needs*."

2.17. **Promoting diversity and quality in the provision of services – s 5**

Section 5(1) A local authority must promote the efficient and effective operation of a market in services for meeting care and support need with a view to ensuring that any person in its area wishing to access services in the market –

(a) has a variety of providers to choose from who (taken together) provide a variety of services…….

The relevant statutory guidance is at Chapter 4 (Market shaping and commissioning of adult care and support). There are also 3 sets of regulations in relation to this general duty.

3. The new duty to meet needs for care and support (replacing s 21 NAA 1948 and other current community care duties) – s 18

3.1. Section 18 contains the duty to meet an adult's eligible needs for care and support: this is the principal individually enforceable duty under Part 1. It replaces a number of duties to provide particular community care services to adults: ss 21(1) and (2) and 29(1) National Assistance Act 1948, s 2(1) Chronically Sick and Disabled Persons Act 1970 and s 45 (1) Health Services and Public Health Act 1968.

3.2. Section 18 reflects the Law Commission's proposal that there should be one duty based on having care needs that meet the eligibility criteria, although the Law Commission had also proposed that s 21 NAA 1948 be retained in substance as a "*long-stop*" for cases that did not meet the eligibility criteria (6.32 of the Law Commission Report of May 2011).

The government responded to the idea - "*to include a residual section 21 provision as a standalone duty would be anomalous with our overall approach, and perpetuate the same division we intended to remove. We propose, therefore, to deal with these cases through the eligibility regulations, so that individuals in the scope of these existing duties continue to be eligible for care and support, and in effect are "mainstreamed" into the core processes for the provision of care and support."*[3]

When the Care Bill was produced, the Government further explained the underlying aim: *"One of the key aims of the new statute is to remove anomalies and difference resulting from the type of care setting, and provide a single route*

[3] Reforming the law for adult care and support: the Government's response to the Law Commission, July 2012

through which consistent entitlement to care and support can be established….Clauses 18 – 19 provide this single route, replacing the precedents with a clear duty to meet an adult's needs for care and support". [4]

3.3. There is also a power to meet needs for care and support in s19 of the Act: where the person is ordinarily resident in the area, or present there but of no settled residence, and having carried out a needs assessment there is no requirement to meet the person's needs under section 18 (he/she has needs which do not meet the eligibility criteria) or the person's needs do meet the eligibility criteria but the person is ordinarily resident in the area of another authority.

3.4. Section 18 also contains the important provision for meeting urgent needs (the equivalent of ss 47(5) and 47(6) NHS and Community Care Act 1990) that a local authority may meet an adult's needs for care and support which appear to it to be urgent, regardless of whether the adult is ordinarily resident in its area without having yet (a) carried out an assessment, or (b) made a determination under s 13(1) (a determination whether any of the assessed needs meet the eligibility criteria).

4. What services can be provided to meet assessed needs?

4.1. Section 8 concerns how eligible needs are met. It provides a non-exhaustive, illustrative list of examples of what may be provided to meet needs under ss 18 - 20.

How to meet needs

Section 8 (1) The following are examples of what may be provided to meet needs under sections 18 – 20 -

(a) accommodation in a care home or in premises of some other type

(b) care and support at home or in the community

(c) counselling and other types of social work

(d) goods and facilities

(e) information, advice and advocacy

[4] The Care Bill Explained, including a response to the consultation and pre-legislative scrutiny on the Draft Care and Support Bill, May 2013, paras 71 – 2.

(2) The following are examples of the ways in which a local authority may meet needs under section 18 – 20 –

(a) by arranging for a person other than it to provide a service;

(b) by itself providing the services;

(c) by making direct payments

(3) Care home has the meaning given by section 3 of the Care Standards Act 2000.

4.2. The statutory guidance explains at 10.10 that the switch from the terminology "*providing services*" to "*meeting needs*" is intended to introduce a broader concept than the duty to provide a particular service and should encourage diversity in the way needs are met; the purpose of the care and support planning process is to agree how a person's needs will be met; these may include assistive technology in the home and **adaptations** as well as traditional service options such as care homes and home care.

4.3. Paras 10.20 – 27 of the statutory guidance concern considerations relevant to decisions on how to meet needs, including preferences of the individual and cost, and is consistent with current case-law.

5. The new national eligibility criteria

5.1. The eligibility criteria are of course key to determining who will receive services and these criteria will now determine who gets accommodation as a social care service as well who gets other types of community care service.

5.2. They will now be national eligibility criteria, setting a minimum threshold for adult care and support needs (and carer support needs) which a local authority must meet. All local authorities must comply with this national threshold. As mentioned, authorities can also decide to meet needs that are not deemed to be eligible if they choose to do so.

5.3. The Government made it clear that it intended to set the national threshold at a level which would in terms of practical outcome be equivalent to "*substantial*" in the current system.[5] This is the level currently operated by the vast majority of local authorities.

[5] Draft national minimum eligibility threshold for adult care and support, a discussion document, June 2013

5.4. The eligibility threshold for adults with care and support needs is set out in the *Care and Support (Eligibility) Regulations 2014*. The criteria are formulated quite differently to the FACS criteria. The questions that must be posed in the process of assessing eligibility under the new national eligibility criteria are whether:

- the adult's needs arise from or are related to a physical or mental impairment or illness (reg 2(1)(a))
- as a result of the adult's needs the adult is unable to achieve two or more of the specified outcomes (listed in regulation 2(2)) (reg 2(1)(b))
- as a consequence of being unable to achieve these outcomes there is, or there is likely to be, a significant impact on the adult's wellbeing (reg 2(1)(c))

5.5. As regards "*arise from or are related to a physical or mental impairment or illness*", this might be considered to be a potentially limiting criterion in comparison to current legislation (s 21 (1) NAA 1948 –includes those who are in need by reason of "any other circumstances"). However, the statutory guidance implies a broad construction: "*Local authorities must consider at this stage if the adult has a condition as a result of either physical, mental, sensory, learning or cognitive disabilities or illnesses, substance misuse or brain injury. The authority should base their judgment on the assessment of the adult and a formal diagnosis of the condition should not be required*". [6.105]

See 6.105 – 6.112 of the statutory guidance on how to apply the eligibility criteria generally.

5.6. The specified outcomes are at reg 2(2):

(a) Managing and maintaining nutrition;

(b) Maintaining personal hygiene;

(c) Managing toilet needs;

(d) Being appropriately clothed;

(e) Being able to make use of the adult's home safely;

(f) Maintaining a habitable home environment;

(g) Developing and maintaining family or other personal relationships;

(h) Accessing and engaging in work, training, education or volunteering;

(i) Making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and

(j) Carrying out any caring responsibilities the adult has for a child

See reg 2(3) for the meaning of being "*unable to achieve an outcome*". Note the breadth of this concept.

5.7. The Department of Health commissioned research to evaluate 3 different versions of the eligibility regulations before deciding on the 2 outcome formula that appears in the regulations.[6] Social workers were asked to apply the different formulae in real cases and the outcomes were compared with the outcome under the existing approach (FACS – Fair Access to Care Services). All the versions tested covered the current critical and substantial levels of need. It was the version that set the minimum level at 2 or more outcomes not being achieved that was found to come closest to current practice.

5.8. What will the impact of the new eligibility criteria be on people who would currently qualify under s 21 NAA 1948 for residential accommodation? The June 2014 consultation on the draft regulations posed the following question:

"*Section 21 of the National Assistance Act 1948 requires local authorities to provide residential accommodation in certain cases. Under the new framework, the eligibility criteria will apply to the provision of all types of care and support including residential accommodation.*

Are you content that the eligibility regulations will cover any cases currently provided for by section 21 of the National Assistance Act 1948?"

The response (in the October 2014 response to consultation document) was - "*the majority of respondents to this question were local authorities, who said they felt confident that the new regulations together with the powers in section 19 of the Care Act would mean people who currently have access to care and support would continue to be supported when the regulations and guidance take effect in April 2015*". (p. 23)

[6] See Response to the consultation on draft regulations and guidance for implementation of Part 1 of the Care Act 2014, October 2014, p 21

6. The duty to assess an adult's needs for care and support; the decision on whether there are eligible needs; the decision on what will be done to meet the eligible needs

6.1. The duty to assess is in s 9. It replaces s 47(1) NHS & Community Care Act 1990 (in England, save as regards s 117 MHA 1983 services). There is similar low threshold to trigger the duty to assess: "*it appears to a local authority that an adult may have needs for care and support*".

See also the *Care and Support (Assessment) Regulations 2014* for further details of how assessments must be conducted.

6.2. Following an assessment of needs, a determination is to be made as to whether any of the needs meet the eligibility criteria. The local authority must give the person a written record of the determination and the reasons for it (s 13 (1) and (2)).

6.3. Where at least some of the adult's needs for care and support meet the eligibility criteria, the local authority must then go on to make what is conventionally called the "service decision". The Act requires that the local authority must consider what could be done to meet those needs that meet the eligibility criteria; to ascertain whether the adult wants to have those needs met by the local authority under the provisions of Care Act 2014 Part 1; and whether the adult is ordinarily resident in the area (s 13(3). (The provisions on ordinary residence are at ss 39 – 40.) Looking further to the next stage of preparing a care and support plan (ss 24 - 25), at that stage the local authority must help the person decide how to have their needs met (s 24(1)(c) and the care plan must specify what needs are going to be met and how the local authority is going to meet them (s 25(1)). A copy of the plan must be given to the adult (s 25(9)).

6.4. Note at s 11 the provision that where a person refuses to be assessed, the local authority is not required to carry out an assessment, except in 2 situations: the adult lacks capacity to consent and the local authority is satisfied that being assessed is in his/her best interests or the adult is experiencing or is at risk of abuse or neglect.

7. When will a need for care and support fall to be met by providing accommodation?

What is the effect of **section 23: "*Exception for provision of housing etc.*"**?

7.1. Section 8 indicates that what can be provided as accommodation either directly or by arranging for someone else to provide it is very wide: "*accommodation in a care home or in premises of some other type*". It is clear therefore that this includes ordinary housing.

7.2. However, it is of course also clear that there must be an identified need for care and support in order to trigger the provision of the service under s 18 (duty to meet needs for care and support) or s 19 (power to meet needs for care and support). The purpose of the assessment carried out under s 9 is to identify whether the adult has needs for care and support. In other words, accommodation can be provided under the Act in order to meet care and support needs.

7.3. When will accommodation be likely to be a means of meeting a person's care and support needs? The list of outcomes in regulation 2 of *the Eligibility Regulations* tells us the type of needs for care and support that fall in the bracket of eligible needs. One can see that some of these needs might sensibly be met by the provision of accommodation e.g. a need based on an inability to maintain personal hygiene or to manage toilet needs could be met by a move to a ground level property; but also less obvious examples such as a need based on an inability to develop and maintain family or other personal relationships which could be met by a move to be nearer relatives (e.g. thereby avoiding travel that is difficult for a person due to their impairment or illness).

7.4. The case-law under section 21 NAA 1948 on the meaning of a need for "care and attention" might be thought to be of some relevance in understanding what is a care and support need e.g. *Wahid v Tower Hamlets LBC [2002] EWCA Civ 287* which concerned whether there was a need for care and attention (under s 21 NAA 1948) in circumstances where better accommodation would have had a beneficial effect on the claimant's mental health: the local authority's decision that there was no such unmet need for care and attention was upheld on the basis that its conclusion was one that was open to it; and also the explanation of the concept of "care and attention" as meaning "looking after" in *M v Slough BC [2008] UKHL 52; [2008] 1 WLR 1808.* However the concept of care and support is not formulated in terms of "care and attention". The list of specified outcomes in the Eligibility Regulations tells us the kind of needs that fall in its scope. The duty to meet care and support needs is of course intended to replace a range of duties, not just the duty under s 21 NAA 1948.

7.5. Turning to s 23, this states that a local authority may not meet needs under ss 18 – 20 by doing anything which it or another local authority is required to do under Housing Act 1996. The Explanatory Notes tell us that s 23 replaces s 21(8) NAA 1948.

7.6. The Government stated during the passage of the Care Bill through the House of Commons: "*The [section] does not place a bar on local authorities providing accommodation where that is necessary to meet care and support needs. What it does is prohibit local authorities from using care and support law to provide general or social housing that is not related to a person's care and support needs*." [7]

7.7. It has been pointed out that the new prohibition refers to anything a local authority "*is required to do under the Housing Act 1996*". It does not prohibit any provision "*authorised or required to be made…by or under the Housing Act 1996*" (s 21(8) NAA 1948). Therefore the new prohibition only applies where the local authority is subject to a duty to provide housing under Housing Act 1996; there is no prohibition merely by virtue of the fact that a housing authority is authorised or empowered to provide housing.

Also, the point is made that s 21(8) NAA 1948 has been applied as a factual test in relation to the individual: whether or not the accommodation that is needed is available to that individual.[8]

The same approach should apply under s 23, or otherwise eligible social care needs that can only sensibly be met by providing or arranging for someone else to provide accommodation will be left unmet as a result of a decision made under housing legislation. This is also consistent with the Government's statement cited above.

7.8. See also the statutory guidance at 15.51 – 52: "*The Care Act is clear that suitable accommodation can be one way of meeting care and support needs*".

8. Exception for persons subject to immigration control – section 21: the "destitution-plus test"

Section 21 (1) A local authority may not meet the needs for care and support of an adult to whom section 115 of the Immigration and Asylum Act 1999 ("the 1999 Act") (exclusion from benefits) applies and whose needs for care and support have arisen solely –

[7] Passage cited in Care Act 2014 Manual, T. Spencer-Lane p 172
[8] Care Act 2014 Manual, p 172 - 3

(a) because the adult is destitute, or

(b) because of the physical effects, or anticipated physical effects of being destitute.

……..

This section performs the same function as s 21 (1A) NAA 1948, but provides for an exclusion in relation to all services for meeting needs for care and support.

The purpose of the provision is explained in the case-law in this area e.g. *R (M) v Slough BC [2008] 1 WLR* – a person whose immigration status puts them in this group will be eligible for services only so long as their need is to any material extent made more acute by some circumstance other than a lack of accommodation and funds. Social services will be responsible for meeting needs rather than the UKBA if the person's needs meet the test of "destitution-plus".

However, for persons subject to immigration control who are not asylum seekers the main barrier to receiving services will of course be Schedule 3 National Immigration and Asylum Act 2002, which makes certain groups ineligible for support except to the extent necessary to avoid a breach of ECHR Convention rights or rights under the EU Treaties. An amendment to Schedule 3 to add care and support under Part 1 is provided in the draft regulations referred to in para 1 of this paper.

9. Choice of accommodation – s 30

9.1. This section implements the principle behind the *NAA 1948 (Choice of Accommodation) Directions 1992* – the right to choose the residential accommodation that is provided subject to certain conditions. The local authority decides to provide or arrange for provision of accommodation of a specified type then the adult can express a preference for particular accommodation of that type which, if specified conditions are met, must be the accommodation that is provided/arranged.

9.2. See the *Care and Support and After-care (Choice of Accommodation) Regulations 2014* which tell us that the specified types of accommodation are care home accommodation, shared lives scheme accommodation or supported living accommodation. These are defined in the regulations.

9.3. The conditions for provision of the preferred accommodation are at reg 3 including that it is suitable, available and if more expensive, the additional

cost will be met by another person, or where certain conditions apply, the adult themselves (reg 5).

10. Amendments to section 117 Mental Health Act 1983 (after-care services) – s 75

10.1. The after-care duty under section 117 of the Mental Health Act 1983 (MHA 1983) has not been consolidated into the CA 2014, as the duty applies to a specific group of former mental health patients whose needs are directly linked to the MHA 1983 and the duty is a joint duty on social services and the NHS. The duty to provide after-care services therefore remains as a freestanding enforceable duty within the MHA 1983.

10.2. However, it has been more integrated in the adult social care framework, with the ordinary residence rules, choice of accommodation provisions and top-up payments all being extended to section 117 users.

10.3. The Law Commission recommendation that it should become a gateway duty leading to services being provided under the CA 2014 (with the consequent provision that they could be charged for) was rejected, so that it remains the position that there is no power for local authorities to charge for such services, save in relation to choice of accommodation.

10.4. The CA 2014 provides, for the first time, a statutory definition of after-care services: services which have both of the following purposes:

- meeting a need arising from or related to the person's mental disorder; and
- reducing the risk of a deterioration of the person's mental condition (and accordingly, reducing the risk of the person requiring admission to hospital again for treatment for mental disorder).

10.5. This definition is wider than the definition which has been adopted in case law, as it refers not only to needs arising from a mental disorder, but also to needs "related to" the mental disorder, and the second limb (referring as it does to mental condition) makes it clear that it covers more than one form of mental disorder, and is not necessarily limited to the disorder for which a person was previously detained and which gave rise to the right to after-care.

10.6. See also the relevant changes to the Mental Health Act 1983 Code of Practice (in force from 1 April 2015) .

11. Some of the other areas covered by Care Act 2014 Part 1

11.1. The new duties to carers – s 20

Section 20 of the CA 2014 sets out a new duty to meet a carer's needs for support. For the first time, local authorities will be required to meet the eligible needs of carers; currently, they only have a power to do so. This duty can be met by providing support to the carer, or through the provision of support to the adult needing care.

Local authorities have a duty to assess whether a carer has a need for support "where it appears to a local authority that a carer may have such needs currently or in the future" (s 10). There is no longer any requirement for a carer to request an assessment or for the carer to provide or intend to provide a substantial amount of care. There is a single duty to assess, regardless of the local authority's view of the carer's need for support, or of their financial resources or those of the person they care for (s 10(4)). The assessment must consider whether the carer is willing and able to continue to care, and have regard to whether the carer is working training or in education, or wishes to be so. The new eligibility criteria for carers' needs for care and support are in the *Care and Support (Eligibility Criteria) Regulations 2014*, reg 3.

11.2. Charging for care and support – ss 14 - 17

11.2.1. Local authorities will have the power to charge for meeting needs under ss 18 – 20 (s 14(1)). This is a change from the current framework under which, subject to the means assessment, local authorities are required to charge for residential care (s 22 NAA 1948). However it is expected that local authorities will continue to charge for residential care.

11.2.2. Note that there will remain some services in respect of which local authorities cannot charge which include provision of community equipment (aids and minor adaptations) and intermediate and reablement support services for the first 6 weeks (see regs 3 and 4 of the *Care and Support (Charging and Assessment of Resources) Regs 2014.*

11.2.3. It is proposed that from April 2016 the upper capital limit will rise to £118,000 for people in care homes whose property is taken into account in the financial assessment. For those in all other settings or people in care homes whose property is not taken into account in the financial assessment the upper capital limit will be £27,000. (See the consultation document, Care Act 2014: How should we deliver the 2016 reforms to cap care costs and manage appeals?)

11.2.4. **The cap on care costs - ss 15 - 16**

- The Commission on the Funding of Care and Support found that the adult social care funding system in England was "not fit for purpose"[9]and recommended the introduction of a cap on the lifetime contribution to adult social care costs that any individual needs to make. This was intended to address the difficulties that people have when faced with the risk of very high and unpredictable care costs.

- By virtue of s 15 a local authority may not make a charge under s 14 for meeting an adult's needs under s 18 if the total of the costs accrued in meeting the adult's eligible needs after the commencement of this section exceeds the cap on care costs. S 15 is expected to be implemented from April 2016 when the cap will be set at £72,000. It is to be uprated annually (s 16) and reviewed every 5 years (s 71).

- It is quite possible that a person will incur higher costs than £72,000 before they meet the cap however, as the costs cap only applies to the costs of meeting needs that a local authority assesses as eligible needs, and based on what the cost would be to the local authority of meeting the eligible needs (which will be set out in an independent personal budget (s 28)). Daily living costs are not included in accrued costs (s 15(6)), and after a person's accrued costs have reached the cap they may still be charged if and to the extent that the support that the local authority provides includes daily living costs (s 15(7)). It is proposed to set daily living costs at £230 per week (see the current consultation document "*Care Act 2014: How should we deliver the 2016 reforms to cap care costs and manage appeals?*").

- People paying for their own care will need to have their needs assessed in order to identify their accrued costs towards the cap. Local authorities are instructed to identify self-funders and begin assessments from October 2015. £116 million has been made available in funding to enable local authorities to undertake early assessments towards the cap during 2015/16. *See LAC (DH) (2015)2 Care and*

[9] Fairer Care Funding: the Report of the Commission on Funding of Care and Support: Vol. 1 (July 2011) p 24

Support: Getting ready for the cap on care costs – funding to support implementation.

- Under the new system people who develop eligible care and support needs before the age of 25 will have a zero cap for life. For those who develop a care and support need from the age of 25 the cap will be set, as mentioned above, at £72,000. See s 15(4) (the cap is an amount specified in regulations) and see the consultation document referred to above for the government's proposals.

11.3. **Appeals – s 72:** an appeals system may be introduced by regulations, and this is planned for April 2016; the power in s 72 is broad "appeals against decisions taken by a local authority in the exercise of their functions under this Part in respect of an individual"; the regulations will specify who can bring an appeal and on what grounds, who is to consider the appeal and the powers of the person or body deciding the appeal. The proposal made in the current consultation document is that the local authority will appoint an independent reviewer and the final stage of the process will be a local authority decision, the local authority making a decision having given consideration to the independent reviewer's recommendation.

11.4. **Prisoners – s 76:** an important provision which clarifies that local authorities are responsible for assessing and meeting the eligible care and support needs of people in prisons or "approved premises" in their areas. See also Chapter 17 of the statutory guidance.

11.5. **Safeguarding vulnerable adults - ss 42 – 57:** outline the responsibilities of local authorities and other partners in relation to safeguarding vulnerable adults including a new requirement to establish Safeguarding Adults Boards.

(NB: This is not a comprehensive list of all areas covered in Care Act 2014 Part 1.)

Bethan Harris
Garden Court Chambers

18 March 2015

HOARDERS – THE COUNTY COURT STAGE
DOMINIC PRESTON
18th May 2015

1. Introduction

1.1. *Hoarders are a varied bunch*: Their habit might be specific (newspapers, animals) or general (everything), it might be caused by sheer bloody mindedness, a coping mechanism for psychological issues, more serious personality disorders, neglect through infirmity or brain damage. It might be treatable or untreatable. It might be impacting on the locality (smells, fire risks) or it might simply represent a risk to property or to the hoarder himself (e.g. gas or electricity cut off to avoid fire risk but causing harm to hoarder).

1.2 *Legal proceedings:* Landlords, local authorities and neighbours are all potential claimants or prosecutors as a consequence of hoarding. Their powers and interests are different, but the two main weapons brought to bear on the problem by landlords wanting a quick fix tend to be injunctions and possession proceedings.

1.3 *Vulnerability:* One common theme amongst hoarders is that they tend to be vulnerable having often ingrained and determined views in which they do not recognise that what they are doing is anyone else's business. In that context breach of injunctions are likely as are possession orders and eviction.

1.4 *The legal advisor's conundrum*: disability, vulnerability, lack of capacity, mental health problems will very often elide as issues in a given case but they do not always overlap completely. This paper seeks to set out how those issues might play out and what strategies need to be considered.

1.5 In considering those strategies distinctions might need to be made between:

(1) those clients who **do not** lack capacity to make decisions about their tenancy, their hoarding behaviour or the litigation;
(2) Those clients who lack capacity to make decision about their tenancy and their hoarding but do not lack capacity to litigate;
(3) those clients who lack capacity to litigate but do not lack capacity to manage their tenancy or make hoarding decisions.

2. Injunctions: Overview of relevant issues

2.1 In hoarding cases there are usually two types of injunctions sought:

- access (for clearing, gas or other appliance safety checks, or general maintenance);
- injunctions requiring work by the tenant, e.g. clearing up, cleaning, maintenance of garden, hygiene, reducing number of pets, vermin clearance etc.

2.2 Often a prelude to possession, the strategy options in injunction cases (assuming conduct is proven and entitles claimant to injunction) are limited: avoidance because of inability to comply can lead to possession proceedings; Agreement to comply can lead to failure and imprisonment – and possession.

2.3 Some relevant case law:

- The court will only grant an injunction if it is necessary to do so. It is not 'necessary' to grant an injunction if the defendant does not have the capacity to understand the injunction or does not have the ability to comply with the injunction: *Wookey v Wookey* (1991) 2 FLR 319. Injunctions are intended to work on the mind of the defendant. If he is incapable of responding to the threat of imprisonment, no injunction will be made;
- It is not necessary for the defendant to understand the finer points of procedure. It is enough that he understands what the injunction is asking him to do and that he understands that if he disobeys the order he will be in trouble and go to prison: P v P (Contempt of Court) Mental Capacity (1999) 2 FLR 897;
- Even if someone understands an order, it will not be 'necessary' to make it if he cannot comply with it because of his mental health condition: see *R (Cooke) v DPP* [2008] EWHC 2703 (Admin). This must not be confused with a *likelihood* that a breach will occur. The question is whether the defendant is *capable* of complying with the order.

3. <u>Possession claims: Overview of defences where social landlord seeking possession on discretionary grounds.</u>

3.1 Where possession is sought pursuant to a discretionary ground for breach of tenancy, ASB or waste[1] the court must consider whether it is reasonable in the circumstances to make a possession order (HA 1985, s 84(2); HA 1988, s. 7). An alternative to possession might be to adjourn the claim (pursuant to HA 1988, s. 9(1); HA 1985 s. 85). If a possession order is considered reasonable, the court must go on to consider whether it is reasonable to postpone/suspend the operation of the possession order and on what terms (HA 1985, s 85; HA 1988, s. 9(2) and (4)).

3.2 *Exercise of discretion to suspend:* Where the conduct is ASB affecting neighbours (e.g. smell, fire risk), the court must consider the effect that the nuisance or annoyance has had on persons other than the Defendant, any continuing effect the nuisance or annoyance is likely to have on such persons, and the effect that the nuisance or annoyance would be likely to have if the conduct is repeated. It must also consider the difficulty of getting witnesses to court if the conduct were repeated (HA 1985, s. 85A; HA 1988, s. 9A).

[1] For secure tenancies: Housing Act 1985, Sch. 2, grounds 1, 2, 3, 4; For assured tenancies: Housing Act 1985, Sch. 2, grounds 12, 13, 14 and 15.

3.3 *Strategies available:* Where the nuisance has a serious consequence on the neighbours, then absent cessation an outright possession order is almost inevitable: A possession order should only be suspended or postponed if there is a realistic likelihood of a cessation of the nuisance or annoyance - *Manchester CC v Higgins* [2006] HLR 14.

3.4 In those circumstances, where the hoarding is likely to be proven, the only strategies available for avoiding possession are:

(1) to show that the hoarding is not affecting neighbours. A risk to self and a risk of damage to property remains important but represents a lowering of the bar to avoiding possession;

(2) to show that the hoarding will cease. Either through the client's change in behaviour, or if the behaviour is related to a medical condition, by showing that medical or social intervention will assist him. Potential sources of information for that purpose:
   (i) a medical report with prognosis and recommendations;
   (ii) proof of social services intervention following an assessment;
   (iii) proof of Community Mental Health intervention following an assessment;

(3) If the Defendant is incapable of doing the clean up himself, to show that there is an alternative means by which the property can be cleared up. For instance:
   (i) *with the Defendant's agreement*, third party intervention – Social services, friends, voluntary organisations. Can the Defendant be persuaded to allow others to intervene?
   (ii) *without the Defendant's agreement,* can others be persuaded to remove the Defendant, clear the Property and put him back in without his consent?

(4) to persuade the court that if the Defendant must go, he should not go without suitable alternative accommodation being available[2].

3.5 The exercise of discretion – assistance from statute and case law:

(1) *HRA 1998, Article 8, proportionality*:
   - Only applies if the landlord is a public authority (HRA 1998, s 6). Most social landlords will be public authorities although the point is not straightforward: *R(Weaver) v London & Quadrant HT* [2010] 1 WLR 363;
   - In discretionary cases proportionality (in HRA terms) and the reasonableness of a possession order are conjoined issues: see *Manchester CC v Pinnock* [2010] 3 WLR at [55] to [56]. Pleading proportionality does not add much, save that in *Pinnock*, Lord

[2] Although there is authority suggesting that it is not for the court to consider whether or not there is alternative accommodation available on the tenant's eviction (see *Lewisham LBC v Akinsola* (1999) 32 HLR 414 at 417 decided in the context of anti-social behaviour) such authority is moot and may not have survived the statutory changes since it was decided, notably the Equality Act 2010 and the Human Rights Act 1998 and the judgment in *Pinnock*.

Neuberger said at [65]: *'...the suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty, and that the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases seem to us well made.'*

(2) *Possession and the Public Sector Equality Duty.* Section 149 of the Equality Act 2010 provides that a 'public authority'[3] shall, in exercising its functions, have due regard to the need to advance equality between those with and those without a disability (s. 149(1)(b) and (3)(b)). In doing so the authority must have regard to the particular disabilities of a disabled person (s. 149(4)). Compliance with those duties may involve treating a person more favourably than someone else would otherwise be treated (s. 149(6)). Note:

- The duty is no mere tick box exercise. It requires the public authority to actively engage with the requirements of the duty: *Barnsley MBC v Norton* [2011] EWCA Civ 834;
- It is only a duty to 'have due regard' … ;
- It cannot trump the absence of any likelihood of nuisance to others coming to an end, although it might buy time to allow a managed transfer to alternative accommodation (see *Brent v Corcoran* [2010] HLR 43 at [19]-[21]; *Barnsley MBC v Norton* [2011] HLR 46).

(3) *Discrimination under Equality Act 2010.* Sections 6, 15 and 35 will apply provided the defendant has a disability[4], and there is a discrimination. A person discriminates if they treat someone with a disability less favourably because of something arising in consequence of the disability *and* it cannot be shown that such treatment is a proportionate[5] means of achieving a legitimate aim (s. 15)[6]. Not only must there be a disability, the defendant's conduct must also be *caused by or contributed by* the disability: the hoarding causatively linked to the disability.

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[3] Equivalent test for HRA 1998, s. 6; *R(Weaver) v London & Quadrant HT* [2010] 1 WLR 363

[4] A person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day to day activities (Equality Act 2010, s. 6).

[5] When considering whether such discrimination is proportionate, the physical, mental and social well-being of a neighbour is a legitimate aim for the purposes of section 15 EA 2010 (see *Manchester CC v Romano* [2004] EWCA Civ 834). In that context, an absence of any real prospect of a cessation of the harm being caused will render any eviction proportionate: *Brent v Corcoran* [2010] HLR 43 at [19]-[21]; *Romano*.

[6] The obligation not to discriminate applies to eviction or taking steps to evict (s. 35(1)).

3.6 *Alternatives to possession – where Defendant has capacity (both to litigate and to make decisions about his tenancy).* Other powers that might be used in a particular case:

(1) Local authorities have the power to act unilaterally if they wish in some circumstances, e.g. filthy and verminous premises (see Public Health Act 1936, s 83 and 287(2); see also Public Health Act 1961, s. 36).

(2) Local authorities also have removal powers where a person is suffering from chronic disease or being aged, infirm or physically incapacitated are living in insanitary conditions and are unable to devote themselves to or are not receiving proper care and attention: National Assistance Act 1948, ss 21 and 47. Such powers could be exercised temporarily whilst the landlord clears out the property and restores it to good condition;

3.7 Unfortunately there are a number of difficulties with those provisions as a means of preventing possession by pushing the court to encourage an alterative means of bringing the hoarding to an end:

- The list of pre-conditions before they can be used are extensive and the facts of a particular case may not suit them;
- The landlord may not be a local authority and it may therefore be necessary to persuade a third party (the local authority) to act which can be difficult where they are not a party;
- Where the claimant has not thought of the option themselves, there may be no opportunity to suggest it as an alterative. In particular, the defendant may not wish you to push for that option – he's quite happy with his hoarding and doesn't want a clear-out! Absent a lack of capacity, you may not be able to advance that alternative.

3.8 Absent lack of capacity, an intransigent hoarder will struggle to defend a possession claim. If he refuses to allow you to advance a case which pushes for alternatives to possession, you may be in difficulties …

4. <u>Possession claims: Overview of potential defences in 'as of right claims'.</u>

4.1 Where the claimant has a mandatory entitled to possession (e.g. non-secure tenancy terminated; assured shorthold and section 21 claim) the defences are much more limited:

(1) HRA, Article 8 and proportionality.

- Where the landlord is a private landlord, highly unlikely to succeed even if the defence is theoretically available: *Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645 (Ch); *Malik v Fassenfelt [2013] EWCA Civ 798, [2013] 3 E.G.L.R. 99*.
- Where landlord is a public authority available but still exceptional: *Manchester CC v Pinnock* [2011] 2 AC 104; *Hounslow LBC v*

Powell [2011] 2 AC 186. Personal circumstances will not be enough. *Corby BC v Scott* [2012] HLR 23 at [31] to [33]:

> *I consider that Corby BC v Scott emphasises that, in such a case, a judge: (i) should be rigorous in ensuring that only relevant matters are taken into account on the proportionality issue; and (ii) should not let understandable sympathy for a particular tenant have the effect of lowering the threshold identified by Lord Hope in Powell [2011] 2 A.C. 186 at [33] and [35]. As for West Kent HA v Haycraft, it seems to me to emphasise the significance of the height of that threshold, or, to put it another way, how exceptional the facts relied on by any residential occupier must be, before an art.8 case can have a real prospect of success.*

- A hook is needed – the most likely hook is a failure to comply with existing policy (akin to JR even if not on all fours – see below)

(2) A JR defence might be available: *Doran v Liverpool City Council* [2009] EWCA Civ 146 at [49] to [50]; *Doherty v Birmingham City Council* [2008] UKHL 57, [2008] 3 WLR 636. But such a defence will only succeed if there is a failure to follow policy or some other obvious breach of public law: *Central Bedforshire Council v Housing Action Zone Ltd and Taylor* [2010] 1 WLR 446 at [40]; *Barber v Croydon LBC* [2010] HLR 26; *Eastland Homes v Whyte* [2010] EWHC 695 (QB)[7].

(3) Discrimination under the Equality Act 2010, ss 6, 15 and 35 (see above for consideration):

- In an as of right case, proportionality will be harder to establish but will still potentially be available. E.g. no eviction until local authority have found alternative accommodation for a vulnerable defendant.
- Proportionality not the same as HRA proportionality: staged (including whether better alternatives available to meet legitimate aim) and *Pinnock* presumptions are merely factors: *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15

5. <u>The game changer – lack of capacity to manage tenancy or make 'hoarding' decisions</u>

5.1 The following are worth emphasis:

(1) *Capacity is issue specific*.

- The ability to make litigation decisions does not equate to an ability to make tenancy decisions and vice versa.
- Equally, the inability to make tenancy decisions does not equate to an inability to make litigation decisions and vice versa.
- However, if there is an inability to make tenancy decisions, in particular about whether to stop hoarding, there is likely to be an

[7] See also *R v Newham LBC, ex p. Bibi* [2001] EWCA Civ 607; (2001) 33 H.L.R. 84; *Leicester CC v Shearer* [2014] HLR 8

inability to litigate where the litigation concerns whether or not to stop hoarding. Ultimately the issue is one for the court on the available medical evidence.

(2) *The presumptions at MCA 2005 ss 1(2) to (4):*

- A person must be assumed to have capacity unless it is established otherwise;
- A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

5.2 The advantages if a person lacks capacity – the unlocking of options:

(1) Instructions will now be from a litigation friend. If those instructions are in the client's best interest, there is likely to be a greater degree of flexibility in arguing for alternatives to possession, e.g. help from others, community care etc;

(2) The Court of Protection jurisdiction is now available in which the court can make decisions about what is in the client's best interest and can authorise third parties to take steps (including if required deprivation of liberty) to secure the client's best interest;

(3) The county court is likely to take the view that the better forum for deciding what should be done to resolve the hoarding and the problems it creates, rests with the COP. Possession proceedings can be stayed or dismissed to allow that to happen.

(4) The COP can make far more nuanced decisions. E.g. it can direct that alternative accommodation is available pending the clean up or that before the defendant is asked to (temporarily) leave, social workers attend on several occasions to explain what is happening and to give the defendant an opportunity to go peacefully.

5.3 **Beware:** The COP strategy depends on the defendant being without capacity during the entirety of the proceedings. In particular:

(1) Some landlords still try for possession where there is a risk of the defendant regaining capacity on the ground that when he regains capacity, no monitoring can continue;

(2) Don't ignore the need for community care support which might continue even if the defendant regains capacity and which might ameliorate his behaviour.

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005 AND IN THE MATTER OF XX

BETWEEN :

A COUNCIL

Applicant

-and-

XX
(by his litigation friend, the Official Solicitor)
P, the person to whom these proceedings relate and the First Respondent

---

draft ORDER

BEFORE District Judge Wisdom sitting as a nominated judge of the Court of Protection at the Capacious Combined Courts on 22 May 2014

UPON reading the draft order agreed and submitted by the parties together with the Position Statements filed by each.

UPON the parties confirming that XX moved to temporary accommodation at [address] on [date] and that this accommodation will be made available for him to occupy for so long as the clearance and reinstatement works necessitate his absence from his home at [address]

UPON the parties confirming that XX's secure tenancy of [address] subsists, and that XX will not be required to any occupation charge for [address] but will be liable for the utility bills incurred there.

UPON the applicant agreeing to use its best endeavours to carry out clearance works to [address] in accordance with the attached 'Schedule of Clearance Works' and to complete the same as soon as is practicable and in any event during the week commencing [date]

UPON the applicant agreeing to use its best endeavours to prepare and disclose to XX's solicitor as soon as practicable and in any event during the week commencing [date] a schedule of the reinstatement works required to put [address] into a safe and habitable comdition

UPON the applicant agreeing to use its best endeavours to complete the reinstatement works to [address] as soon as practicable and in any event during the week commencing [date]

AND UPON the parties agreeing that [address] will be made available for XX to occupy as soon as practicable after the completion of the clearance and reinstatement works and that XX will be expected to move back to and occupy [address] as soon as is practicable after he is notified that it is ready for occupation.

IT IS DECLARED THAT XX lacks capacity to -

1) litigate these proceeding

2) make decisions about the management of [address] in accordance with the covenants of his tenancy agreement

3) decide whether he should vacate [address] whilst the clearance and reinstatement works are carried out

IT IS FURTHER DECLARED AND ORDERED that it is lawful, being in XX's best interests, that -

1) XX is not permitted to re-enter or re-occupy [address] for the duration of the clearance and remedial works other than with the prior agreement of the applicant.

2) The applicant and/or their agents and contractors have the right to enter and remain upon [address] for the purposes of and duration of the clearance and remedial works.

3) The applicant will offer the opportunity to XX to have accompanied visits to [address] at regular intervals during the clearance and reinstatement works so long as it is safe to do so and, in the event that it is not safe to do so or that XX declines such visits, then the applicant will provide XX with photographs showing the progression of those works.

4) The clearance works to [the address] will be carried out in accordance with the attached 'Schedule of Clearance Works'.

5) The applicant and/or its agents have the right to enter and inspect XXs temporary accommodation at [address] for the purpose of checking that the same remains in a safe habitable state and shall, save in the event of any immediate risk to his safety and

wellbeing, give XX no less than 3 days notice of its intention to enter and inspect.

6) The applicant and/or its agents have the right to enter and remain upon XX's temporary accommodation at[address] for the purpose of assisting XX to take such steps, or in the event that he refuses to or fails to do so, to themselves take such steps, as are required to ensure that the same remains in a safe habitable state and shall, save in the event of any immediate risk to his safety and wellbeing, give XX no less than 3 days notice of its intention to enter for that purpose.

7) In the event that XX accumulates any belongings and effects on the communal land surrounding his temporary accommodation at [address] then the applicant has the right to remove the same.

8) In the event that the same is necessary then the applicant may use such reasonable and proportionate measures as are necessary to give effect to the provisions of this order.

AND IT IS FURTHER ORDERED THAT -

9) The matter shall be listed for an oral hearing before District Judge Wisdom on the first open date after [date] at which time the court will consider such final declarations and orders are necessary and appropriate in relation to XX's present and future occupation of [address].

doughty street chambers

Court of Protection and Housing
Strategies for hoarder cases

Dominic Preston, Doughty Street Chambers

'at the heart of human rights'

doughty street chambers

Part 1: The Court of Protection

An overview

'at the heart of human rights'

The Court of Protection – Its purpose

- To adjudicate on disputes about what an adult should do where the adult does not have the capacity to make that decision themselves.
- Requires:
  - A lack of capacity to decide a particular issue
  - A dispute about how that issue should be resolved
- Essence of COP:
  - Making a choice between different options
  - ***Cannot*** create choices
  - **But** powerful investigatory powers – can require evidence on what choices are available
- Governed by Mental Capacity Act 2005

'at the heart of human rights'

The structure of the MCA 2005
Sections 1-4, 15 and 16

- The (overriding) Principles: section 1.
- The jurisdictional issue – lack of capacity:
  - Section 2: Definition of people who lack of capacity
  - Section 3: Definition of 'inability to make a decision'
- Making decisions for P
  - Section 4: The 'best interest' principle
  - Section 15: Court's power to make declarations
  - Section 16: Court's power to make decisions and/or appoint deputies to make decisions.

Note: 'P' is the person lacking capacity

Other important provisions to highlight?

- Section 48: interim orders and directions
- Section 50: Applications to COP
  - Permission usually required
  - Whether it is granted depends on:
    - Applicant's connection to P
    - Reasons for the application
    - Benefit to P of the application/orders sought
    - Alternative means of achieving that benefit
- Code of Guidance to MCA 2005
- Court of Protections Rules 2007 ('CoPR')

Section 1 – the Five Principles

- A person must be assumed to have capacity unless it is established that he lacks capacity.
- A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- An act done, or decision made, on behalf of P must be done or made in his best interests.
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Section 2 – Establishing lack of capacity

- Established if:
  1. P is ***unable to make a decision*** for himself ***in relation to a matter***
  2. Because of an impairment of, or a disturbance in the functioning of, the mind or brain
- Irrelevant whether the impairment is temporary or permanent
- Cannot be determined by mere reference to age/appearance or a condition or aspect of P which might lead others to make unjustified assumptions about his capacity
- On 'balance of probabilities'
- P must be 17 or over (unless an 'anticipatory' decision; s. 18(3))

Section 3: Inability to make decisions

Capacity is issue specific.

P cannot make a decision for himself if he is:

- unable to understand the information relevant to the decision.
- unable to retain that information.
  - Ability to retain for a short period does not prevent capacity
  - But must be able to keep it 'on line' during the decision making process
- unable to use or weigh the information as part of the process of making the decision
- unable to communicate his decision (whether by talking, using sign language or any other means).

Note: 'relevant information' includes information about the reasonably foreseeable consequences of making a choice or making no decision at all

Capacity to litigate – case law

- **Masterman-Lister v Brutton & Co** [2003] 1 WLR 1511, per Chadwick LJ at 75 ,79; per Kennedy LJ at 26, 27.
- **Sheffield CC v E & S** [2004] EWHC 2808 (Fam); [2005] Fam 326, per Sir James Munby (Pres) at 34
- **Bailey v Warren** [2006] EWCA Civ 51; [2006] C.P. Rep. 26 per Arden LJ at 126

Section 4 – Best interest decisions (1)

1. Age, appearance or a particular condition or aspect of behaviour which might lead others to make unjustified assumptions about what might be in P's best interest cannot be only basis for determining best interest
2. Must consider all relevant circumstances
3. Must consider likelihood of regaining capacity and if so, when that is likely to happen
4. Must encourage P's participation, as fully as possible, in the decision making process
5. Must consider his wishes, feelings, his prior capacitous written statements, beliefs, values, and any other matter P would have been likely to consider himself

Section 4 – Best interest decisions *cont*. (2)

6. Must also consider the views of:
   - anyone P has indicated should be consulted on the issue in question
   - anyone engaged in caring for or interested in his welfare
   - anyone granted a lasting power of attorney
   - any deputy appointed by the court
7. Where decision is about life-saving treatment, the decision must not be motivated to bring about his death

Court's powers: Declarations (s. 15)

The court may make declarations as to:

- Capacity or lack of capacity to make an **identified decision**
- Capacity or lack of capacity to make a decision relating to **identified issues**
- The lawfulness or otherwise of any act (or omission) done or yet to be done in relation to P

Courts power to make decisions: s. 16

1. Can only make an order if P lacks capacity in relation to a matter concerning:
   - **personal welfare**;
   - **property and affairs**
2. May, by order, make a decision in P's stead in relation to those matters
3. In the alternative court may appoint a deputy provided that in doing so the court :
   1) has had regard to the general proposition that it is better for the court to make a decision than a deputy;
   2) has limited the deputy's powers in scope and duration to that which is reasonably practical in the circumstances

'at the heart of human rights'

Power to make personal welfare decisions: Sections 16 and 17

Power to make personal welfare decisions includes:

(1) deciding where P lives;

(2) deciding what contact P should have with another person;

(3) prohibiting another person from contact with P;

(4) giving or refusing consent to the carrying out or continuation of treatment;

(5) giving a direction for the handover of responsibility for the care of P's health.

Powers in relation to property and affairs
S. 18

Includes the following powers likely to be relevant to housing:

1. **Control and management of P's property;**
2. Sale, exchange, charging, gift or other disposition of P's property;
3. Acquisition of property in P's name or on P's behalf
4. Discharge of P's debts and obligations;
5. Exercise of any power vested in P
6. Conduct of legal proceedings in his name

Legal aid and costs:

- Inter partes: General rule is no order for costs (CoPR Part 19, Rules 155-168)
- Legal aid for MCA 2005 - generally in scope (LASPO, sch. 1, para 5)
- But note only available for **advocacy in the court of protection** to the extent that the proceedings concern (sch. 2 para 4):
  - A person's right to life;
  - **A person's liberty or physical safety**
  - A person's medical treatment
  - A person's right to marry/enter into sexual relations
  - A person's right to family life
- See also Civil Legal Aid (Merits Criteria) Regulations 2013, para 52

doughty street chambers

Part 2 – a practical example

Hoarders, strategies and the potential benefits of the Court of Protection

'at the heart of human rights'

Common themes in hoarder cases

- Landlord's concerns?
  - fire, health, damage to property, nuisance to others
  - Quick fix: Injunctions and/or possession orders

- Common themes
  - Vulnerable clients; intransigent clients
  - Injunctions are just the beginning

- Some conundrum's for the legal advisor:
  - To act on instructions
  - To be aware and consider whether client has capacity
  - To act in client's best interest

Injunctions – Overview of Issues

- Types of injunctions sought?
  - Access
  - Requiring tenant to do works/take action

- A prelude to possession? Limited strategy options:
  - Evidence of hoarding?
  - Ability to comply with injunction?
  - Agree to injunction? Risk of failure?

- Cases: Wookey v Wookey; P v P; R (Cooke) v DPP
  - Main issue: ability to comply.

Possession Cases - Overview

- Discretionary cases:
  - Breach of ground
  - Reasonable to make order
  - Reasonable to suspend order/time to move out
  - If classed as ASB, no suspension absent realistic likelihood of cessation

- 'As of right cases' – what defences?

Discretionary Possession Cases: Hoarders and Strategy

- To show it is not affecting anyone – is it ASB? Removes heightened *Higgins* hurdle
- To show hoarding can come to an end:
  - Voluntary change of behaviour?
  - Medical problem – medical intervention – good prognosis: expert? CMHT involved? GP? Counseling? CPN?
  - Social problem – social services intervention: Referral being made? Assessment/Care plan/services in place? Voluntary support? Family support?
  - Tenant consents but needs help? Voluntary support? Funding for clear out? Landlord?
- Last ditch defence: Possession but not without Suitable alternative accommodation.

Discretionary Possession Cases: The legal props (1)

- HRA, Article 8, Proportionality
  - Public Authority
  - Adds little to reasonableness
  - But *Pinnock* at [65]

- Disability discrimination – Equality Act 2010
  - Impairment
  - Having a substantial, long-term adverse effect on carrying out normal day to day activities
  - Causing/contributing to conduct that is a breach
  - Eviction is not proportionate means of achieving legitimate aim – staged test: *Akerman-Livingstone*

Discretionary Possession Cases
The legal props (2)

- **Public Sector Equality Duty - S. 149 of Equality Act?**
  - Only public authorities (*Weaver*)
  - Only 'due regard';
  - For ASB, only relevant for Suitable Alternative Accommodation: See *Corcoran* and *Norton*
  - Not a tick box exercise
  - Not dependent on causative link – outcome of homelessness relevant in itself.

‘As of right’ possession claims: defences?

- *HRA, Article 8 and proportionality*
  - Social or private landlord? Public authority? Horizontal application?
  - Personal circs not enough – need a hook – breach of promise/policy.
- *JR defences* – Public authority; Needs a hook; *Barber* and *Whyte*
- *Public Sector Equality Duty? Where no causation?*
- ***Disability discrimination* – Equality Act 2010, s. 6, 15, 35**
  - Proportionality (not HRA proportionality). Staged consideration including ‘is there a better alternative’
  - **But needs causation**
  - Still need a solution etc … same strategies as discretionary grounds

Proportionate alternatives where client has capacity and refuses to alter behaviour

- **Legal alternatives to possession for landlord:**
  - Public Health Act 1936, s 83 and 287(2)
    - Filthy and Verminous premises
  - Public Health Act 1961, s. 36
  - National Assistance Act 1948, ss 21 and 47

- **Practical conundrums for tenant lawyers:**
  - Pre-conditions may not fit your facts
  - Local authority may not be a party
  - Can't advance them without instructions

Proportionality if client lacks capacity?

- Instructions from litigation friend – wishes relevant but client's best interests are key
- COP jurisdiction available – more nuanced solutions in client's best interest
- Disability discrimination defence: not proportionate because better alternative: COP.
- Order sought in county court:
  - Stay of possession proceedings whilst in COP
  - Ask for dual-ticketed judge to hear both cases.

Beware: Only for so long as client doesn't have capacity – a moving feast …

How would you use COP?

- Expert evidence on capacity
- Landlord or local authority can apply (OS won't)
  - Stay in possession proceedings forces landlord's hand
- Final Orders sought:
  - Declaration on capacity
  - Order moving P to temporary accommodation
  - Order/declaration giving landlord/local authority power to enter, carry out works and dispose of belongings
  - Order moving P back into his home
  - Each with safeguards allowing for further opportunity to persuade P to comply

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Court of Protection and Housing
Strategies for hoarder cases

Dominic Preston, Doughty Street Chambers

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