COURT OF PROTECTION

- **An introduction to the Court, and its powers**
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The Court of Protection, an introduction

1. The 'old' Court of Protection was established under s. 93(2) of the Mental Health Act 1983. New provision relating to people who lack capacity was made by the Mental Capacity Act 2005. Section 45 of that Act ("the 2005 Act") provides:

> *'(1) There is to be a superior court of record known as the Court of Protection.*
> *…*
> *(6) The office of the Supreme Court called the Court of Protection ceases to exist.'*

2. The Code of Practice (para 8.1) issued under the 2005 Act explains:

> *'Section 45 of the Act sets up a specialist court, the Court of Protection, to deal with decision-making for adults (and children in a few cases) who may lack capacity to make specific decisions for themselves. The new Court of Protection replaces the old court of the same name, which only dealt with decisions about the property and financial affairs of people lacking capacity to manage their own affairs. As well as property and affairs, the new court also deals with healthcare and personal welfare matters. These were previously dealt with by the High Court under its inherent jurisdiction.'*

3. The relevant provisions of the 2005 Act came into force on 1 October 2007.

4. Cases are listed before one of three tiers of judges:
    a) Tier 1, i.e. District Judges,
    b) Tier 2, i.e. Circuit Judges, and
    c) Tier 3, i.e. High Court Judges.

5. All of the High Court Judges in the Family Division can sit as Tier 3 Judges in the Court of Protection.

6. The Court's top judges are:

    a) President: McFarlane LJ
    b) Vice-President: Hayden J
    c) Senior Judge: HHJ Hilder

Key provisions of the Mental Capacity Act

7. The Act makes provision, inter alia, for: (i) determining a lack of capacity; and (ii) how decisions should be made (by the court and others) in respect of an incapacitated person.

Exclusion of liability when caring for an incapacitated adult

8. Section 5 of the Act provides:

> ***Acts in connection with care or treatment***
>
> *(1) If a person ("D") does an act in connection with the care or treatment of another person ("P"), the act is one to which this section applies if—*
>
> *(a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and*

(b) when doing the act, D reasonably believes—

(i)that P lacks capacity in relation to the matter, and

(ii)that it will be in P's best interests for the act to be done.

(2) D does not incur any liability in relation to the act that he would not have incurred if P—

(a)had had capacity to consent in relation to the matter, and

(b)had consented to D's doing the act.

The court's main powers / functions

9. Section 15 of the Act empowers the court to make declarations, i.e. as to a person's capacity:

Power to make declarations

(1) The court may make declarations as to—

(a) whether a person has or lacks capacity to make a decision specified in the declaration;

(b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;

(c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

(2) "Act" includes an omission and a course of conduct.

10. Section 16 of the Act provides that – if a person lacks capacity in respect of a matter – the court can make decisions, or appoint a deputy to make decisions, see s. 16(2):

(2) The court may—

(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or

(b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.

Bringing proceedings in the Court of Protection

11. The Act regulates applications to the court. In some cases, a person has a right to issue proceedings. In other cases, an applicant must secure permission from the court. Section 50 of the Act provides:

> ***Applications to the Court of Protection***
>
> *(1) No permission is required for an application to the court for the exercise of any of its powers under this Act—*
>
> > *(a) by a person who lacks, or is alleged to lack, capacity,*
> >
> > *(b) if such a person has not reached 18, by anyone with parental responsibility for him,*
> >
> > *(c) by the donor or a donee of a lasting power of attorney to which the application relates,*
> >
> > *(d) by a deputy appointed by the court for a person to whom the application relates, or*
> >
> > *(e) by a person named in an existing order of the court, if the application relates to the order.*
>
> *(1A) Nor is permission required for an application to the court under section 21A by the relevant person's representative.*
>
> *Nor is permission required for an application to the court under section 21ZA by any independent mental capacity advocate or appropriate person representing and supporting the cared-for person (see Part 5 of Schedule AA1).*
>
> *(2) But, subject to Court of Protection Rules and to paragraph 20(2) of Schedule 3 (declarations relating to private international law), permission is required for any other application to the court.*
>
> *(3) In deciding whether to grant permission the court must, in particular, have regard to—*
>
> > *(a) the applicant's connection with the person to whom the application relates,*
> >
> > *(b) the reasons for the application,*

(c) the benefit to the person to whom the application relates of a proposed order or directions, and

(d) whether the benefit can be achieved in any other way.

(4) "Parental responsibility" has the same meaning as in the Children Act 1989 (c. 41).

12. Part 8 of the Court of Protection Rules 2017 make further provision as to permission.

The Act's principles

13. The Act begins with a statement of principles:

1 The principles

(1) The following principles apply for the purposes of this Act.

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) 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.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) 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.

Incapacity

14. Sections 2 and 3 make provision in respect of the test for capacity:

2 People who lack capacity

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to–

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person ("D") may exercise under this Act–

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity,

is exercisable in relation to a person under 16.

(6) Subsection (5) is subject to section 18(3).

15. Section 3 provides:

3 Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable–

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–

(a) deciding one way or another, or

(b) failing to make the decision.

16. There are two elements to incapacity: the diagnostic test and the functional test. Section 2(1) demands that there must be an *'impairment of, or a disturbance in'* the functioning of the mind or brain (this is the diagnostic test) and that, '*because of*' that impairment, the person is unable to make the decision (this is the functional test). The diagnostic test will require medical evidence, recording a diagnosis. Often, expert evidence is required to determine capacity.

Best interests

17. If a person lacks capacity, an act or decision on their behalf must be in the person's best interests, see the principles at s. 1(5). Section 4 provides the best interests test:

4 Best interests

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of–

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider–

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable–

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of–

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which–

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections

(1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) "Life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11) "Relevant circumstances" are those–

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

18. In determining P's best interests, the court will choose from the available options, see ***N v A Clinical Commissioning Group*** [2017] UKSC 22. A priority in cases is, therefore, to establish what the options are. That might include the public authorities deciding what services, or accommodation, they will offer to P.

When should applications be made in homelessness cases?

19. The court has a number of functions, e.g. determining whether an person has, or lacks capacity, and deciding what is in an incapacitated person's best interests. However, the 2005 Act does not determine *when* recourse must be had to court, to determine those questions.

20. A local authority's decision to issue, or to not issue, proceedings is amenable to judicial review.

21. Aside from cases involving a deprivation of liberty, there are, arguably, three scenarios in which a local authority might need to issue proceedings:

    a) where the local authority seeks to intervene, e.g. entering a home / restricting a person's access, and where that intervention is not otherwise authorised;

b) where there is doubt about the individual's capacity to refuse services which the local authority proposes / is duty bound, to deliver; and

c) where the adult is at risk of abuse or neglect, and court orders are necessary to guard against the risk.

(1) Intervention proposed

22. Local authorities have no inherent power to regulate or control a vulnerable adult. In ***A Local Authority v A (A Child) & Anor*** [2010] EWHC 978 (Fam), at [75], Munby LJ said:

> *'... if there is objection to the steps it is proposing to take, either from the vulnerable adult or from relatives, partners, friends or carers, it seems to me that a local authority needs to enlist the assistance of the court – either the High Court or the Court of Protection – before it embarks upon any attempt to regulate, control, compel, restrain, confine or coerce a vulnerable adult. Only if the person is compliant and there is no objection from those concerned with his welfare is a local authority probably going to be justified in having resort without judicial assistance to the doctrine of necessity. And even where the person appears to be compliant a local authority needs to act with considerable caution before attempting even to regulate or control, let alone to restrain or coerce, a vulnerable adult. One cannot conflate absence of objection with consent. And to equate helpless acquiescence with consent when a person is confronted with the misuse or misrepresentation of non-existent authority by an agent of the State is both unprincipled and, indeed, fraught with potential danger...'*

23. Section 5 of provides some protection from liability for acts carried out when it is believed a person lacks capacity. But, s. 5 does not authorise regulation, control, restrain, confinement etc. Therefore, if such steps are proposed, the court's authority will be required.

(2) Doubt about the individual's capacity to refuse services which the local authority proposes / is duty bound, to deliver

24. The Code of Practice to the 2005 Act says:

> ***Who should make the application?***
>
> *8.7 The person making the application will vary, depending on the circumstances. For example, a person wishing to challenge a finding that they lack capacity may apply to the court, supported by others where necessary. Where there is a disagreement among family members, for example, a family member may wish to apply to the court to settle the disagreement – bearing in mind the need, in most cases, to get permission beforehand (see paragraphs 8.11–8.12 below).*
>
> *8.8 For cases about serious or major decisions concerning medical treatment (see paragraphs 8.18–8.24 below), the NHS Trust or other organisation responsible for the patient's care will usually make the application. If social care staff are concerned about a decision that affects the welfare of a person who lacks capacity, the relevant local authority should make the application.*
>
> [emphasis added]

25. If there are doubts about a person's capacity to refuse social care support from a local authority, it may be impossible to resist issuing proceedings.

26. Section 11(1) and (2) of the Care Act 2014 provides that refusal to accept an assessment of need is not necessarily valid, if the person lacks capacity to refuse:

> ***Refusal of assessment***
>
> *(1) Where an adult refuses a needs assessment, the local authority concerned is not required to carry out the assessment (and section 9(1) does not apply in the adult's case).*
>
> *(2) But the local authority may not rely on subsection (1) (and so must carry out a needs assessment) if—*
>
> *(a) the adult lacks capacity to refuse the assessment and the authority is satisfied that carrying out the assessment would be in the adult's best interests, or*
>
> *(b) the adult is experiencing, or is at risk of, abuse or neglect.*
>
> *…'*

27. If a person refuses an assessment, and:

a) The person lacks capacity to refuse, but the authority considers the assessment to be in the person's best interests; or

b) The person is at risk of abuse or neglect (which includes self-neglect),

The duty to assess remains, and orders from the court might be necessary to enable the authority to comply with its assessment duty.

28. There might also be an obligation to apply to court if, following assessment, the adult refuses services to meet eligible needs.

29. What social care service might be relevant to a person's accommodation?

30. Section 18 of the Care Act provides that local authorities are (subject to certain conditions, which are not relevant here) under a duty to meet needs for care and support which meet the eligibility criteria. The Care and Support (Eligibility Criteria) Regulations 2015 set out the eligibility criteria.

31. Needs are eligible needs if (a) they arise from or are related to a physical or mental impairment or illness; (b) as a result of the needs, the adult is unable to achieve two or more specified outcomes; and (c) as a consequence there is, or is likely to be, a significant impact on the adult's well-being.

32. The specified outcomes are:

(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.

33. Outcomes 'e' and 'f' bring the adult's accommodation issues into the scope of social care provision. The statutory Care and Support Guidance summarises each eligibility outcome at para. 6.106. In respect of 'f', the guidance says:

> *Maintaining a habitable home environment - local authorities should consider whether the condition of the adult's home is sufficiently clean and maintained to be safe. A habitable home is safe and has essential amenities. An adult may require support to sustain their occupancy of the home and to maintain amenities, such as water, electricity and gas.*

34. Therefore, an adult may have an eligible need for support to maintain their accommodation. If:
    a) There is eligibility for support to maintain a habitable home environment;
    b) The proposed service is refused;
    c) There is a doubt about capacity to refuse; and
    d) The individual faces being homeless,

    it may be difficult to justify failing to ask the court to determine capacity.

(3) Where the adult is at risk of abuse or neglect, and court orders are necessary to guard against the risk

35. Local authorities may be obliged to issue proceedings, if proceedings are necessary to discharge the authority's safeguarding duties.

36. The judgment in ***London Borough of Hillingdon v PS & Anor*** [2014] EWCOP 55 is one of very few cases considering the issue of permission. There was a dispute about whether an individual should have contact with P. Safeguarding concerns were raised. P self-funded his care; the Local Authority's involvement was solely by reason of the safeguarding concerns. Judgment was delivered before the Care Act 2014 came into force. But, at [29], DJ Marin (as he then was) said:

> *'The need for Hillingdon to remain involved is further reinforced first by section 42 of the Care Act 2014 which places a statutory duty on a local authority to become involved where inter alia an adult has support needs. Although the Act is not to be implemented until April 2015, section 42 reflects an existing duty owed to PS now. Second, the need for local authority involvement in certain situations was also highlighted by Russell J in London Borough of Redbridge –v- G and others (2014 EWCOP 485).'*

37. In ***Redbridge v G***, at [2-3], Russell J had said:

> *'In this case the local authority were under a duty to investigate the circumstances of an old and frail lady following reports regarding the behaviour of C and F and their influence over G, her home and her financial affairs and with respect to her personal safety from multiple sources including private citizens and professionals, from agencies providing care support and from a lawyer engaged by C to act for G (to change her will in C's favour). The complaints came from G too; although she would later retract them. The obstruction met by the social worker when she tried to carry out her duties led to the attendance of the police more than once.*
>
> *3. The local authority had no alternative but to visit on numerous occasions and to attempt to see G on her own. Anything else would have been a dereliction of their duty to her as a vulnerable person about whom they had received complaints about possible financial predation.'*

38. Positive obligations under art. 8 might require intervention to protect a vulnerable adult, see ***Local Authority X v MM & Anor (No. 1)*** [2007] EWHC 2003 (Fam) where, at [110], Munby J, as he then was, said:

> *The Strasbourg court has long recognised that the "respect" for private and family life guaranteed by Article 8 may impose on the State not merely the duty to abstain from inappropriate interference but also, in some cases, certain positive duties. The State may be*

obliged to take positive action to prevent or stop another individual from interfering with someone's private life; the State may be under an obligation to intervene in the relationship between purely private individuals in order to prevent 'private' violations of rights protected by the Convention: see Botta v Italy (1998) 26 EHRR 241. Thus the State, in the form of the local authority, may not merely have the power but may also be under a positive obligation to intervene, even at the risk of detriment to Y's private life and in such a way as interferes with the family life which Y shares with X, if such intervention is necessary to ensure respect for X's rights under Article 8. And where X is a child or a vulnerable adult the State, in the form of the High Court, has a positive obligation to act in such a way as to ensure respect for X's rights.

39. Section 42 of the Care Act 2014 provides:

> ***42 Enquiry by local authority***
>
> *(1) This section applies where a local authority has reasonable cause to suspect that an adult in its area (whether or not ordinarily resident there)—*
>
> > *(a) has needs for care and support (whether or not the authority is meeting any of those needs),*
> >
> > *(b) is experiencing, or is at risk of, abuse or neglect, and*
> >
> > *(c) as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.*
>
> *(2) The local authority must make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case (whether under this Part or otherwise) and, if so, what and by whom.*

40. What amounts to '*abuse or neglect'*? The statutory Care and Support Guidance explains the term from 14.16. The Guidance explains that abuse and neglect might including ignoring medical, emotional or physical care needs, and a *'failure to provide access to appropriate health, care and support or educational services.*' Self-neglect also falls within the scope of s. 42. At 14.17, the Guidance says:

> ***Self-neglect***
>
> *This covers a wide range of behaviour neglecting to care for one's personal hygiene, health or surroundings and includes behaviour such as hoarding. It should be noted that self-neglect may not prompt a section 42 enquiry. An assessment should be made on a case by case basis. A decision on whether a response is required under safeguarding will depend on the adult's*

ability to protect themselves by controlling their own behaviour. There may come a point when they are no longer able to do this, without external support.

41. Therefore, self-neglect (including neglect of accommodation), and hoarding, might trigger the s. 42 duty.

42. What does s. 42 require of local authorities?

43. Two matters are of note. First, the duty is merely to make enquiries to enable the authority to decide whether action should be taken. The duty does not extend to mandating any particular action by the local authority.

44. Second, s. 42 envisages that the authority might decide that a protective measure should be taken by a third party – the duty is to '*decide whether any action should be taken .... and, if so, what and by whom'*. Therefore, even if a s. 42 enquiry led a local authority to conclude that an application to the court should be made, it would be perfectly lawful – under s. 42 – for the authority to decide that a third party should make that application.

45. However, if a local authority decides that an application should be made by a third party, but the third party refuses / fails to do so, it may be extremely difficult for the local authority to justify doing nothing; it may be unreasonable for the local authority to fail to make the application itself. The failure to act may be challenged by judicial review. As the court noted in ***Hillingdon v PS***, the s. 42 duty underlines that local authorities might be the appropriate applicant where P is vulnerable and has care needs.

Inherent jurisdiction

46. The inherent jurisdiction of the High Court has been described as the '*great safety net'*, see ***Re F (Mental Patient: Sterilisation)*** [1990] 2 AC 1, at [13].

47. In ***A Local Authority v DL*** [2012] 3 All ER 1064, the Court of Appeal held that the inherent jurisdiction remained available, despite the passing of the Mental Capacity Act.

48. The jurisdiction extends to a wide range of vulnerable adults. It can apply to those who are vulnerable, but not lacking capacity. The jurisdiction can also be used to provide – in respect of incapacitated adults - remedies not available under the MCA.

49. As to the meaning of vulnerable adult, see ***A Local Authority v MA & Ors*** [2005] EWHC 2942 (Fam), where at [77], Munby J (as he then was) said:

> *It would be unwise, and indeed inappropriate, for me even to attempt to define who might fall into this group in relation to whom the court can properly exercise its inherent jurisdiction. I disavow any such intention. It suffices for present purposes to say that, in my judgment, the authorities to which I have referred demonstrate that the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent.*

50. The test for engaging the jurisdiction is whether it is necessary and proportionate, see ***DL*** at [66].

51. Generally, the primary aim will be to facilitate unencumbered decision making by the individual, rather than taking the decision for them, see ***LBL v RYJ and VJ*** [2010] EWHC 2665 (COP) where, at [63] Macur J said:

> *However, I reject what appears to have been the initial contention of this local authority that the inherent jurisdiction of the court may be used in the case of a capacitous adult to impose a decision upon him/her whether as to welfare or finance. I adopt the arguments made on behalf of RYJ and VJ that the relevant case law establishes the ability of the court, via its inherent jurisdiction, to facilitate the process of unencumbered decision-making by those who they have determined have capacity free of external pressure or physical restraint in making those decisions.*

52. There remains a debate as to the extent to which the jurisdiction can impose decisions on the vulnerable person.

53. In ***London Borough of Wandsworth v M*** [2017] EWHC 2435 (Fam) Hayden J used the inherent jurisdiction to prevent a young man returning to live with his mother, while the matter of the man's capacity was explored.

54. In ***A Local Authority v BF*** [2018] EWCA Civ 2962, Baker LJ distilled five key points as to the scope of the jurisdiction, and its power to control a vulnerable adult:

    a) The inherent jurisdiction may be deployed for the protection of vulnerable adults.
    b) In some cases, a vulnerable adult may not be incapacitated within the meaning of the 2005 Act, but may nevertheless be protected under the inherent jurisdiction.
    c) In some of those cases, capacitous individuals may be of unsound mind within the meaning of Article 5(1)(e) of the Convention.
    d) In exercising its powers under the inherent jurisdiction in those circumstances, the court is bound by ECHR and the case law under the Convention, and must only impose orders that are necessary and proportionate and at all times have proper regard to the personal autonomy of the individual.
    e) In certain circumstances, it may be appropriate for a court to take or maintain interim protective measures while carrying out all necessary investigations.

55. In short, the court endorsed the jurisdiction being used, at least temporarily, to deprive a person of their liberty. See the continuation of the proceedings: ***Southend-On-Sea Borough Council v Meyers*** [2019] EWHC 399 (Fam) where Hayden J proceeded on the basis of Baker LJ's conclusions. But a note of caution – Baker LJ was only determining permission to appeal, and did not certify his judgment in accordance with ***Practice Direction (Citation of Authorities)*** [2001] 1 W.L.R. 1001.

56. Another difficult question is the extent to which the vulnerable adult should be subject to injunctions. The usual approach under the jurisdiction is to restrain third parties, see ***LBL***. However, it might, sometimes, be thought necessary to issue an injunction against the individual. To do so raises conceptually difficult questions as to the purpose of the jurisdiction. There may be additional difficulties if the adult's capacity to understand the injunction is in doubt. Cobb J recently referred to the difficulties in ***Redcar & Cleveland Borough Council v PR & Ors*** [2019] EWHC 2305, see from [43]:

> *Where I differ in approach from HHJ Hallam, is that I do not consider that it was appropriate to make orders against PR herself on 25 March 2019. While I am conscious that there is precedent in the case law of judges making orders against the vulnerable adults themselves in proceedings under the inherent jurisdiction[8], I prefer the argument advanced on PR's behalf in this case that it was illogical for the court to conclude that PR needed the protection of the court, yet required her, by order, to refrain from doing something which she wanted to do, backed with the punitive force of an injunction. To some extent, the appropriateness of this type of provision will always be a question of fact and degree. As Butler-Sloss LJ said in Wookey:*
>
> > *"If it is clear that he is mentally ill, the extent of his ability to understand becomes crucial. If he may well understand the purpose of an injunction, no problem arises, and an interim order might be made whilst waiting for evidence" (emphasis added) (at p.143)*
>
> *In this case, there was sufficient evidence that PR was confused in her thinking about her immediate future and/or was possibly being coerced and thus unable to make a decision of her own free-will; she was also suffering from a possible mental disorder. Accordingly, it would have been difficult for the court to conclude that any attempt to return to live with her parents in breach of the injunction would be a decision that could be classified as deliberate. Although distinguishing the London Borough of Wandsworth v M & others [2017] (above) on its facts, I agree with Hayden J when he said (in line with the comments in Wookey – see [24] above) at [85] that:*
>
> > *"Injunctive relief is a discretionary remedy, it acts in personam and it is derived from equitable principles. Furthermore, it may only be granted to those amenable to its jurisdiction and it must be capable of being put into effect. It follows logically from these general propositions that the injunction must serve a useful purpose and have a real possibility of being enforced in personam".*

Interplay between concurrent possession and CoP proceedings

57. One of the most frequent scenarios in which housing practitioners encounter the Court of Protection ("CoP") is when possession proceedings are in progress against a tenant (or possibly even after a possession order has been obtained but not yet enforced) and there are concurrent proceedings in the CoP in which the CoP is considering where the tenant should live. This usually occurs in cases where the tenant has gone into hospital or a care home (possibly for respite or on a trial basis) so they are not currently residing in their property but where there is a question about whether they are likely to return to live there or not. This scenario therefore commonly arises in cases where possession has been sought in respect of a secure or assured tenancy on the basis of a 'non-occupation' (i.e. where a NTQ has been served because the tenant is not living in the property thus arguably has lost security). It can, however, also arise where possession has been claimed on other grounds (e.g. rent arrears, ASB before the tenant went into care home/hospital or caused by a family member living there, s.21 notice etc).

58. A common question for housing practitioners in such cases is what effect, if any, the CoP proceedings may have on the possession claim.

What effect do the CoP proceedings have on the possession proceedings?

59. The two sets of proceedings are, in the main[i], separate proceedings being heard by different judges. There is, however, inevitably some degree of overlap and it is not uncommon for the landlord in the possession claim to be informed of ongoing CoP proceedings and possibly be asked to disclose documents from those proceedings to the CoP and/or even to provide statements to inform the CoP of the status and landlord's intentions in the possession proceedings. The reason for this is that, in a case where the CoP is considering where an individual ("P") should live, the CoP needs to know what options are available to it.

60. It was confirmed by the Supreme Court in ***N v ACCG and others*** [2017] UKSC 22 that the CoP is only able to choose between the available options. This is because the jurisdiction of the CoP is limited to making decisions that P could take if he had the capacity to do so and the CoP therefore has no greater power to make a decision than P would have had her/himself if s/he had capacity. The CoP does not have the power to compel any third party (e.g. local authority, CCG, other landlord) to make provision (e.g. accommodation, care services) which P could not secure for him/herself (see para. 29 *N v ACCG*). Nor can the CoP use its powers to put pressure upon a local authority (or health body) to make particular decisions in exercise of its statutory powers and duties to provide public services (see para.38 *N v ACCG*), although it may use its case management powers to provide time of the authority to consider its position and negotiations between parties in the CoP to take place. If a public body (e.g. social services authority) ultimately refuses some proposed course of action then the remedy is judicial review of that decision and in such circumstances CoP proceedings may be stayed to await the outcome of that.

61. In the same vein, the CoP does not have the power to stop a possession order being lawfully made or lawfully enforced (as P himself would not) and if that occurs then the option of P returning to live at the property that is subject of the possession proceedings will no longer be an available option for the CoP to consider. What happens in the possession proceedings will therefore very often inform the CoP proceedings but less so the other way round. There are a couple of exceptions to this:

    a. Firstly, if the CoP makes a decision that the option of a return home to the property is no longer reasonably 'on the table' (whether that is because the parties agree that or otherwise) then that is likely to be relevant for the County Court in the possession claim to know. It will certainly be of relevance in a non-occupation case where P's intention to return is a major issue (see further below) and in other cases may assist when it comes to determining issues of reasonableness, proportionality and indeed may well impact on whether the possession claim is even defended anymore (e.g. where P is represented by the Official Solicitor in both sets of proceedings it is not uncommon for the OS at this stage to agree to possession). In such situations, the CoP proceedings may well continue in respect of determining

what alternatives are in P's best interests, but will no longer be of relevance to the possession claim.

b. Secondly, as noted above, in non-occupation cases what is happening in the CoP proceedings may be relevant to the issue of P's intention to return. As already noted, if the CoP has taken the option of returning home off the table then there will be no intention. In other cases even though there is a ongoing dispute about P's ability to return home, there may be evidence in the CoP proceedings from health and social care practitioners which make it very clear that P's needs are such that in their view P could or could not return home. Whilst not necessarily determinative (particularly if that issue is being disputed in the CoP) the views of such health and social care practitioners may assist a County Court Judge in determining the issue of intention to return. Ordinarily of course the landlord will not have access to the evidence or other documents in the CoP proceedings and, although it is possible for the CoP to give permission to disclose certain documents to third parties, the likelihood of this occurring is likely to depend on whether there is any overlap in the representation of P in the CoP and possession claim and whether such disclosure would be in P's best interests. Even without disclosure, however, the landlord may simply be able to obtain separate statements from the relevant health and social care practitioners to set out their view on the issue (which will either support the possession proceedings or not) and, as the practitioners will have already turned their minds to the issues in the CoP proceedings, it may be easier for the landlord to obtain such evidence.

62. In theory the CoP could make a decision that it is P's best interests to return to the property even where possession proceedings are pending because, technically, the property still remains available up until a possession order is enforced. It would, however, be an extremely unusual course of action for the CoP to take as the CoP is only likely to conclude that a return home is in P's best interests if it is known that is a stable and secure option for P. In many cases therefore the CoP is likely to want to know the outcome of the

possession claim before making any decision, unless it is able to do so simply on the basis of P's needs (i.e. the CoP has determined P cannot return home in any event).

63. This is where sometimes problems can arise as, despite the fact that the possession proceedings ought more often to inform the CoP's decision rather than the other way round, it is not uncommon for County Court judges to adjourn or stay possession proceedings once they become aware that there are ongoing CoP proceedings. Although that can in some circumstance be appropriate, often it is unnecessary and can lead to unnecessary delays and even to the potential difficulty that each court is, in effect, waiting for the other, so that little or no progress is made in either case. It is therefore helpful for housing lawyers to have an understanding of the CoP's powers, how it makes its decisions and in particular to understand, as outlined above, that the CoP can only choose between available options.
64. The writers are aware that landlords may find they sometimes feel put under pressure (e.g. from P's legal representatives or family members or even the CoP itself) not to robustly pursue possession in such cases, in effect so that the option of a return to the property is not 'taken off the table' as an available option for the CoP. That combined with reluctance, or a cautious approach, from County Court judges to grant possession in such cases can mean that the possession claims effectively come to a standstill. Whilst each case needs to be considered on its facts and an assessment of what is appropriate made taking into account P's vulnerabilities, in principle landlords are able to continue to pursue a possession claim even though there are concurrent CoP proceedings and should not be afraid to impress this on the County Court. Indeed, there may very often be a good argument that it is not in the interests of anyone (including P/the tenant) to delay things as often in the meantime arrears are increasing and additionally it may prolong uncertainty (and court time and costs) in the CoP proceedings.

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[i] It is possible to have a Judge who is able to sit as both a County Court Judge and a CoP Judge and could therefore theoretically deal with the two cases together with each of his/her 'different hats' on, however this possibility does not appear to be commonly utilised.