

● ● ●
● ● ● cornerstone
● ● ● barristers

**Dealing with defendants with mental health problems
and capacity issues in ASB cases**

Jon Holbrook, Kuljit Bhogal, Michael Paget, Peggy
Etiebet and Tara O'Leary

••• Introduction and welcome
••• Kuljit Bhogal

Housing Week 2020



Monday 5 - 11AM - [Looking backwards to go forwards - Housing 2020 and 2021](#) Speakers: Andy Lane, Ruchi Parekh, Catherine Rowlands. Chair: Ranjit Bhowse QC - - material available online soon

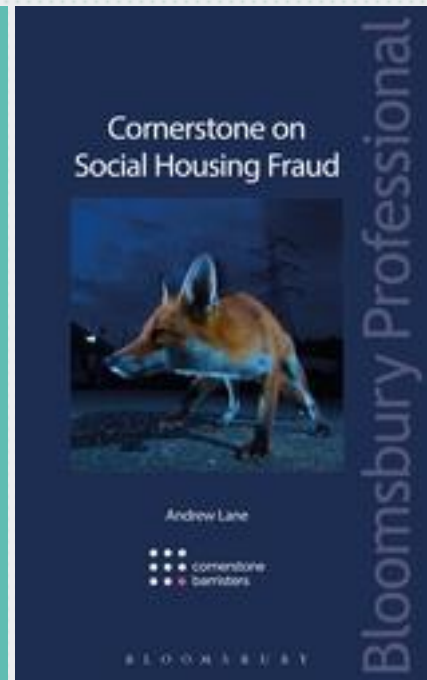
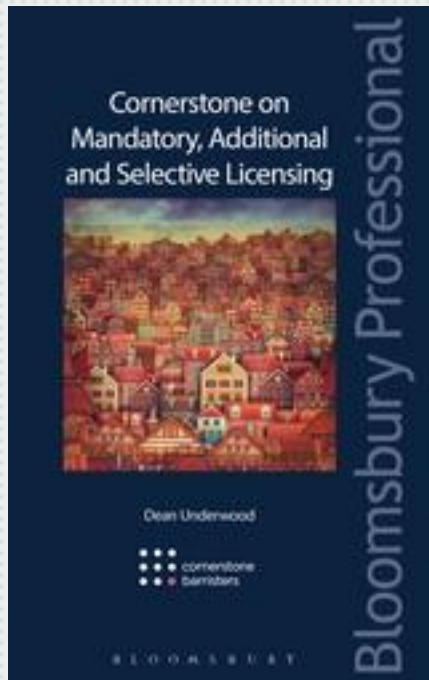
Tuesday 6th - 3PM - [Dealing with defendants with mental health problems/capacity issues in ASB cases](#) Speakers: Jon Holbrook, Michael Paget, Peggy Etiebet, Tara O'Leary. Chair: Kuljit Bhogal

Wednesday 7th - 11AM - [Housing-Related Judicial Review](#). Speakers: Catherine Rowlands, Wayne Beglan, Alex Williams. Chair: Kelvin Rutledge QC

Thursday 8th - 3PM - [Public law and discrimination challenges to possession claims - where are we now?](#) Speakers: Andy Lane, Ryan Kohli, Riccardo Calzavara, Rowan Clapp. Chair: Dean Underwood

Friday 9th - 11AM - [Collection and Use of Personal Data: A guide for Landlords](#). Speakers: Kuljit Bhogal, Matt Lewin, John Fitzsimons. Chair: Matt Hutchings QC

Cornerstone Books



What are we going to cover?



1. Introduction & welcome – **Kuljit Bhogal, Chairperson**
2. The role of the Court of Protection ('CoP') – **Jon Holbrook and Michael Paget**
3. Terminating tenancies in the CoP – **Peggy Etiebet**
4. Capacity assessments and litigation friends in the County Court – **Tara O'Leary**
5. Questions and answers



The role of the Court of Protection
Jon Holbrook and Michael Paget

COP's role



- COP only has jurisdiction where P lacks capacity to make a decision for themselves.
- Under the Mental Capacity Act 2005 there is a presumption of capacity.
- And capacity is issue specific.
- So need evidence to show P cannot:
 - Litigate
 - Decide where to live
 - Enter into or terminate a tenancy.

Capacity evidence



- Sensible to get this in place at an early stage.
- Follow the decision-specific guidance of Theis J in **LBX v K, L and M** [2013] EWHC 3230 (Fam) for assessing capacity in relation to decisions as to residence and care.
- the Act emphasises the right of the individual, in exercising his or her personal autonomy, to make bad decisions even extending to those with potentially catastrophic consequences (see: **Barnsley Hospital NHS Foundation Trust v MSP** [2020] EWCOP 26).

Capacity – formal test



- It is the ability to take the decision, not the outcome of it which is in focus: **CC v KK and STCC [2012] EWHC 2136 (COP); Kings College Hospital NHS Trust v C & V [2015] EWCOP 80**
- Intrinsic to assessing capacitous decision taking is the ability to weigh and sift the relevant information - **PCT v P [2011] 1 F.L.R. 287, AH and The Local Authority [2009] COPLR Con Vol 956 at [35] Hedley J, :**
- “the capacity actually to engage in the decision-making process itself and to be able to see the various parts of the argument and to relate one to another”.

Capacity – to hold a tenancy?



- What does s3 (understand, retain, use, weigh & communicate) mean in this context?
- Understanding the technical nature of a T is easy:
 - ‘I don’t own it; I have to pay rent; I mustn’t make a noise or disturb neighbours’ etc
- But can P relate that to his own circumstances?
 - Does he appreciate he cannot manage T?
 - Does it impact on his behaviour?

What housing cases should be in COP?



- Two conditions
 - Law: incapacity to hold a T
 - Practicality: there is an alternative
- Benefits
 - One issue: P's best interests
 - Not adversarial
 - Court not concerned that P will become H
 - Facilitates joined-up approach of H & SS

Problems of COP decisions



- What options are available for the judge when determining best interests?
- When finally persuaded to make a decision there is a risk of overreaching.
- ***N v ACCG*** [2017] UKSC 22 explains why.

Real options not hypothetical



- Headlines –
 - COP stands in the shoes of P and not the funder of P's care.
 - Cannot use COP to force the funder to provide additional care elements.
 - Any challenge to those decisions should be by other routes (judicial review etc.)

Available options and best interests



- Anyone acting on behalf of P should take a decision in their best interests.
- But that decision can only be one that P could have made.
- Neither COP nor other parties can put ‘pressure’ on the funder to create better options.

••• Terminating tenancies in the CoP
••• Peggy Etiebet

Why does the CoP need to get involved at all?



- The Mental Capacity Act 2005 enables the making of certain decisions without the need to obtain any formal authority to act but it does not extend to signing legal documents, such as tenancy agreements.
- Someone can only sign or terminate a tenancy agreement on the person's behalf if they are:
 - An attorney under a registered lasting power of attorney (LPA) or enduring power of attorney (EPA) (with the required scope of authority);
 - A deputy appointed by the Court of Protection; or
 - Someone else authorised to sign by the Court of Protection.

Role of the CoP v Role of County Court



- Different roles – housing management versus best interests of P (where there is a lack of capacity).
- Easy to conflate – we did it!
 - *How can the CoP be persuaded to decide that P should surrender his/her tenancy?*
- Real issue – does P lack capacity to make a decision to surrender her tenancy and, if yes, is it in her best interests for the court to authorise the local authority to terminate the tenancy?
- Real question is – *how can the CoP be persuaded to grant an order authorising the local authority to terminate the tenancy?*

Does P have capacity to surrender her tenancy?



- *LB Islington v QR* [2014] EWCOP 26
- Decision to enter into a supported living tenancy agreement:
 - P's obligation to pay rent, occupy, maintain the property.
 - LL's obligations to P.
 - Risk of eviction if P does not comply.
 - The purpose of and terms of the tenancy which is to provide P with 24 hour support so that P takes her medication and can maintain her mental health.
 - The landlord/support staff's right to enter P's flat without her permission in an emergency if there is serious physical danger or risk to her.

Does P have capacity to surrender her tenancy?



- Decision to surrender secure council tenancy:
 - P's loses the right to live or return there, and thus the opportunity to exchange that tenancy for another secure council tenancy if she surrenders.
 - P cannot move to a less restrictive environment than ABC unless she gives up her tenancy.
 - For the foreseeable future the terms of the CTO will not permit her to live in her flat.
 - P needs 24 hour support in her accommodation in order to remain well.
 - Giving up her tenancy does not preclude the grant of a council tenancy by LBI in the future if she is well enough to live completely independently.

Best Interests to Terminate



- Is it in P's best interests to have the tenancy terminated?
- Fact specific but extraordinarily unlikely unless and until there is another property/placement for T to move to (on a final order) that is in her best interests.
- Issues of housing management and/or the effect on the neighbours are part of the context but, as a rule of thumb, they are used to illustrate the care and support needs P has that then need to be addressed through a care plan so that they are no longer an issue that requires eviction (either in this property or a more suitable one).

Tricky Issues



- Housing benefit difficulties:
 - Explore two homes, temporary absence from home
 - LL writes off arrears.
 - LA agrees to cover arrears.
- Placement provider wants to evict P (informal notice of eviction/cessation of provision of care package).
- Non LA social housing landlord wants to evict P.

••• Capacity assessments and litigation
••• friends at the County Court

Tara O'Leary

Capacity at the County Court



- Is it relevant? Most definitely:
 - Claims for possession
 - Injunctions and committal proceedings
- MCA 2005 also applies here: ss.1-3 and CPR 21.1(2)
- Capacity remains issue specific – relevant to remedy:
 - Capacity to litigate: appointment of LF under CPR 21
 - Capacity to comply with injunction: *Wookey v Wookey* [1991] 3 WLR 135 and *P v P* [1999] 2 FLR 897
 - Capacity to comply with SPO?

Litigation friends at the County Court



- Any Protected Party ('PP') must have LF to conduct proceedings on his behalf: CPR 21.2(1)
- Any steps taken in proceedings involving a PP without an LF are null and void, absent permission: CPR 21.3(4)
 - Other than issuing/serving claim form and applying for LF: CPR 21.3(2)
 - Can be catastrophic: *Dunhill v Burgin* [2014] UKSC 18
- Any settlement with PP requires court approval: CPR 21.10

Appointing a Litigation Friend



- Without a court order: CPR 21.4 – 21.5:
 - A deputy appointed by CoP with power to litigate; or
 - Any other person who files certificate of suitability stating they meet criteria in CPR 21.4(3):
 - Can “*fairly and competently conduct proceedings*” for PP
 - Has “*no interest adverse*” to that of PP
- With court order: CPR 21.6. If Claimant wishes to progress their claim, they must apply to court for LF: 21.6(3)
 - Official Solicitor can act in civil proceedings
- Costs: CPR 21.4(3)(c). See *Barker v Confiance Ltd* [2019] EWHC 1401 (Ch) and *Glover v Barker* [2020] EWCA Civ 1112

Practical considerations



- An issue for earliest possible consideration – by claimant
- How to obtain capacity evidence? Must address MCA tests
 - Preferably SJE report by consultant psychiatrist
 - Social workers – role of adult social care and CMH teams
- What if D cannot or will not engage? e.g. hoarding cases
- Presumption of capacity still applies: findings on capacity require evidence: *Baker Tilly v Makar* [2013] EWHC 759 (QB)
- Consider the identity of a suitable LF
 - Test the impartiality of a (self-)suggested LF... and beware the distinction between LFs and McKenzie Friends

Public law considerations



- Very considerable overlap with duties under Equality Act 2010 and especially the PSED:
 - Duty to investigate potential or suspected disability:
Pieretti v Enfield LBC [2010] EWCA Civ 1104
 - Duty to have due regard to effects and implications of person's disability on (a) their behaviour; (b) situation if become homeless; and (c) overall proportionality
 - Consideration of whether to treat the disabled person more favourably than non-disabled person
 - Identifying any options which are less onerous or adverse to D than possession/injunction



Questions and Answers



cornerstone



barristers

Ask us more questions:

events@cornerstonebarristers.com

For instructions and enquiries:

elliottl@cornerstonebarristers.com

dang@cornerstonebarristers.com

samc@cornerstonebarristers.com