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## CAPACITY AND TENANCIES / LICENCES

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1. How should a tenancy or licence of supported accommodation be created in favour of a person who lacks or may lack the mental capacity to enter into such an agreement?

### Capacity

2. In relation to the ability to contract, capacity is still determined pursuant to the common law rules (not that they differ much if at all from statutory rules).
3. The common law rule is set out at paragraph 8-069 of *Chitty on Contracts (30<sup>th</sup> Edition)* as follows:

*“At common law, the understanding and competence required to uphold the validity of a transaction depend on the nature of the transaction. There is no fixed standard of mental capacity which is requisite for all transactions. What is required in relation to each particular matter or piece of business transacted, is that the party in question should have an understanding of the general nature of what he is doing.”*

4. Thus, the more straightforward the transaction, the more readily will a court hold that a person has the capacity to make the contract.
5. A basic licence agreement might provide for the right to occupy subject to either party being able to give specified notice, a provision as to the conduct of the occupant (that might include a requirement that the occupant takes recommended medical treatment or follows a care plan). Such an agreement might also contain provisions for reviewing the licence fee payable from time to time.
6. Such an agreement need not be complex because in such cases there will ordinarily be a further agreement between the relevant local authority and the provider of the accommodation and, if different, the provider of care services. The Contracts (Rights of Third Parties) Act 1999 provides two circumstances in which a third party can enforce a term of a contract to which he is not a party. Under section 1(1)(a) of the Act, the third party can enforce the term of the contract if the contract expressly provides that he may. In those circumstances, there is no further need that the particular term must have been made for the third party's benefit.
7. Section 1(1)(b) of the Act entitles a third party to enforce a term of a contract if the term purports to confer a benefit on him subject to section 1(2) that provides that the third party has no such right if on a proper construction of the contract it appears that the parties thereto do not intend the term to be enforceable by the third party.

8. So far as remedies are concerned, section 1(5) of the Act provides that for the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of the contract if he had been a party to the contract. Thus, the third party can claim damages, an injunction or specific performance. In particular, if the contract between the local authority and the accommodation provider contained terms that restrict the accommodation provider's rights to terminate the occupant's licence, then the occupant could enforce those terms.
9. Even if a person lacks capacity to enter into a basic contract, such as discussed above, that does not mean that any contract that he does agree to, whether by signing or otherwise, is void. The contract is voidable at his option, see paragraph 8-068 op cit. Furthermore, it would be up to the occupant to prove that the other contracting party knew that he was so lacking in capacity as not to be capable of understanding what he was doing.
10. The effect of that is that until the contract is avoided, a contract made by a person without capacity is binding upon him. If proceedings were taken to enforce that contract, then the person lacking capacity (or his representatives if he still lacked capacity) could avoid the contract and successfully defend a claim based on that contract.

### Housing Benefit

11. Regulation 12, Housing Benefit Regulations 2006 provides that the payments in respect of which housing benefit is payable in the form of a rent, rebate or allowance are periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home and that includes payments by way of rent, payments in respect of a licence or permission to occupy the dwelling and payment in respect of or in consequence of use and occupation of the dwelling. Thus, even if the occupant lacks capacity to enter into a licence or a tenancy, until the contract is avoided, the occupant is still “liable” to make the payments and entitled to housing benefit.
  
12. If the occupant were thought to be so obviously incapable of understanding the nature of what he was being asked to sign that it was inappropriate so to do, then the agreement could be made on behalf of the occupant by the Court of Protection. There would be no need to appoint a deputy, and the application could be a paper exercise. Clearly, he would be liable to pay in those circumstances and entitled to housing benefit.
  
13. Furthermore, it may be that the occupant has such severe incapacity that he cannot give assent to the tenancy or licence in any meaningful way. In those circumstances, there might be no agreement at all. The occupant could be liable to pay for his occupation on the basis that the supply of the accommodation was necessary. Section 7, Mental Capacity Act 2005 provides that if necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he

must pay a reasonable price for them. “*Necessary*” is defined as meaning suitable to a person’s condition in life and to his actual requirements at the time when the goods or services are supplied. The common law relating to the provision of necessary goods and services is to similar effect.

14. Accommodation is likely to be seen to be necessary so long as it is no more lavish than the occupant needs for his “*condition in life*”. The words “*he must pay a reasonable price*” make the person to whom the service has been supplied “*liable*” for such a reasonable price. Going back to regulation 12 of the Housing Benefit Regulations 2006, housing benefit is payable in respect of periodical payments which a person is liable to make in respect of the dwelling which he occupies as his home if the payment is in respect of or in consequence of the occupant’s use and occupation of the dwelling.
15. That definition covers the liability created by section 7, Mental Capacity Act 2005 or the common law and, therefore, even if there is no contract of tenancy or licence between the occupant and the provider of accommodation, so long as the provision of that accommodation was no more than necessary, the occupant is liable to pay a reasonable sum for the accommodation and that liability is “*in respect of or in consequence of use and occupation of the dwelling*”, thus giving rise to the right to payment of housing benefit.

16. This was the situation that arose in Wychaven District Council v EM [2012] UKUT 12 (AAC). The tribunal held that a purported tenancy agreement was a nullity as the occupant was so severely disabled as not to be capable of indicating any assent thereto but went on to hold that she was entitled to housing benefit because the supply of the accommodation had been necessary.

Is the accommodation a care home?

17. Housing benefit is not payable, however, where the person liable to make payments is in residential accommodation. In such circumstances, pursuant to regulation 9(1)(k) of the Regulations, the person is treated as not liable to make payments in respect of a dwelling. The term “*residential accommodation*” is defined as meaning accommodation which is provided in a care home. Regulation 2 of the Regulations defines a care home as having the meaning assigned to it by section 3 of the Care Standards Act 2000. Section 3 of that Act provides that an establishment is a care home if it provides accommodation, together with nursing or personal care for (amongst others) persons who have or have had a mental disorder.
18. This provision was considered in G v E [2010] EWHC 621 (Fam), [2010] 2 FLR 294.
19. In that case, Baker J considered various questions arising out of the placement of a person with severe incapacity in accommodation that had some of the hallmarks of a care home but was not registered as such. The court decided first that the

document that purported to grant to the occupant a tenancy was a nullity because it had been signed on his behalf by someone who was an employee of the accommodation provider. It was also clear, on the facts, that the occupant had no exclusive possession of any part of the premises.

20. A particular problem arose in that case because of the fact that the so-called tenancy agreement was signed by an employee of the accommodation provider who had no authority to act on behalf of the occupant. To that extent, therefore, the case was clearly correct in holding that the document that purported to be a tenancy was a nullity. If, however, the occupant had assented to the document himself, then it would not necessarily have been a nullity. If it had not created a tenancy, it would have created a licence that would have been voidable at his instance.
21. The judgment then went on to consider whether the establishment was a care home within the meaning of section 3, Care Standards Act 2000. At paragraph 108, Baker J stated:

*“The crucial question whether the establishment provides the accommodation, together with nursing or personal care, is essentially a question of fact.”*

22. He then, at paragraph 110 of the judgment, having determined that there was no tenancy, recorded the submissions of counsel for the patient’s sister to the effect that as a consequence the patient occupied the establishment by permission of the

establishment and that, therefore, the establishment provided both accommodation and personal care to the patient so that, it was submitted, the establishment should have been registered as a care home under the Care Standards Act.

23. Baker J did not decide whether that submission was correct or not, partly because the establishment was not represented in the proceedings and the effect of a ruling that the establishment was a care home but not registered would have had very significant consequences, one of which was that might have been illegal receipt of housing benefit.
24. It is not the purpose of this article to go deeply into the question of the definition of a care home but, on the face of it, the definition requires the establishment in question to provide accommodation and nursing or personal care. If the establishment simply provides accommodation, then it is not a care home. Furthermore, the question whether the accommodation is provided by way of a tenancy or licence does not determine the issue. See *R (on the application of Moore) v Care Standards Tribunal* [2005] 1 WLR 2979.
25. The Care Quality Commission has issued guidance [[http://www.cqc.org.uk/sites/default/files/media/documents/rp\\_poc\\_100001\\_20110803\\_v3.01\\_amended\\_scope\\_guidance\\_updated\\_gp\\_text\\_final.pdf](http://www.cqc.org.uk/sites/default/files/media/documents/rp_poc_100001_20110803_v3.01_amended_scope_guidance_updated_gp_text_final.pdf)] as to whether supported living schemes need to be registered as care homes. The Guidance suggests that in certain circumstances, although personal care and accommodation

are provided by the same company, the personal care or nursing is not provided “*together with*” the accommodation. The Guidance states that the existence of a tenancy agreement is not conclusive and that would appear to be entirely correct.

26. The Guidance goes on to state that in the Commission’s view, although accommodation and care have to be provided together, that does not mean that the providers have to be the same company or individual. There may be different legal entities involved, for example different companies within the same group or organisations that are otherwise unrelated but work together in some way to provide the service given.
27. For that to apply, either the notionally separate providers of the accommodation and care would have to form together the “*establishment*” or they together or jointly “*provide*” the accommodation and care so that each is providing accommodation together with care.
28. If there is a genuine tenancy where the occupant has exclusive occupation of, at least, a bedroom, it may be easier to say that the establishment is not a care home because then it will be more possible to argue that the provision of the accommodation is independent and not “*together with*” the provision of care.
29. To be borne in mind is the fact that if a tenancy is granted, then the tenancy might qualify as an assured tenancy because section 3, Housing Act 1988 provides that where a tenant has exclusive accommodation of any accommodation and uses other

accommodation in common with others, not including the landlord, then the accommodation of which the tenant has exclusive occupation is deemed to be a dwelling house let on an assured tenancy. Such a tenancy would be an assured short hold tenancy pursuant to section 19A, Housing Act 1988 and, therefore, with limited security of tenure. The granting of a tenancy also has consequences for the determination of the issue of ordinary residence, see Guidance on the identification of the ordinary residence of people in need of community care services in England issued by the Department of Health [[http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/documents/digital\\_asset/dh\\_131705.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digital_asset/dh_131705.pdf)] (outside the scope of this article).

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