

CSHS AND HOUSING LIN SEMINARS

THE MENTAL CAPACITY ACT AND TENANCIES



- What is the position regarding granting a tenancy if a person's capacity to agree is in doubt?
- A Tenancy Agreement is a legal estate in the land, as well as a contract

Minefield or storm in a teacup???

- Complicated and contentious
- I am not a lawyer
- I have read three lawyer's interpretations and they are all slightly different and in certain key areas contradictory
- What follows is my understanding of the position and issues made as simple as possible

First things first

- Firstly – NB to follow the principles of Act SO
 - Don't automatically assume someone lacks capacity to understand and agree because they have a particular condition
 - Take time to support person to understand
 - Choose a time and place likely to maximise capacity
 - Seek involvement of other professionals as necessary

Threshold of understanding

- At a minimum
 - An agreement to exchange money for right to occupy i.e. to pay money to live there
 - That there are conditions attached like not creating a nuisance and
- If unlikely to be able to understand and retain such conditions, needs and risk assessment should consider likely compliance or otherwise, albeit with support

Disability Discrimination Act

- It is unlawful to discriminate against disabled people, including those suffering from mental incapacity, in the selling, letting or management of residential properties – even on the grounds of best interests
- However – Lack of capacity to understand and comply with the contract is a lawful reason under the DDA for the landlord to refuse a tenancy, as is risk to health and safety
- However don't want to bar people who would benefit from a housing option if their needs can safely be met, and others' rights protected

Questions

- Does there have to be a written agreement for a tenancy to exist?
- What if, even with support, person lacks the capacity to understand and agree to it?
 - Should they be asked to sign it anyway?
 - Could someone else sign it informally on their behalf?
 - What are the formal legal options?

Shall deal with each of these in turn

Does a tenancy have to be in writing and signed?

- No. From a legal perspective, a tenancy exists if the “essential elements prevail”.
- If a person has exclusive possession of identifiable premises for a known period, it counts as a tenancy even if only verbal agreement – so, not unlawful occupation
- The occupant under common law owes compensation to the landlord.
- However:
 - It exposes both landlord and tenant to risks
 - Tenant can't be held to conditions that haven't been agreed
 - If person incapacitated, DDA comes into play if trying to terminate agreement

Should an incapacitated adult be asked to sign a tenancy?

- Poor practice to get someone to sign something if they don't understand the fundamentals
- Tenancy would remain valid unless “avoided” by tenant once capacitated or someone with legal authority – undoing it means no right to occupy
- If landlord knew about incapacity, may be unable to evict for breach of contract if tenant cannot help being in breach – DDA
- Landlord not authorised to restrict a person's autonomy in their own home – if concerns about risk of harm would need authorisation from Court of Protection

Could a family member sign the Tenancy Agreement informally?

- Contradictory views and interpretations as follows:
 - Position 1 says it's not a good idea
 - Position 2 says it may be acceptable

Position 1: Not ideal because:

- The signatory him/herself becomes the tenant – landlord can only take action against signatory, not applicant.
- S5 protection unlikely to apply because property-related transactions specifically listed under S18 and therefore probably not a S5 act
- S7 – paying for necessary goods and services - doesn't apply because occupation rights don't count as necessary goods and services in a legal context
- S8 – pledging person's credit unlikely to apply because signing a tenancy unlikely to be an act covered by S5
- Common law recompense probably would apply but that pre-supposes signatory has access to sufficient of the person's money to cover the cost. Recovery of rent is subject to DDA rules if they don't.

Position 2: Family can sign and:

- S5 would apply if it could be shown that move was necessary, in individual's best interests and is the least restrictive solution
- S7 could apply because housing does count as "necessary goods and services" and so the occupant must pay a reasonable price for it

This approach much more appealing, but potentially legally messy if something goes wrong – landlords need to understand and weigh up these and other risks

Have sought clarification – none forthcoming; will probably be tested in the courts. OPG e-mail

Risks to position 2

- Where housing and care provided, if tenancy not validly in occupant's own name, possible risk of registration as a care home
- Difficulty of taking legal action if occupant is in breach of Agreement
- HB could be awkward if they chose to because occupant is not the tenant

How about an IMCA?

- IMCAs can't sign for a person
- Only get involved where public authority responsible for a placement (i.e. they hold the contract) – could be into a tenancy but not to a housing and care scheme; this would be accommodation together with care under 1 contract and registrable.

Other legal options

- Contracts (Rights of Third Parties) Act 1999
 - Very complex (see p17 Housing LIN Factsheet 20)
- Formal authority under MCA as follows infinitely preferable if possible:
 - A property and Affairs LPA can sign a tenancy on an incapacitated person's behalf and it applies to the occupant as though s/he her/himself had signed it
 - A CoP appointed Deputy can be given the power to sign a tenancy on person's behalf
 - A Single Order from the Court of Protection

Surrendering a tenancy

- Someone with formal authority such as an LPA can surrender a tenancy
- A local authority has no power to surrender a tenancy unless specifically authorised by Court of Protection
- Anyone can ask landlord to release someone from their obligations, and it may suit the landlord to agree. Probably legally dodgy but happens up and down the country for sound practical reasons – and may even be in individuals' best interests

Practice implications for Extra Care staff taking in tenants with dementia

- Engage as early as possible with the person who has dementia or other mental health problems, whilst they still have capacity to explore options
- Encourage them to arrange Lasting Power of Attorney which ideally covers both welfare decisions and financial and property powers
- Get to know them and talk about the possibility of a move while they still have the capacity to take a considered view and make their preferences known
- Ideally make the move to Extra Care early while the person still has the capacity to understand and adjust to the move

Getting the balance right...

- Housing providers can tread a fine line between acting unlawfully under DDA/ housing legislation and MCA/DDA
- Need to act reasonably and be able to demonstrate you are
- Need to weigh up various risks and manage them, not being overly risk averse
- Policies, procedures and practice should reflect this balance
- If not having to make decision in a crisis, MCA presents the opportunity to do things properly
- A legally signed tenancy is to the advantage of both the tenant and the housing provider

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