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The House of Lords in a case in 1986 set out the key elements of a tenancy to be:

- exclusive occupation of land/premises
- payment of rent
- for a term (for a week or a year etc.)

These simple principles run through the law of landlord and tenant. In the same case and others the important matter is the true relationship of the parties ...not the label put upon it.

Some people with learning disabilities may not fully understand the obligations and implications of taking up a tenancy. A tenancy agreement is a contract and therefore some 'legal capacity' is required otherwise the contract is void i.e. not valid and the parties are not bound by the terms of the contract.

The conclusion at the end of the analysis in this *factsheet* is:

- the law is complex
- in practice there is little to fear in granting a tenancy to someone who has a learning disability

This is always a difficult topic but if the legal complexity of the matter is disentangled from the practical issues it is possible to achieve sensible solutions. What are the questions which cause a problem and how can they be overcome. This *factsheet* will deal with the theory, legal arguments, what matters in respect of peoples' housing, problems and solutions.

Issues of Concern

The questions raised cover a range of subjects:

- the capacity of an individual to enter into contracts
- the enforcement of a contract
- individual's rights and protection
- treating people with learning disabilities with respect and fairness
- ensuring responsibilities under a contract are met
- the entitlement to benefits
- reasonable terms of occupancy
- the circumstances in a tenancy or a home which may be registered under the Care Standards Act 2000
- is registration compatible with holding a tenancy
- separating housing and care services and contracts so that the two together do not give a single organisation too great a control or authority over someone's living arrangements
- We deal with each below.

Capacity

Capacity is important first of all because the legal arguments can be used to enhance or frustrate the proper and respectful recognition of an individual's wishes. The law on capacity, the Mental Capacity Act 2005, makes an assumption that people have capacity to make decisions and enter into contracts unless it can be shown otherwise. The Government policy in the White Paper *Valuing People* asserts principles of choice, inclusion and citizenship. Legislation on Human Rights and Disability Discrimination underwrite the same ideas.

Taking on a tenancy or a licence means entering a contract. This requires legal capacity. In lay terms legal capacity means three things:

- being able to make a decision
- understanding there is a choice and wanting to enter a contract
- understanding the obligations of the contract e.g. to pay rent, keep the terms of the tenancy

In law there is a presumption that a person is capable until proved otherwise. The test of capacity should be functional i.e. take account of the particular activity and the complexity of the elements of the contract not a blanket test that a person is incapable of understanding: buying a bus ticket or a house is not the same.

This would look at the information available and its form. A contract will still be binding if the landlord believed the tenant was capable of making it.

The Official Solicitor has confirmed in advice to a local authority that the grant of a tenancy would be proper even though capacity may be limited. The landlord would be bound by the Agreement and a claim against the landlord could be pursued by a 'Next Friend' or Deputy even though its provisions might be unenforceable against the tenant.

Signing on Someone's Behalf

If someone signs a tenancy agreement on behalf of someone the landlord knows lacks capacity *Section 5 of the Mental Capacity Act* gives the representative statutory protection from liability. However the Act does not seem to convert what would otherwise be a voidable contract at common law into a valid contract simply because it is signed by the tenant's representative even if that person has acted in the best interests of the tenant.

If there was a challenge in such circumstances the landlord could probably rely on *Section 7 of the Mental Capacity Act*. This provision says that if necessary goods or services are supplied to somebody who lacks capacity to contract for the supply the person must pay a reasonable price for them. So the agreement would be enforceable and reasonable payment could be recovered. If the tenancy has been signed by the tenant's representative in order to argue that Section 7 applies the landlord would probably have to argue that the representative is acting on behalf of the tenant as an agent of necessity.

If there was an argument as to whether or not the tenancy agreement should be signed like this the best course would be to apply to the Court for permission to apply to the Court of Protection, for a decision to be taken by the Court that the tenancy could be signed on the prospective tenant's behalf or for a Deputy to be appointed.

Enforcement

In practice does it matter whether someone is thought to have capacity to make an agreement? A general rule is that a contract made by someone without capacity is voidable but it is binding until contested. If it is fair and in the resident's interest it is unlikely to be challenged.

There is a legal concept described as 'the doctrine of necessities'. The law considers that someone should be able to contract for life's essentials and it can be argued that housing, care and support are among these. The link of consent may be made by reference to a friend or carer assisting with the purchase of goods or services. The landlord could be seen in this way in the case of housing and community care services where they ensure that a needed service is provided. It could be argued that if someone was thought not to have capacity to make an agreement themselves, a contract would be created by the local authority following their assessment and placement of the person.

If a housing organisation gives someone a contract for which they expect payment it is probably enforceable regardless of incapacity or necessities. Demonstrating that a contract exists may not matter where the other principals, the local authority and the housing provider, are clear about what they intend to offer. It is only an issue when an organisation needs to enforce an agreement with an individual or in questions about entitlement to benefits. More is said about this below.

Housing Benefit

The question of lack of capacity has no bearing on entitlement to Housing Benefit. Housing Options has seen Housing Benefit claims refused in the past because decision makers took a view that lack of capacity meant that they should treat the person as not liable to pay rent, and so not entitled to benefit. A test case by the Social Security Commissioner, ref: CH/2121/2006, stated that such decisions are incorrect in law, and that if a tenant without capacity does not wish to avoid the tenancy, there is a legal liability to pay rent and, therefore, entitlement to benefit.

Making the Contract Intelligible

If, as we say above, the test of capacity takes account of the understanding of a particular situation, obvious, simple, practical measures can be taken to make sure this is possible and it is a civilised thing to do regardless of the requirements for a contract for example:

- give information simply
- with suitable language or non-verbal means
- audio or video aid
- with the help of a carer or advocate familiar with someone to assist communication
- rehearsing information

The Mental Capacity Act 2005 states that such help should be extended to anyone whose capacity is in question, and the Code of Guidance which supplements the Act gives examples of what approaches are necessary to help communication and decision-making.

A letter could be provided by a friend, advocate or relative to say how the tenancy had been explained and that they believed it to be understood.

Housing Options have produced materials and guidance published by the National Housing Federation, Easy Read Tenancy and Support Agreements which can be used with tenants to help explain a tenancy in simple words and pictures. It is based on the NHF form of assured tenancy and assured short hold. For details visit www.housing.org.uk.

Appointees for Financial Affairs

Some organisations have looked to appointing another to act for someone in an agreement. In the case of tenancies or licences this is probably unnecessary but could be used when where capacity is very limited. The Court of Protection could appoint a receiver but this is a cumbersome and very much a last resort. In the case of loans for house purchase it may be a necessary alternative.

In order to receive welfare benefits someone else can be nominated to cash benefits as 'agent'. Where someone is unable to act in the claiming of benefits an appointee can be arranged.

The Court of Protection is a division of the High Court whose purpose is to appoint receivers for people who are deemed not to have the capacity to manage their own financial affairs and it then supervises these and has the power to enter binding arrangements on that person's behalf. It is chiefly concerned where someone has assets to be protected or administered. The Court of Protection is usually only involved where substantial sums of money or assets are at stake - this is not the case with a tenancy. It can however be relevant when someone is seeking to take out a mortgage or buy a property.

Lasting Power of Attorney/ Deputyship

This is another option suited for cases such as loans and home ownership where enforceability of the contract matters. To buy a property the contract to purchase and the mortgage agreement are the usual main commitments. The person would need to understand the elements of the agreements and where this is thought not to be possible the options are:

- to use the Court of Protection
- Lasting Power of Attorney
- joint ownership
- for a trust to own the property

These are dealt with in detail in the publication *Ownership Options* and other *factsheets* produced by Housing Options.

It is possible for someone who is capable of understanding what they are doing to appoint another to act on their behalf permanently. Someone with learning disabilities or mental health problems may be judged to be able to give someone this power even if they do not have sufficient capacity to manage their own financial affairs. The relevant legislation is the *Mental Capacity Act 2005* and the person granting the power needs to understand the extent of the powers they are giving by this means. This could probably be used for a tenancy but we have suggested, unnecessary.

Mental Capacity Act 2005

The Act deals again both with power of attorney and deputyship and creates two new public bodies to support the statutory framework, both of which are designed around the needs of those who lack capacity. Our factsheet "Mental Capacity Act 2005" gives more information.

Tenancies or Licences

There is adequate guidance on this now in the *Housing Corporation Tenant's Guarantee* and elsewhere. However, before concluding that all is straightforward for the housing provider it should be said that there are serious strains in the system which the legal niceties illustrate more than they cause.

These are further apparent when the *Care Standards Act 2000* is applied. Before looking at the complications which overlay this, it is simplest to start with the elements and then look at the law. What is evident is that a housing manager, social worker, the inspection department and health and safety officers have quite different views.

TYPES OF TENANCY AGREEMENTS

A tenancy grants 'an interest in land', established by the payment of rent and the contract conveying usual rights and responsibilities which derive from centuries of law and statute. Your home, within agreed limits, is your castle. You have 'quiet enjoyment' but must not commit 'waste' nor 'nuisance'.

Occupying under a licence is a lesser right and is more like buying a bus ticket than having a home of your own. You have the seat on the bus or the room in a house. *The Abbeyfield Case* in the House of Lords (*Street and Mountford*) describes things very well and is now most often referred to for recent guidance. First the reality of the arrangement is more important than what it's called.

In this case although the occupier had exclusive use of a room, there was a housekeeper and the extent of services and board were such as to suggest the occupier was a licensee or lodger. The level of attendance or services were such as to require that the landlord had unrestricted access through the house, and the arrangement was so personal in nature. This in law suggested that there was no estate in land the key feature of tenancy.

If the licence and tenancy are distinguished clearly, what may create confusion is where housing organisations grant assured tenancies even when there may be a significant level of attendance and services, care and support. This may not matter between consenting parties and many have argued strongly for this approach.

Safeguards for Vulnerable People 'v' Independence

The poor conditions which gave institutions and lodgings a bad name led to the precautions of the *Registered Homes Act* and law on environmental health, health and safety and fire prevention. But precautions and controls can be intrusive. The management control required under the *Care Standards Act* may appear to intrude on people's choice of how they live. Providers can be facing both ways if they aren't careful when they give rights to residents and therefore are unable to exercise sufficient management control to satisfy other statutory requirements.

There are several sets of safeguards needed and some required by law others as a condition of Funding:

- Registration and minimum standards for Care Homes and Domiciliary Care
- Environmental health and other controls of houses in multiple occupation
- Quality assurance and accreditation for Supporting People Grant
- Local Authority contract supervision for support services
- Housing Corporation supervision of Housing Associations
- Organisation's own internal supervision and audit
- Recognised third party accreditation systems

The regulation provided for Registered Care ought not to be the sole safeguard but for learning disability this was sometimes the only protection for residents and for service standards.

Care Standards Act 2000

'An establishment is a care home if it provides accommodation together with nursing or personal care' (*Section 3*). Agencies providing care in people's own homes is regulated under new provisions in the *Act* for domiciliary care. The requirement to register applies to local authorities and care trusts, the reasons that a decision about registration is important are that:

- the managing organisation has wide and enforceable responsibilities for care, welfare and supervision
- Housing Benefit is not payable
- the welfare of residents is subject of regulation

The Sweet and Maxwell Guide to the law is of the opinion that a tenancy with care does not fall under the *Act*. A government minister's advice reflects this too. 'Where care is provided to people in their own home - whether as owner occupier or tenant - that home will not be registerable as a care home' and 'it is immaterial whether the person is living alone or with others'. Although capacity is often raised as an issue, both tenancy and licence are forms of contract and it could be argued that courts will pay more attention to the nature of occupation, exclusive occupation and the way support is provided.

Providing 'accommodation together with personal care' in a registered care home suggests the two come as part of a package. Housing and care are contracted separately through the tenancy and the contract with a provider for care. This allows for an individual's tenancy rights, less institutional arrangements and for more independence.

For the housing organisations it is important that they are clear about their intention towards residents, what rights and responsibilities are set out in an agreement. They need to be clear whether they are only a landlord or whether they take a greater responsibility for a resident's welfare and care.

The arrangements for Care Homes is based on a single establishment providing accommodation and care. In practice there have been many services where there were different organizations one offering accommodation and the other care. New funding arrangements for Supporting People are for 'housing related support' introducing the possibility of a third provider. In practice the job is usually shared between two.

Further Information >> See our *Factsheet* Registration of Care Homes and Domiciliary Care

Conclusion

For the housing organisations what is most important is to be clear about their intention towards residents, what rights and responsibilities are set out in an agreement. They need to be clear whether they are only a landlord or whether they take a greater responsibility for a resident's welfare and care.

Where these are the responsibility of a third party the separation and interdependence of agreements needs thought. What are the safeguards for a resident if the welfare part of a package fails, is the tenancy sustainable? It is desirable that residents have rights that accord with what the rest of us would expect. These must be arranged to be secure and there are safeguards provided by regulation which should be extended to tenants as well as those in registered homes.

References

Housing Corporation (1989) - *The Tenant's Guarantee London*, the Housing Corporation
Penta & New Era Housing Associations (1996) - *Your Tenancy or Licence Agreement London*, National Housing Federation
Department of Health (1993) - *Mental Health Act 1983 Code of Practice London*, HMSO
Simons K (1997) - *A Foot In The Door Manchester*, National Development Team
Mental Capacity Act 2005 + Code of Guidance

Related Factsheets

The Right and Capacity of a Person with a Learning Disability
Registration of Care Homes and Domiciliary Care

If you require further information or have other queries contact Housing Options.
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