Housing Enforcement for Landlords – the Housing Act 1988 (amended by the Housing Act 1996)

Grounds for seeking possession, which may relate to hoarding conditions	The Housing Act 1988 (amended by the Housing Act 1996
Ground 12 **Breach of tenancy**	Any obligation of the tenancy (other than one related to the payment of rent) has been broken or not performed. It is, of course for the Court to decide in each case whether possession should be granted (and, if so, whether the possession order should be suspended) but it is much likelier to grant possession if the breach is still in progress.
Ground 13 **Deterioration of premises**	The condition of the dwelling-house or any of the common parts has deteriorated owing to acts of waste by, or the neglect or default of, the tenant or any person residing in the dwelling-house and, in the case of an act of waste by, or the neglect or default of, a person lodging with the tenant or a sub-tenant of his, the tenant has not taken such steps as he ought reasonably to have taken for the removal of the lodger or sub-tenant.
Ground 14 **Nuisance**	The tenant or a person residing in or visiting the dwelling-house: (a) Has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality, or (b) Has been convicted, or

Grounds for seeking possession, which may relate to hoarding conditions	The Housing Act 1988 (amended by the Housing Act 1996
	(i) Using the dwelling-house or allowing it to be used for immoral or illegal purposes, or (ii) An arrestable offence committed in, or in the locality of, the dwelling-house.

Landlord related housing support for hoarding		
Social landlords must also be mindful of any potential Human Rights Act defence under Article 8 (right to private and family life, home and correspondence). Again, this hangs on proportionality and the court will only have to consider whether the making of a possession order is proportionate if the defence is raised by the occupier and it crosses the high threshold of being seriously arguable. This will be more relevant with possession claims based on mandatory grounds – such as Section 21 notices. With discretionary grounds, the court will assess the proportionality of the eviction as part of its judicial function looking at what is reasonable in all the circumstances.		
Landlord	**Acceptable behaviour contracts**	Will need the agreement and co-operation of the tenant and it may also be possible to enlist the assistance of family and friends to ensure that the purpose of the ABC is understood and complied with. A term of the ABC may be to allow officers or support of a third person giving routine access to the property.
Landlord	**Injunctions**	An injunction can be an effective remedy as it should either force the tenant to deal with the problem or may allow the landlord to enter the property and resolve the issues. However, if there is a real possibility that the tenant will lack the capacity to understand or comply with an injunction then it will not be granted. There must be solid evidence to support an application for an injunction; also, please note if an injunction order is breached, the court will view it as contempt of court

Landlord related housing support for hoarding		
		and the punishment for this is either a fine or imprisonment. It is unlikely to result in any order permitting the landlord to force entry to the property and resolve the hoard. It is however good evidence to show a court that you have tried a lesser remedy than seeking a possession order to resolve the situation.
Landlord	**Possession proceedings**	Such proceedings can be complicated by defence arguments relating to capacity and The Equality Act 2010 so these matters must have been dealt with prior to issue. The case will be decided on the question of reasonableness and it is essential that a landlord's policies and procedures have been complied with so as to demonstrate that a possession order is necessary and a proportionate response to the hoarding behaviours displayed and is a measure of the last resort/no lesser remedy is likely to resolve the issue. ** The threshold will be crossed in only a small number of cases and the question is whether the making of a possession order is a proportionate means of achieving a legitimate aim. As such, to show this, evidence of the risk to the residents/neighbours health, safety and wellbeing will be paramount.
Environmental health **(Local authority power only)**	**Local authority statutory powers**	Enforcement using the local authority's statutory powers under the Public Health Act 1936 and Environment Protection Act 1990 which are concerned with health and amenity. Potentially the court can grant a power to force access to the property.

Landlord related housing support for hoarding		
Mental health	**Mental capacity**	Mental Capacity Act – specific to managing the home environment
Mental health	**Court of Protection for tenants who lack mental capacity**	In cases where the tenant is found to lack capacity, the Court of Protection could (not always – sometimes this would take too long to process) be used instead of possession proceedings. The Court of Protection has extensive decision-making powers on behalf of vulnerable individuals which includes personal welfare matters. There is case law to demonstrate that this can be a very effective with the potential for an order to be effective for a unlimited amount of time, ie, a tenant is decanted every six months to allow the landlord to remove hoarded goods and clean a property so as to deal with fire hazards, smells, pests etc. The test that the Court of Protection applies is whether a proposed decision or course of action is in the person's 'best interests' in all the circumstances. The Court of Protection will expect evidence from most parties involved in the care and wellbeing of the resident to support the application and give evidence of the same.
Social care **(Local authority power only)**	**Safeguarding and self-neglect**	Safeguarding enquiry Care needs assessment Multi-agency proportionate response

Legal powers of other agencies

Agency	Legal power and action	Circumstances requiring intervention
Environmental health	**Section 83 Public Health Act 1936 Filthy/Unwholesome premises which are prejudicial to health or verminous.** **Service of Notice requiring clearance/cleansing/pest control treatment. No appeal.** **Council has powers to enter premises by warrant if reasonable access not given after giving notice. This will be to assess the conditions or carry out works in default. Possible prosecution and Council can recover expenses for works in default.**	Where hoarded materials result in filthy, unwholesome or vermin infested premises. This is often where there is a lack of engagement or co-operation of occupier. There must be likelihood of adverse health effect to occupant or rodents or insects present. There may also be complaints from neighbours which must be investigated by the Council.
Environmental health	**Section 79/80 Environmental Protection Act 1990** **Statutory Nuisances Service of Abatement Notice requiring action to remove nuisance and/or prevent a recurrence.** **Appeal against notice possible.**	Council has a legal duty to investigate complaints of statutory nuisance and must take action if nuisance proven. The premises must be in such a state that they are prejudicial to healthy or a nuisance to neighbours. This may be from condition of the premises, accumulations, deposits or even

Agency	Legal power and action	Circumstances requiring intervention
	Warrant powers similar to above.	animals kept in unsanitary conditions.
	Possible prosecution and Council can recover expenses for works in default.	Intervention often prompted by complaints from neighbours.
	Injunctive proceedings may be taken.	For exceptional situations where widespread nuisance to neighbours continues after intervention and usually after service of notice.
Environmental health	**Housing Act 2004** **Housing hazards such as domestic hygiene, pests and vermin, excess cold, fire.**	Relates to possible health and safety effects on occupier. Hoarding can lead to fire hazards from accumulated materials.
	Service of Improvement or Awareness Notice usually on owner of premises requiring removal of hazards. Council can charge for costs incurred serving notices. **Appeal provisions. Possible prosecution and Council can recover expenses for works in default**	Due to hoarding, there may be a lack of repair/maintenance of property leading to other health effects on occupier such as lack of heating (excess cold) or washing/sanitary facilities.
Environmental health	**Prevention of Damage by Pests Act 1949 (section 4)**	Powers usually used for accumulations of rubbish or items attracting/harbouring rodents on private land. This is usually used for external parts of property, eg, gardens.
	Service of Notice to keep land free from rats or mice **No warrant powers** **Possible prosecution and Council can recover expenses for works in default**	

Agency	Legal power and action	Circumstances requiring intervention
Environmental health	**Refuse Disposal (Amenity) Act 1978** **Anything abandoned in the open air** **Town and Country Planning Act 1990** **Anything adversely affecting the amenity (pleasantness/quality) of the area** **Environmental Protection Act 1990** **Litter clearance notices**	Collectively known as “amenity powers” – anything affecting the enjoyment of the amenity
Police	**Power of Entry (S17 of Police and Criminal Evidence Act)** **Person inside the property is not responding to outside contact and there is evidence of danger.**	Information that someone was inside the premises was ill or injured and the police would need to gain entry to save life and limb
Fire brigade	**Prohibition or Restriction of use (Regulatory Reform (Fire Safety)Order 2005)** **The fire brigade can serve a prohibition or restriction notice to an occupier which will take immediate effect. In some circumstances this can apply to domestic premises including single private dwellings where the appropriate criteria of risk to relevant persons apply.**	If a premises involves such risk to persons so serious that the use of the premises ought to be Prohibited or Restricted notice can be served on the responsible person (owner/occupier).

Agency	Legal power and action	Circumstances requiring intervention
Animal welfare agencies such as RSPCA/Local authority, eg, Environmental Health/DEFRA	**Animal Welfare Act 2006** **Offences (Improvement notice)** **Education for owner a preferred initial step, Improvement notice issued and monitored, If not complied can lead to a fine or imprisonment**	Cases of Animal mistreatment/neglect. The Act makes it not only against the law to be cruel to an animal, but that a person must ensure that the welfare needs of the animals are met. See also: http://www.defra.gov.uk/wildlife-pets/.
Local authority/Adult Social Care	**S.46 of the Care Act 2014** **This is the power to remove but not necessarily to resolve so would have to be used in conjunction with other measures. An assessment would have to be carried out regarding the person's living conditions and their best interest. This would always have to be undertaken by a professional.**	Where a person by way of chronic disease, age infirmity or physical incapacity is living in insanitary conditions and is unable to care for themselves. However, this action may be open to challenge under the Human Rights Act 1998 and should only ever be used as an absolute last resort, with justification such as reasonable belief it is to prevent death.
Mental health	**Mental Health Act 1983 Section 135(1)** **Provides for a police officer to enter a private premises, if need be by force, to search for and, if though fit, remove a person to a place of safety if certain grounds are met.** **The police officer must be accompanied by an Approved Mental Health Professional (AMHP) and a doctor.**	Evidence must be laid before a magistrate by an AMHP that there is reasonable cause to believe that a person • Is suffering from mental disorder, and is being • Ill-treated, or • Neglected, or • Being kept other than under proper control, or • If living alone is unable to care for self.

Agency	Legal power and action	Circumstances requiring intervention
	In general practice an AMHP would apply for the 135(1) warrant at the appropriate Magistrates Court. **Section 135(1) permits removal to a place of safety for up to 72 hours with a view to the making of an application under the provisions of the Mental Health Act or other arrangements for the persons care or treatment.** **NB. Place of Safety is usually the mental health unit, but can be the Emergency Department of a general hospital, or anywhere willing to act as such.**	And that the action is a proportionate response to the risks involved.
Mental health	**Section 4 of the Mental Health Act 1983. Admission for assessment in cases of emergency.** **In any case of 'urgent necessity'.** **The criteria for detention mirror Section 2 (below) but Section 4 may be used in cases of emergency where it has not been possible to secure an assessment by a second doctor.** **This section expires after 72 hours unless a second medical recommendation is**	In any case of 'urgent necessity' an application may be made by an AMHP or Nearest Relative and founded on one medical recommendation made by, if practicable, a doctor with previous knowledge of the person or a Section 12 approved doctor.

Agency	Legal power and action	Circumstances requiring intervention
	received within this time period.	
Mental health	**Section 2 of the Mental Health Act 1983.** **Admission to hospital for assessment. Application can be made by an AMHP or Nearest Relative based on two medical recommendations in the prescribed form by two independent doctors.** **The person may be detained for a period of up to 28 days.**	The following grounds must be met: The person is suffering from a mental disorder of a nature or degree which warrants the detention of that person in hospital for assessment (or assessment followed by treatment). That the person ought to be detained in the interests of his/her own health or safety or with the view to the protection of others.
Mental health	**Section 3 of the Mental Health Act 1983** **Admission to hospital for treatment. Application can be made by an AMHP or Nearest Relative and is based on two medical recommendations in the prescribed form by two independent doctors.** **The person may be detained initially for a period of up to six months for the purposes of treatment.** **Section 17a of the amended Mental Health Act**	The following grounds must be met: That the person is suffering from a mental disorder of a nature or degree which makes it appropriate for him/her to receive medical treatment in a hospital. That it is necessary for the health or safety of the person or for the protection of others that he/she should receive this treatment and it cannot be provided unless the person is detained under this section That appropriate treatment is available for him/her.

Agency	Legal power and action	Circumstances requiring intervention
Community Treatment Order		

Fire service (continued)

- The Fire Service has no legislative powers in domestic properties
- We will refer to partner agencies when the safeguarding of the resident is compromised in particular fire or infestation
- A Community Fire Safety Officer will visit and attempt to fit Wi-safe smoke alarms and a carbon monoxide alarm
- Carry out a full home fire safety check
- Offer advice on a home fire escape plan
- Discuss the dangers seen
- Ascertain if the service we can visit again bringing a colleague (another agency)
- Complete a referral form and submit to Service Safeguarding Officer before being forwarded to MASH
- Record all information on Service data base
- Inform Combined Fire Control of the scale.

Legal factors in practice

An anti-social behaviour order

In partnership with other agencies a civil order made against a persistently anti-social individual which restricts his or her activities or movements, a breach of which results in criminal charges.

A demoted tenancy

- In partnership with other agencies a reduced level of tenancy can be applied for
- It removes a number of tenancy rights, lowers security of tenure and makes it easier for a landlord to seek possession or evict a tenant if they do not improve their behaviour.

An injunction

Injunctions can either be 'final' (part of the decision of the court after all the issues have been heard at trial) or 'interim' (made at an early point in the case before all matters have been heard). Most injunctions are interim, providing an immediate remedy.

Power of Entry

Capping the gas?

Possession/eviction

This is the most extreme method of dealing with a hoarder.

1 Hoarding

Living in such cluttered conditions means it often becomes almost impossible to keep a property in a clean and sanitary condition, particularly if animals are also present. Such properties are prone to rodent and insect infestations, mould and blocked drains. Minor repairs are unlikely to be completed or reported.

There is also a significantly increased fire risk: hoarded items are often highly combustible, and can block escape routes. Figures from the Chief Fire Officers Association, released as part of their Hoarding Awareness Week 2014, state that fires are contained within the room of origin in 90% of cases for normal residential homes, but only 40% of hoarding homes. This increases the risk that the fire may spread outside of the property, a particular danger if in a block of flats or densely built up area.

Hoarding can prevent landlords from fulfilling their statutory duties. By preventing, either by refusing access or making this physically impossible, access to the property for gas inspections, landlords are at risk of breaching the requirements under Section 36(2) Part F of the gas Safety (Installation and Use) Regulations 1998 to keep gas fittings in a safe condition. Again, a gas explosion or leak is likely to affect neighbours as well as the hoarder.

Further, at the end of the tenancy, the costs of returning the property to an inhabitable state (and for social landlords to the Decent Homes Standard) can be prohibitive due to the lack of maintenance and care. Should the resident die or abandon the property, there are the additional costs incurred of clearing the contents, which, again, are difficult to recover.

1.1. Anti-social behaviour

Hoarding is typically dealt with as anti-social behaviour, so actions taken by landlords are governed by the anti-social Behaviour, Crime and Policing Act 2014 (“the Act”), whose powers are currently being phased in. The advantage for landlords is that 2(1)(c) of the Act introduces the concept of **“housing related nuisance”**, so that a direct or indirect

interference with housing management functions of a provider or local authority, such as preventing gas inspections, will be considered as anti-social behaviour.

1.2. Mental capacity/illness

However, due to the close connection with mental illness, any landlord dealing with a hoarder must first determine whether they are likely to be considered to have capacity or not. This will affect what powers can be enforced against the hoarder, and in which court the case should be heard.

Under Section 2(1) of the Mental Capacity Act 2005, a person lacks capacity 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*". The element of *"in relation to the matter"* is essential here as although compulsive hoarders may be able to cope with the essential legal process, they may not have insight into their behaviour and so would not be able to keep to the terms of an injunction even if a landlord were able to obtain one.

Where the hoarder does have capacity, then the main sanctions include injunctions and possession orders.

2 Injunctions

Injunctions, which compel someone to do or not do specific activities, may be obtained under Section 1 of the Act. They can be used to get the tenant to clear the property or provide access for contractors. To gain an injunction, the landlord must show that, on the balance of probabilities, the hoarder is engaged or threatens to engage in anti-social behaviour, and that it is just and convenient to grant the injunction for the purpose of preventing an engagement in such behaviour.

Another new element of the Act is that it will give the Court the ability to require the tenant to take certain actions. The aim of these *"positive requirements"* is to encourage the tenant to *"address the underlying causes of their behaviour".* So, they can be used to require that a hoarder will co-operate with a support service to address the underlying issues related to their hoarding as well as physically clearing the hoard.

Tackling the underlying problem through such requirements means that action is more likely to be successful and decrease the likelihood of breaching the injunction. However, where such requirements are attached to an injunction, the landlord must be able to prove that they can enforce and monitor this. This has the potential to put off smaller or private landlords due to the expense, or even large landlords where there is a lack of support services.

Where injunctions are not successful or appropriate, a landlord may wish to seek possession of the property. Severe hoarding will inevitably represent a clear breach of the tenancy agreement to either keep the property in a good state of repair, or to allow access for required works. Landlords will therefore be entitled to seek possession and evict the tenant under either Ground 1, Schedule 2 of the Housing Act 1985 (secure tenancies) or

Ground 12, Schedule 2 of the Housing Act 1988 (assured tenancies). As a result of this action, the hoarder would be evicted and the landlord would usually need to clear the property at their own expense.

This can be an effective remedy as it forces the tenant to clear their property or allows the landlord or social services to enter the property to affect a clean-up or to undertake the necessary inspections or works. But in many such cases, the tenant's problems are caused by a mental disorder. A pathological hoarder may be diagnosed with Diogenes' syndrome or senile squalor syndrome, a disorder characterised by extreme self-neglect, domestic squalor, social withdrawal, apathy and compulsive hoarding of rubbish. It is often one symptom of a formal psychiatric disorder. Such tenants are often elderly and have a long attachment to their home. Those who refuse to engage may also be doing so as a result of suffering mental illness or psychoses.

In either case there is a real possibility that the person will lack the capacity to litigate and the capacity to understand or comply with an injunction, in which case an injunction cannot be granted (Wookey v Wookey (1991) 2 FLR 319).

In the alternative, if a person is found to lack capacity, then an application will need to be made to the Court of Protection. Any decision made on the tenant's behalf, must be in their *"best interests"* (Section 1(5)).

As an example, may contain a foreseeable removal of the tenant every three months coupled with the power for hoarded goods to be removed and cleared, which would help the hoarder maintain their tenancy and enjoy a safe living environment. It may be more suitable for the resident to be removed to live in another environment.

In very extreme cases, a person may need to be detained under the Mental Health Act 1983: under Section 135 an Approved Medical Health Professional may gain a warrant to enter and remove a person from the property following an assessment under Section 2.

3 Derbyshire Fire and Rescue Service

A new multi-agency process has been launched in Derbyshire – Vulnerable Adult at Risk Management (VARM). Run by Derbyshire County Council and Derby City, and supported by the FRS, police, social housing providers, environmental health and others, the policy gives professionals a framework to facilitate effective multi-agency working with vulnerable adults who are at risk of serious harm or death through self-neglect, risk-taking behaviour or refusal of services.

The VARM process is designed to be used for those vulnerable adults who do not fall within existing processes. Each agency appoints a 'champion' or lead to take part in the process: to meet, discuss, identify, and document risk for high-risk cases, and to formulate an action plan.

While the process covers all types of harm, it has been used in cases of hoarding. In a recent case, fire crews attended two false alarms at a flat, triggered by burnt cooking. An assessment by the fire officer concluded that the hoarding behaviour of the elderly

occupant – of magazines, books, drawings, and human excreta in all rooms, blocking doors – meant that he was unlikely to escape unaided from a fire, and that crews would struggle to rescue him and be at risk themselves.

Although his social housing provider and social services had been trying to work with the occupant, who had health and mobility issues, previous interventions had not succeeded and he was in danger of losing his tenancy. A fire in his property would almost certainly kill him. A VARM was called, involving practitioners and managers from key agencies. One of the ways of getting the occupant to engage was to show he could be helped in a way that he wanted. As the tenancy support worker had formed the most positive relationship with him, this person was able to take simple steps to address his concerns, while getting other agencies' concerns addressed. His care package was adjusted, to include assistance with household chores; he was visited and helped by health practitioners; his home was cleared allowing his central heating to be repaired. Fire risks were mitigated down to an acceptable level without the need to revisit and upset him.

The occupant is maintaining a clean and tidy house, is engaging with his care package and is still living at home.

4 Lewisham Borough Council and London Fire Brigade collaborative working

In March 2011, Lewisham Affordable Housing Group (LEWAHG) raised awareness of issues surrounding cases where tenants were hoarding in their homes. It became evident that no one single agency could resolve the situation in isolation and a collaborative approach needed to be adopted. In April 2011 an initial LEWAHG sub-group meeting took place to discuss setting up a Lewisham Multi- Agency Hoarding Protocol. The group consisted of housing providers with properties in Lewisham, Environmental Health, Pest control, Social Care and Health, Community Mental Health, London Fire Brigade, support organisations and voluntary organisations. The London Fire Brigade Borough Commander had been conducting prevention and intervention work to ensure the safety of people who hoard in the borough and so the benefits of working with borough partners in this way were clear.

Over the following year, a series of meetings took place which allowed the group to share issues and experiences of dealing with hoarding cases, including best practice. The group benefited from the experience of Westminster City Council, which acted as a peer, throughout the process of developing the protocol. Other advisers from legal, therapy groups and support organisations also shared their knowledge at working meetings.

The Lewisham Multi-Agency Hoarding Protocol ensures there is a commitment by participating organisations and a co-ordinated joint approach to hoarding. This is an essential element of ensuring hoarders safety, access support and sustain their independence. The result is a cost and time effective, experienced approach. The protocol also provides a support network of organisations and agencies, including contact details, guidance, support and sharing of best practice. Cases are monitored to identify themes, triggers, duration, number of cases, etc. which develops an understanding of the reasons why a person hoards to inform future best practice. It can also trigger a referral to

Community Mental Health or Social Care and Health, or highlight when a hoarding case is also a safeguarding case.

The multi-agency protocol adopted by Lewisham Borough Council and London Fire Brigade has been working well in practice.

5 Court of Protection and AT

The Court of Protection has far-reaching powers to make decisions on behalf of a person who lacks capacity to do so for themselves in respect of both their property and affairs, and their welfare. The test that the court applies is whether a proposed decision or course of action is in the person's *"best interests"* in all the circumstances (s 4 Mental Capacity Act 2005).

A recent application made by the Official Solicitor on behalf of a man (AT), who was facing eviction by his local authority landlord, exemplifies what has the potential to be an extremely effective remedy for these situations.

This is, as far as we are aware, the first case of its kind in which the Court of Protection has been asked to make orders to allow a local authority to undertake works for the sole purpose of allowing the person to maintain their tenancy. It is suggested that this could and should be a more widely used remedy by social landlords and social services departments, so as to avoid the need for possession proceedings against vulnerable individuals.

5.1. Paranoia

AT (80) had lived in his property as a secure tenant for some 40 years. He managed his affairs in most respects without any problems and did not require support in his day-to-day life. However, he suffered from a paranoid delusional disorder whereby he believed the local authority was in a conspiracy to harm him. He therefore refused to engage with them at any level. He refused to allow the local authority landlord to enter his home to undertake annual gas inspections and so placed himself, his neighbours and the property at risk.

The local authority issued possession proceedings on this and other grounds, and obtained an order. AT was medically assessed as lacking capacity to litigate and the Official Solicitor was appointed as his litigation friend. He was also assessed as lacking capacity so the authority could not obtain an injunction to address the problem. As an alternative to eviction, the local authority proposed to remove the gas supply and convert the property to electric heating so that the annual inspections were not required. AT refused to allow this.

The Official Solicitor suggested that the local authority make an application to the Court of Protection to obtain the necessary authority. It refused and so the Official Solicitor made the application on behalf of AT instead. The local authority agreed to co-operate but maintained its application for a warrant of eviction as a fallback position.

5.2. Client's best interests

The application was carefully formulated by the Official Solicitor working together with the local authority social services. It was envisaged that the works would require five to six days to undertake and that it would not be safe for AT to remain at the property during that period. The court was asked to make orders that allowed for a carefully structured process to ensure that the works were done, with AT's best interests protected throughout.

The order authorised the contractors to enter the property, including using forced entry, to change the locks and to undertake the works. It required AT to reside at a specified care home for seven days and permitted the local authority to use reasonable and proportionate force, if necessary, to affect his removal to the care home. It provided for AT to have daily supervised visits to his property and for the use of reasonable and proportionate force should he refuse to leave. No other restrictions were placed on his movements, he was not compelled to remain at the care home and there was no deprivation of his liberty.

Before the first hearing, the parties had gathered the necessary expert evidence to satisfy the Court of Protection that AT lacked capacity in relation to the relevant decisions about gas safety inspections and the proposed conversion works. The Official Solicitor's representatives and the local authority agreed a detailed plan that set out exactly what was proposed and how this would be effected, what steps would be taken to minimise distress to AT, who would be assisted with his move (including liaison with the police) and what amounted to reasonable and proportionate force.

All this was viewed as being in AT's best interests because, even if the removal and temporary re-housing had required AT to be restrained and had caused him distress, this would have been better than the effects on him of eviction by bailiffs, which would have been the likely result of the possession proceedings. In the end, once faced with the court order, AT moved to the care home for the seven days. No restraint was required and although he objected, AT was not unduly distressed and the works were undertaken successfully.

5.3. A fast and effective remedy

Because the parties undertook all the planning beforehand, the court was able to agree the plan and make the requested order in full at the first hearing and no further hearing was required. The proceedings were therefore short and costs were kept to a minimum. The Court of Protection therefore provided a fast and effective remedy, which avoided the eviction of a vulnerable man from his home of 40 years. This is in contrast to possession proceedings which can be protracted and expensive and ultimately provide an unduly harsh and distressing result.

5.4. Scope

Similar use of the Court of Protection could be made in respect of tenants who are hoarding or neglecting their properties, to allow the local authority to enter and undertake work to clean, clear or repair the property or any other such works. Where a person lacks capacity to make the relevant decisions, the Court of Protection has the power to authorise

restraint or restrictions on the person, even giving authority for them to be moved out of the property temporarily as in AT's case above.

The court could potentially authorise regular works to be undertaken (cleaning and clearing the property every three months for example) without the need to return to court on each occasion, provided the person did not regain capacity to make decisions for themselves.

Court of Protection proceedings needn't be long or protracted in these circumstances. The more planning that occurs beforehand and the more detailed the application, the faster and more effective the process will be. Taking such action is likely to be cost effective for a local authority because where a vulnerable person is evicted, the authority may have duties to re-house and the person's care needs are likely to increase, at least in the short term.

Whether the landlord is the local authority, a housing association or a private landlord, careful liaison with the social services department will be required to formulate a plan that can be authorised by the court. While the Official Solicitor made the application on behalf of AT in the case referred to, the social landlord or relevant social services department should seriously consider making the application to the Court of Protection in appropriate cases to avoid the need for possession proceedings at all.

6 Lewisham Council vs. Malcolm (note DDA1995 has been replaced by the Equalities Act 2010)

Three aspects of the case are particularly noteworthy:

In previous cases, the courts have had a discretion whether or not to make a possession order, and disability discrimination was one factor in the exercise of that discretion. Malcolm is the first case in which the Court has refused a possession order on the grounds of disability discrimination despite having no such discretion under the applicable housing law. The three judges failed to agree among themselves what this meant for the ongoing legal status of Mr Malcolm's occupancy. The landlord will have to try to work that one out for itself.

The reason for eviction was not, in this case, abusive or harassing conduct, but the fact that Mr Malcolm had sublet the flat without permission. There was no evidence to show that a schizophrenic episode actually caused the subletting, but the bare fact that the nature of Mr Malcolm's condition 'involved a susceptibility to distortions of thinking' was enough to hold that the eviction was for a reason that 'related to' his disability, and therefore amounted to unlawful discrimination.

The Court held that discrimination could be established even though the discriminator did not know about the disability.

To sum up the landlord's position:

Even if you have what would otherwise be a good reason for eviction, you may still be discriminating unlawfully if you proceed to evict and it turns out that your reason related to your tenant's mental illness.

- It does not help you that you had no knowledge of that illness
- It does not help you that it cannot be shown that the illness actually caused the conduct for which you are evicting, so long as the nature of the mental illness is of a type which might influence such conduct
- It does not help you that the law otherwise gives you an absolute entitlement to evict; the Court will still find that your conduct was unlawful
- The legal status of your ongoing relationship with the occupier of your property is a mystery.

You cannot avoid problems of this sort by refusing to let your property to persons with a mental illness; that is also discriminatory and unlawful.

This is not to say that the law is wrong; a balance has been struck, as it must be, between the interests of the disabled and those of third parties. As Mummery LJ remarked in Clark v TDG Ltd (t/a Novacold), anyone who thinks that there is an easy way of achieving a sensible, workable and fair balance between the competing interests has probably not given much serious thought to the problem.

6.1. Suggestions to deal with above

An obvious starting point is to talk to the tenant. Landlords must be alive to disability issues, and should be prepared for a process of engagement with the tenant and healthcare and social services agencies as a means of resolving problems. The process may be a long one.

Ultimately, in the case of the abusive and harassing tenant, landlords may have to rely on the defence of justification:

a) That in the landlord's opinion the eviction is necessary in order not to endanger the health or safety of any person; and

b) That it is reasonable for the landlord to hold that opinion.

The landlords in Manchester City Council v Romano and another relied on this defence successfully, and were entitled to evict. The key for them was that they were prepared to show in some detail how they had arrived at the conclusion that eviction was necessary in order not to endanger health and safety, and to back it up with evidence.

Record of Mental Capacity Assessment		
It should be assumed that every person has the capacity to make decisions, unless they have been tested and found to lack capacity for a particular decision. Initial testing of capacity should be recorded on this record sheet whenever there is doubt about a person's ability to make a particular decision and where the decision is likely to have lasting consequences. If you complete this form and undertake the tests of capacity listed below you are acting as a possible 'Decision Maker' with regard to the particular decision, on behalf of the named tenant/client. The tests may need to be carried out over more than one occasion and once your initial assessment has been carried out you may wish to make a referral to Health/Social care for a formal assessment.		
Tenant/Client Name:	Property Ref (if applicable):	
Completed by:	Job Title:	Date:
What is the issue(s) about which a decision has to be made?		
Why does it have to be made now?		
Is the tenant/client in comfortable surroundings, (ie, reasonable time of day, at home, calm, quiet environment, family present or not etc - please delete) Yes/No	Describe the efforts that have been made to establish the best communication possible. (ie, interpreter needed, Speech and Language Therapist guidance, communication methods)	
Assessment of Capacity – Part 1		
Does the tenant/client also have an impairment of the mind or brain? eg, a clinical diagnosis of dementia, delirium, learning disability, brain damage or severe mental illness (2005).		Yes/No/ Not Known
Assessment of Capacity – Part 2		
Can the tenant/client understand information about the decision to be made?		Yes/No
Can the tenant/client retain that information in their mind?		Yes/No
Can the tenant/client use or weigh that information as part of the decision-making process?		Yes/No
Can the tenant/client communicate their decision, (eg, by talking, using sign language, etc)		Yes/No
Referral to Health/Social care? Yes/No		Date Referral Made: