

Summary of when a tenant lacks appropriate mental capacity.

If a landlord is dealing with a tenant who is deemed not to have the ability to deal with a legal problem they might find any court order issued becomes null and void.

Anyone who lacks this ability is known to have capacity issues – i.e. they don't have the mental capacity to process a situation appropriately. If this is the case it is critical the situation is recognised as soon as possible, and that appropriate legal help is sought from someone with experience of this. It is possible that a legitimate Section 21 and/or Section 8 can be overturned if the Judge decides the tenant did not have the capacity to deal with the problem.

There are three types of capacity that are relevant to landlords and litigation:-

1. Litigation capacity – protected persons and litigation friends;
2. 'Wookey' capacity – the ability to understand and comply with an order of the court;
3. Mental capacity more generally – the ability to serve notices.

Litigation capacity.

Protected Persons

If you have a tenant who lacks mental capacity, perhaps through dementia, or another recognised medical condition you might find it difficult to evict them or get orders against them.

Under the Mental Capacity Act (2005) the following principals apply:-

- A person is assumed to have capacity unless it is established they lack it.
- A person is not to be treated as unable to make a decision unless all practical steps to help them to do so have been taken without success.
- A person is not to be treated as unable to make a decision because they make an unwise one.
- Any act done or decision made on behalf of someone who lacks capacity must be done or made in their best interest.
- Before that act or decision is made, a regard should be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedoms.

Where it is perceived that someone lacks capacity it would normally require expert medical evidence and a certificate of capacity – see an [example here](#).

Litigation Friend

Unless the court rules to the contrary, any order, etc obtained has no effect unless a Litigation Friend has been appointed. This can lead to delay and increased expense.

A Litigation Friend can be:-

- family member;
- friend;
- support worker, or
- an [Official Solicitor](#).

If you suspect someone lacks capacity or has a mental impairment you can:-

- ask them;
- ask them if they want you to write to their GP, or the Community Mental Health Team;
- ask for their permission to discuss their case with their family member/social worker/ Community Psychiatric Nurse (CPN)
- if necessary, try to get someone to act as their Litigation Friend ([form 325](#)), and get them available for the hearing;
- try to get the Community Mental Health Team (CMHT) to complete the [Certificate of Capacity](#).

Wookey Capacity (named after *Wookey v Wookey* (1993) 3 ALL ER 365.

A court will not make an order in circumstances in which there is clear evidence that the respondent lacks the capacity to comply with its terms: this is sometimes referred to as “specific capacity” or “Wookey capacity” and is distinct from litigation capacity.

In *Wookey v Wookey* the Court of Appeal held that an injunction can be granted against a patient even if a guardian has been appointed, but not if he or she is incapable of understanding what he or she is doing or that it is wrong, as the patient would not be capable of complying with it and would have a defence to any subsequent application for committal.

The court must be satisfied that a tenant understands each and every part of the conditions to be imposed.

Mental Capacity.

A tenant may lack the capacity to serve their own Notice to Quit on the landlord.

If they are in a Care Home or under a [Mental Health Section](#) they may be unable to serve a tenant’s Notice to Quit to end the tenancy and often (although they have the powers) Social Services will not ask the court of protection to empower them to act, even if it is in the tenant’s best interest.

A tenant’s lack of capacity does not stop you serving notices on them, but the court will not make an appropriate order unless they have a Litigation Friend.

If you need to end a tenancy when you know, or presume a lack of capacity and you cannot procure a tenant’s notice:-

- serve your notice on the tenant at the property and any care home/hospital they are residing at
- serve copies of the notice(s) on Adult Social Services/CMHT/family;
- procure agreement from a family member, or Support Worker to act as a Litigation Friend. Get them to complete the Certificate of Capacity and a letter confirming they do not oppose the making of a possession order if it is the tenant’s best interest;
- or, get CMHT/treating physician to complete the Certificate of Capacity;
- issue proceedings with Litigation Friend named on the claim;
- the Court will then (hopefully):-
 - appoint a Litigation Friend
 - make the possession order.

This fact sheet is for outline information only. It is critical to get appropriate legal advice from someone with experience in this area.

The duties imposed by the Equality Act 2010 relating to capacity issues are complex, and the cost implications of getting it wrong will probably outweigh the costs of seeking professional advice at an early stage.