MENTAL CAPACITY REPORT: HEALTH, WELFARE AND DEPRIVATION OF LIBERTY

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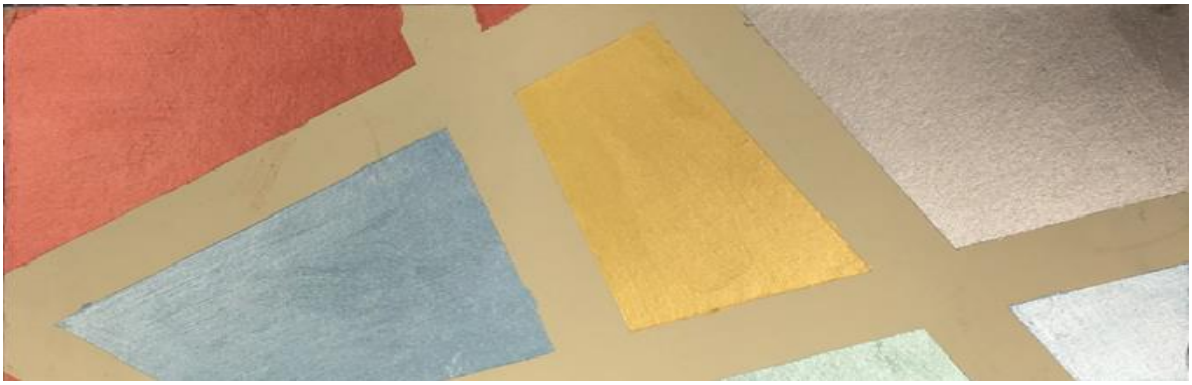

Welcome to the October 2022 Mental Capacity Report. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Report: Capacity to make decisions regarding hoarding, parental consent for deprivations of liberty, and Article 2 and informed consent.

(2) In the Property and Affairs Report: A new guidance notes on selling properties;

(3) In the Practice and Procedure Report: The Court of Appeal weighs in on the test for injunctions in the Court of Protection, and a new Civil Justice Council working group considers litigation capacity in civil proceedings;

(4) In the Wider Context Report: Withdrawal of treatment; jurisdiction of the Ombudsman; mental capacity and Article 14 status; and 'Shedinars' galore.

(5) In the Scotland Report: An update on the Mental Health Law Review.

You can find our past issues, our case summaries, and more on our dedicated sub-site here, where you can also subscribe to this Report, and where you can also find updated versions of both our capacity and best interests guides.

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The picture at the top, "*Colourful*," is by Geoffrey Files, a young autistic man. We are very grateful to him and his family for permission to use his artwork.

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Hoarding: capacity and best interests

AC and GC (Capacity: Hoarding: Best Interests) [2022] EWCOP 39) (15 August 2022) (HHJ Clayton)[1]

Best interests – care
Best interests – property and affairs
Mental capacity – care

Summary

In *AC and GC*, HHJ Clayton was concerned with two individuals: AC, 92, and her son, GC. The court considered whether they lacked capacity to make decisions about their items and belongings.

An application had been made for an order that AC should be moved from her home where she was living with GC to a respite placement so that the property could be cleaned and made safe after a long period of 'hoarding.' The local authority then issued proceedings in relation to GC, seeking an order requiring him to leave the home as well to allow for it to be cleaned.

The issues for consideration, at this hearing, were:

(1) whether GC had capacity to:
   a. Manage his own property and affairs;
   b. Manage AC's property and affairs;
   c. Make decisions regarding his items and belongings;
   d. Make decisions regarding AC's items and belongings;
(2) whether AC should return home for a trial period, receiving a package of care;
(3) whether to appoint a deputy for AC's property and affairs.

The parties had reached a consensus (inter alia) that GC lacked capacity to make decisions regarding his own items and belongings, based upon the expert evidence of Professor Salkovskis; and the court accepted that analysis.

The following information was identified as relevant to the decision in respect of one's items and belongings [para 14]:

(1) Volume of belongings and impact on use of rooms: the relative volume of belongings in relation to the degree to which they impair the usual function of the important rooms in the property for the individual concerned (and other residents in the property) (e.g. whether the bedroom is available for sleeping, the kitchen for the preparation of food etc). Rooms used for storage (box rooms) would not be relevant, although may be relevant to issues of (3) and (4).

(2) Safe access and use: the extent to which the individual concerned (and other residents in the property) are able or not

[1] Neil having appeared in this matter, he has not contributed to this note.

to safely access and use the living areas.

(3) Creation of hazards: the extent to which the accumulated belongings create actual or potential hazards in terms of the health and safety of those resident in the property. This would include the impact of the accumulated belongings on the functioning, maintenance and safety of utilities (heating, lighting, water, washing facilities for both residents and their clothing). In terms of direct hazards this would include key areas of hygiene (toilets, food storage and preparation), the potential for or actual vermin infestation and risk of fire to the extent that the accumulated possessions would provide fuel for an outbreak of fire, and that escape and rescue routes were inaccessible or hazardous through accumulated clutter.

(4) Safety of building: the extent to which accumulated clutter and inaccessibility could compromise the structural integrity and therefore safety of the building.

(5) Removal/disposal of hazardous levels of belongings: that safe and effective removal and/or disposal of hazardous levels of accumulated possessions is possible and desirable on the basis of a "normal" evaluation of utility.

The court determined that it was in AC and GC's best interest to enable the family to be supported to have house-clearing and cleaning services enter the property to clean it and make it safe to occupy.

The issue in dispute was whether it was in AC's best interests for a trial to take place at home. One of the principal issues was the risk that GC would continue to hoard (and relatedly (i) the impact of his mental health if items were taken away and (ii) the care package at home would breakdown because of the conditions in the house). Professor Salkovskis therefore provided further evidence to the court in respect of the interactions between GC's obsessive compulsive disorder and hoarding disorder.

The Local Authority's view was that the risk of placement breakdown was too great and that AC should therefore remain in the care home. The Official Solicitor, on AC's behalf, supported a trial at home with a number of conditions on to GC (given he had litigation capacity).

Whilst acknowledging that a trial at home was not without risk, HHJ Clayton was ultimately not satisfied that a final placement at the care home would be an appropriate and justifiable interference with AC's article 8 rights.

Comment

The judge observed that, particularly in light of *A Local Authority v JB* [2021] UKSC 52, no declaration was ultimately required in respect of GC managing his own property and affairs, because there was no need for any deputyship order in respect of his own finances and he had disclaimed his lasting power of attorney for AC. The Supreme Court in *JB* had emphasised the importance of (1) identifying the precise matter upon which the person's decision is required; and (2) identifying the information relevant to the decision.

Parental consent to deprivations of liberty

Lincolnshire County Council v TGA & Ors [2022] EWHC 2323 (Fam) (17 August 2022) (Lieven J)

Article 5 ECHR -"Deprivation of liberty"

Article 5 ECHR – Children and young persons

Two recent cases appeared in quick succession considering whether parents could consent to a child's deprivation of liberty; the second took into account the holdings in the first. We consider each in turn.

Summary

In *Lincolnshire County Council v TGA*, a 14-year-old boy with epilepsy, autism, Attention Deficit Disorder and global developmental delay was accommodated by the local authority under s.20 of the Children Act 1989 with the consent of his testamentary guardians. The issue was "*whether K is deprived of his liberty*" and "*whether the testamentary guardians can consent to such a deprivation*". It was common ground that it would make no difference if his parents were alive and themselves exercising parental responsibility. In case law terms, the issue was whether the decision in *Re D (Deprivation of Liberty)* [2015] EWHC 922 (Fam) (which held that parents could consent to the confinement of a child under 16) had been overtaken by the Supreme Court decision in *Re D (A Child)* [2019] UKSC 42 (which held that no such consent could be given upon turning 16). The short answer was 'no' it had not.

After traversing the case law, Lieven J held that a parent could consent to the confinement of their child under 16 if the child lacks *Gillick* competency to make the decision as to his liberty and there is no dispute that such confinement is in the child's best interests (paras 47 and 58). However, no consent can be given upon the child turning 16:

> *50. The contrast with the statutory position of children aged 16 and over is set out by Lady Hale in Re D at [26]. There are a host of statutory provisions which mark the legal importance of attaining the age of 16, and the legal separation that gives between a child's rights and those of his/her parents.*
>
> *51. However, the position is different for a child under 16 years old, both in common law and under the ECHR. It follows that the very nature of "family life" and therefore the protections under Article 8 for the parents' rights, will be different for a younger child. It is however critical to have in mind that the exercise of any parental rights in respect of a child must be for the benefit of the child. If the parent was exercising parental rights, including consenting to the deprivation of liberty, in a way which was said to be contrary to the child's best interests then such a decision would no longer fall within the zone of parental responsibility.*

Comment

This judgment reaffirms the current understanding that natural parents (and testamentary guardians) can consent to the confinement of their under-16-year-old if the arrangements are in the child's best interests. As a result, no deprivation of liberty occurs because the subjective element of the *Storck* trinity (objective-subjective-state responsibility) is not made out.

Perhaps owing to the parties' arguments, within the judgment there is not an insignificant amount of analysis of the role of a child's particular characteristics when considering the objective element of confinement. What was described as "*the heart of the issue in this case*" was *"whether the Court should take the approach of Lord Scarman and Lord Fraser in Gillick and consider the scope of parental responsibility (and the powers inherent within it) as depending on the specific characteristics of the individual child. Alternatively, whether the Court should take the approach of Lord Kerr in Cheshire West and*

compare the child to a hypothetical child of the same age in deciding the extent of parental responsibility." [para 52] This may have derived from the local authority's argument that K was not deprived of liberty because his freedom was not restricted more than would be the case of another 14-year-old who was of similar competence. No details are provided in the judgment of the actual arrangements in place for K.

Whether there is "*considerable tension*" between Lord Kerr in *Cheshire West* (and, for that matter, Lady Hale in *Re D*) and Lords Scarman and Fraser in *Gillick* may in fact have been an unnecessary concern. The former were focusing on the objective question of confinement, introducing for those under 16 a comparator of children of the same age and relative maturity who are free from disability. The latter was focusing on the validity of a child's decision to consent. To confuse the two elements by focusing on the characteristics of the particular child when determining whether a child is confined – in effect removing the non-disabled child comparator – runs the risk of narrowing the safeguards of Article 5 ECHR.

Instead, we suggest, a child's particular characteristics are relevant when determining whether such confinement is in the child's best interests and, therefore, whether it is an appropriate exercise of parental responsibility to consent to those arrangements. Such an approach accords with that taken by Keehan J in *Re D* [2015] EWHC 922 (Fam):

> *57.The decisions which might be said to come within the zone of parental responsibility for a 15 year old who did not suffer from the conditions with which D has been diagnosed will be of a wholly different order from those decisions which have to be taken by parents whose 15 year old son suffers with D's disabilities. Thus a decision to keep such a 15 year old boy under constant supervision and control would undoubtedly be considered an inappropriate exercise of parental responsibility and would probably amount to ill treatment. The decision to keep an autistic 15 year old boy who has erratic, challenging and potentially harmful behaviours under constant supervision and control is a quite different matter; to do otherwise would be neglectful. In such a case I consider the decision to keep this young person under constant supervision and control is the proper exercise of parental responsibility.*

Lancashire County Council v PX & Others [2022] EWHC 2379 (Fam) (21 September 2022)(HHJ Burrows)

Article 5 ECHR -"Deprivation of liberty"

Article 5 ECHR – Children and young persons

Summary

PX was a 15-year-old boy had ADHD, learning disabilities, and suffered frequent epileptic seizures every day for which he took a high level of medication. He was prone to act in a way that made it extremely difficult to meet his needs at home and he was accommodated by the local authority under s.20 of the Children Act 1989. There was no dispute that his care arrangements amounted to confinement which included [para 43]:

1. *1:1 supervision and support in the placement and the community*
2. *He has support with all aspects of his care including personal care and independent living skills*
3. *His medication is managed and administered for him*

4. *A harness is used within vehicles which physically restrain him and prevents him from interfering with the driver*
5. *Doors to the premises are locked- front and back doors and side gate and there are window restrictors*
6. *There are waking staff as well as sleeping staff at night*
7. *Restraint is used as a last resort.*

An application was made to invoke the inherent jurisdiction to authorise PX's deprivation to liberty. HHJ Burrows agreed with the comparator approach in determining whether a child under 16 was confined for Article 5 ECHR purposes. The test was whether the "*restrictions imposed on PX [are] beyond what one would expect to be imposed on an average child of 15, without mental health issues and challenging behaviour?*" The comparator was not "*a 15-year-old with the same characteristics as PX*", otherwise the test risked being discriminatory on the grounds of disability.

As to whether his parents could consent to his confinement, but for the recent decision in *Lincolnshire County Council v TGA & others* [2022] EWHC 2323 (Fam), HHJ Burrows would have held that the arrangements went far beyond what any parent should be called upon to approve or authorise. After all, "*there is always a danger that good and devoted parents such as PX's might simply follow the advice given to them by clinicians and social workers who are, after all, agents of the State.*" [para 53] However, *Lincolnshire* held that parents could consent to the confinement of their under-16 child and HHJ Burrows observed:

> *56. This means that the Court will only become involved if there is a dispute between the parents and the local authority or other State body, such as the NHS, or between the parents themselves, as to what is in the child's best interests. As I understand it, Article 5 is not engaged unless and until the matter is referred to a Court. At that stage if, and only if the Court then concludes that it has to override the parent's decision because it is not in the child's best interests, is Article 5 engaged. That is because it is the Court that is authorising the State detention of the child rather than the parents, and the subjective limb in Article 5 is present.*

As a result, PX's parents were held to be entitled to use their parental responsibility to consent to his confinement and, given the consensus that the same was in his best interests, "*the court has no business interfering*" with their exercise of it (para 57). The judge went on to note:

> *59. Ironically, of course, had I concluded that PX ought to be subject to a care order, I would have been required to authorise his deprivation of liberty. The law, however, is that where parents agree with statutory bodies as to what care provision is in the best interests of their under 16 year old child, there is no place for the Court to intervene as a separate guarantor of the human rights of the child.*

However, PX will be 16 in two months' time so the matter would need to pass to the Court of Protection for future authorisation. [para 62]

Comment

In relation to the objective question of a child's confinement, the (conventional) approach in this case is at odds with the (conflated) approach taken in the *Lincolnshire* case. We suggest it better reflects the jurisprudence by comparing a disabled child's arrangements with those of a non-disabled child of the same age. However, the judicial U-turn on the validity of parental consent to confinement in this case illustrates what some might see as a precarious legal position regarding the interface of Articles 5 and 8 ECHR for those under 16. The majority of reported judicial thinking at present recognises the (Article 8) rights of parents to make decisions regarding the arrangements for their disabled child, with the underlying safeguard that a dispute over best

interests must come before the court. But there remains a lingering question of to extend *Re D* to those under 16.

Is it in P's best interests to move to Jamaica?

XX v West Northamptonshire Council & Anor [2022] EWCOP 40 (22 July 2022) (Lieven J)

Best interests - residence

XX was an 89-year-old man who had come from Jamaica to the UK to live and work in the 1960s. XX had been living in a care home since December 2020. An application was brought by AA, one of XX's nieces, and asked the court to consider whether it is in XX's best interests to travel to Jamaica for his last years.

It was noted at the outset at [5] that the case was an example of the "*human cost of delays that have built up in the family court and Court of Protection"* both before and during the pandemic, as it took a number of months before the case was heard.

XX had only retuned to Jamaica on 2/3 occasions since he emigrated. However, he had paid tax on a property that he had inherited, which was relied upon by AA as evidence of his intention to return. XX's family called almost daily, but the care home staff did not believe that he appeared to know who they are. A s.49 report by a psychiatrist did not advise against XX's move to Jamaica if he were to receive the same standard of care.

Mrs Justice Lieven considered that the case was similar to the one considered by Mr Justice Hayden in *Re UR* [2021] EWCOP 10. which concerned a lady from Poland and whether she should return to Poland. That case, cited at [27], emphasized at paragraphs [25]-[27] the dangers of an overly paternalistic approach. Mrs Justice Lieven accepted that there may be some physical risk to XX making the move.

Mrs Justice Lieven concluded that the evidence indicated that when XX had capacity he did wish and intend to move to Jamaica for his final years, once he had dealt with his affairs in the UK. She concluded that he would have the *"intangible benefits that lie in the nature of human feeling and experience for XX to spend those last years with a loving family around him rather than being cared for by strangers in a care home. It is a benefit hard to explain or quantify."*

Article 2, mental illness and informed consent

Traskunova v. Russia - 21648/11 (Judgment : Article 2 - Right to life : Third Section) [2022] ECHR 631 (30 August 2022)

In *Traskunova v Russia*, the Third Section of the Strasbourg Court revisited the issue of capacity and informed consent, this time in the context of experimental treatment and a breach of Article 2 ECHR.

The applicant's daughter, Ms AT, died age 59 of complications arising out of cardiac and respiratory arrest following participation in clinical trials for a drug, Asenapine. Asenapine was being trialled for the treatment of schizophrenia, a condition from which Ms AT had suffered since early adulthood.

The court was told that part of the mandate for the trial was monthly check-ups by a doctor and six-monthly ECGs and 3 monthly blood tests. Having taken part in one year-long trial, from 2004-5, following which she was hospitalised as a result of her worsening mental health, Ms AT was signed up for a further trial in December 2005. On both occasions she signed consent forms agreeing to take part in the study.

In April 2006 Ms AT suffered a cardiac and respiratory arrest. She lapsed into a coma and died a few days later. Subsequent to her death it was revealed that not only was Ms AT not provided with the relevant check-ups, after agitation and insomnia all increased during the

trial in addition to weight gain, no steps were taken to remove her from the study.

Expert evidence indicated that her death was as a result of pneumonia (overlooked by her doctors), the cardiotoxic effect of Asenapine, and latent cardiovascular disease. An indirect causal link between her death and the taking of Asenapine was found [38]. Further investigation revealed a lack of general health monitoring and no recognition of the fact that she had suffered side-effects in the first trial.

Reiterating the limited scope of Article 2 in so-called "healthcare cases", the court held [69]

> *the States' substantive positive obligations relating to medical treatment are limited to a duty to regulate, that is to say, a duty to put in place an effective regulatory framework compelling hospitals, whether private or public, to adopt appropriate measures for the protection of patients' lives. The Court has, moreover, emphasised that the States' obligation to regulate must be understood in a broader sense which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement (see Lopes de Sousa Fernandes v. Portugal [GC], no. 56080/13, §§ 186 and 189, 19 December 2017 and Sarishvili-Bolkvadze, cited above, § 74; see also, for the summary of the applicable principles regarding effective functioning of relevant framework in the broader context of unintentional taking of life, Smiljanić v. Croatia, no. 35983/14, § 66, 25 March 2021)."*

The Court went on to emphasise [70] the importance for individuals facing risks to their health

> *to have access to information enabling them to assess those risks. It has held in particular that States are bound to adopt the necessary regulatory measures to ensure that doctors consider the foreseeable impact of a planned medical procedure on their patients' physical integrity and to inform patients of these consequences beforehand in such a way that the latter are able to give informed consent (see Ioniță v. Romania, no. 81270/12, § 84, 10 January 2017, in the context of the Article 2 complaint; and Csoma v. Romania, no. 8759/05, § 42, 15 January 2013; and Botoyan v. Armenia, no. 5766/17, § 93, 8 February 2022, in the context of the Article 8 complaint).*

Notwithstanding that Ms AT was deemed to have "retained her legal capacity" throughout the trials, the Court was critical of the failures to provide her with the heightened protection her vulnerability mandated:

> *79. The Court furthermore notes that Ms A.T. suffered from a serious mental illness for many years. It considers that, in view of their vulnerability, it is important that mentally ill patients enjoy a heightened protection and that their participation in clinical trials be accompanied by particularly strong safeguards, with due account given to the particularities of their mental condition and its evolution over time. It is essential, in particular, that such patients' decision-making capacity be objectively established in order to remove the risk that they have given their consent without a full understanding of what was involved (compare Arskaya v. Ukraine, no. 45076/05, §§ 87-90, 5 December 2013). The facts of the case reveal that Ms A.T.'s mental illness worsened during the first clinical trial (see paragraphs 24-25 above). It is noteworthy in this connection that a mental illness such as the one which the applicant's daughter suffered from could manifest itself, among other things by disordered thinking and*

difficulties in communicating with others (see paragraphs 5 and 9 above). Yet there is no evidence in the case file that, when inviting her to take part in the second clinical trial and accepting her consent thereto, the doctors in charge duly assessed whether the applicant's daughter was indeed able to take rational decisions regarding her continued participation in the trial.

80. Bearing in mind the above shortcomings, Ms A.T.'s vulnerability, and the serious consequences of those decisions for her, the Court finds that the practical implementation of the existing framework was deficient and that the existing guarantees ensuring the informed consent of participants of clinical trials were not complied with in the present case, with the result that there has been a breach the State's substantive positive obligations under Article 2 of the Convention."

Comment

The court ultimately awarded damages for breach of both the substantive and procedural obligations under Article 2. This is an interesting judgment in an expanding area of law – one which is shortly to be debated before the Supreme Court in the appeal of *R (Maguire v HM Senior Coroner for Blackpool & Fylde* [2020] EWCA Civ 738. A substantive breach of Article 2 was found, *not* because of deficiencies in the legal or regulatory framework but rather because of a failure to implement the same [76]. This underlines a point made previously by the Grand Chamber in the leading case of *Lopes de Sousa v. Portugal* [GC], no. 56080/13, at [189] – *"that the States' obligation to regulate must be understood in a broader sense which includes the duty to ensure the effective functioning of that regulatory framework. The regulatory duties thus encompass necessary measures to ensure implementation, including supervision and enforcement."* We consider this an important message for decision-makers to take home: the fact of the Mental Capacity Act 2005 is not enough; it must be properly implemented and adhered to if rights are to be protected.

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Conferences and Seminars

Forthcoming Training Courses

Neil Allen will be running the following series of training courses:

30 November 2022	BIA/DoLS Update Training
13 January 2023	Court of Protection training
26 January 2023	MCA/MHA Interface for AMHPs
16 March 2023	AMHP Legal Update
23 March 2023	Court of Protection training

To book for an organisation or individual, further details are available here or you can email Neil.

25 October 2022: Understanding the Law around Dementia

Are you a carer or partner of someone with dementia in the North West of England? Neil Allen with university students and lawyers from Simpson Millar solicitors will be offering free legal information and advice from 1-4pm at the Greater Manchester Law Centre. There will be four talks and drop-in advice clinics (and refreshments!). No need to book, but please do come along for what will be a super afternoon. Further details are available here.

National Mental Capacity Forum new series of webinars: starting 20 October with DNACPR and the MCA

NEVER STOP LEARNING ABOUT MENTAL CAPACITY:

The National Mental Capacity Forum is pleased to announce the launch of a second series of National Mental Capacity Webinars, produced in collaboration with the Autonomy Project at the University of Essex, and with support from the MoJ and DHSC. Born of necessity during the COVID-19 pandemic, National Mental Capacity Webinars provide a forum for free training and discussion for anyone involved in applying the Mental Capacity Act in practice. These 1-hour webinars bring together experts to address specific challenges relating to the MCA, and provide an opportunity for participants to ask questions and raise concerns, shaping the agenda for future webinars. The webinars are designed for new, novice and experienced practitioners. There are many paths to learning and the webinar series will provide learning prompts for individual professionals, professional associations and networks.

The first webinar in the new series will take place on **Thursday, 20 October, 2022, 1-2pm**. It will focus on the application of the Mental Capacity Act to decisions around the initiation of Cardiopulmonary Resuscitation, along with practices concerning DNACPR (Do Not Attempt Cardiopulmonary Resuscitation). We will review existing law regarding DNACPR, launch a new set of educational videos, and address some hard questions about the use of best-interests decision-making in the context of cardiac arrest. Confirmed speakers include: Karen Chumbley (Clinical Lead for End-of-Life Care; Suffolk & North East Essex ICS); Margaret Flynn (Chair, National Mental Capacity Forum); Alex Ruck Keene (Barrister, 39 Essex Chambers); Prof Wayne Martin (Director, Essex Autonomy Project) and Ben Troke (Partner, Hill Dickinson solicitors).

HOW TO REGISTER: Participation is free but places are limited. **Advance registration is required.** To register, please follow this link and take a few moments to answer the registration questions.

Our next edition will be out in November. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Report in the future please contact: marketing@39essex.com.

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