

## TACKLING ANTI-SOCIAL BEHAVIOUR

### Tackling Anti-Social Behaviour – the Landlord's Arsenal

As the concerns about anti-social behaviour (ASB) have risen, new and updated tools for tackling that behaviour have been placed in the hands of Local Authorities and Housing Associations. But how do we know which tool is right for the job?

It is important to identify the preferred route at an early stage in the preparation of a case. Although it is often a simple matter to switch approaches before court proceedings are issued, correctly picking the best way forward as soon as possible will reduce the cost and minimize delays – wasting money on inappropriate steps will reduce the number of cases that can be taken, and wasting time runs the risk of alienating witnesses or seeing the problem escalate.

What measures are available?

#### **1. The Anti-social Behaviour Order**

A free-standing application that will be heard by local magistrates. High profile. Straightforward. Quick. Interim measures available. Often publicized. Utilises local courts.

Section 1 of the Crime and Disorder Act 1998 provides the basic framework:

- i. The defendant must be 10 or over;
- ii. The Court can grant an order against a defendant
  - a. If he has acted in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment alarm or distress to one or more persons not of the same household as himself; and
  - b. that such an order is necessary to protect persons in the local government area in which the harassment alarm or distress was caused or likely to be caused from further anti-social acts by him.
- iii. The magistrates' court may make an order under this section (an "anti-social behaviour order") which prohibits the defendant from doing anything described in the order.
- iv. The court shall disregard any act of the defendant which he shows was reasonable in the circumstances.

It is a precondition of the making of the application that the applicant has consulted each other relevant authority (the Police and any Local Authority whose area is to be covered by the order).

It is then for the Defendant to prove that his actions were reasonable in the circumstances if he accepts behaving in the manner alleged and seeks to persuade the court that they should be disregarded.

This section empowers the Court to make anti-social behaviour orders. These orders are a hybrid of civil and criminal procedure; they are said to be civil orders, but the case of *R (McCann) v Manchester Crown Court [2003] 1 AC 787* established that magistrates need to be satisfied on a standard of proof indistinguishable from the criminal standard (largely because they couldn't be trusted to understand the civil standard, it appears).

Once the order is made, enforcement becomes a matter for the criminal law. A breach of the order is not referred back to the court that made the order – instead, it is a separate and free-standing criminal offence. Proceedings can be brought by private individuals or councils for breach (as a private prosecution), but this is cumbersome and rare in practice. Instead, it is for the Police to arrest and the CPS to prosecute such cases.

### **What is anti-social behaviour for an ASBO?**

Section 1(1)(a) defines anti-social behaviour as behaving in “a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household” as herself.

The use of the words “harassment, alarm or distress” in the Crime and Disorder Act mirrors the language used in sections 4 and 5 of the Public Order Act 1986 (printed in *Stone’s Justices Manual* at 8-27723 to 27724).

The words are not subject to further definition in either Act, but it is to be assumed that they are ordinary words of the English language unless or until a definition is provided (*Blackstones*, B11.57). This is confirmed in the cases decided under section 5 of the Public Order Act 1986, for example *Lodge –v- Director of Public Prosecutions* (1988) *Times* 26<sup>th</sup> October, the Divisional Court deciding that whether a person was likely to be caused harassment, alarm or distress is a matter of fact to be determined by the magistrates. The Court indicated that it is sufficient if the person in question feels alarm (or harassment or distress) on behalf of someone else, (a child, for example, or other bystander).

In *Ball* (1989) 90 Cr App R 378, the Court of Appeal decided that the conduct in section 5 does not have to be directed at another person, but there must be someone who could be caused harassment, alarm or distress – occasionally some incidents will be entirely “self-contained” causing no distress to others.

According to the commentary in Halsbury’s Statutes, “acting in an anti-social manner” can be summarised as “*doing something which is not consistent with the responsibilities of a citizen who derives rights and benefits from living in our society.*”

### **Interim Orders**

Section 1D of the Crime and Disorder Act allows the court to make an Interim ASBO. This will usually be imposed at the very first hearing, and can be within days of the problems being presented to a local authority.

The test on presenting the request for an interim order to the court is whether the court considers it “just” to make the order pending the full determination of the application.

Interim orders must be for a fixed period.

In an extreme case, the court may permit an application to be heard without notice to a Defendant. In these situations, the application is not presented to a defendant in advance. The order is only valid once served, and if not served within 14 days lapses without effect.

Advantages are:

- i. An ASBO lasts for a minimum of two years, and may in exceptional cases last for life. The usual term of a county court order is 12 months.

- ii. ASBOs tend to attract publicity, even in the case of minors. Rules of court prevent criminal cases involving under 18s from being widely publicized. In an ASBO case, although the child's welfare might require restrictions being put in place, in most cases the need to publicise the order to aid in enforcement, public reassurance and deterrence will usually dictate that no restrictions are put in place. It is always worth considering whether publicity might affect the fairness of other ongoing criminal trials however.
- iii. Cases can be listed quicker than county court proceedings. The absence of pleadings and directions hearings means that final hearings tend to be listed far more quickly.
- iv. Although they will examine all cases carefully, magistrates tend to identify more strongly with the problems suffered by local communities than the explanations proffered by defendants.

Disadvantages are:

- i. Enforcement is a matter for the Police and CPS. The Police must be informed of the ASBO. Some CPS lawyers still see ASBOs as insufficiently serious to concern themselves with (although thankfully this attitude has diminished). There is still a tendency for defence solicitors and CPS prosecutors to do a deal on any breach proceedings which sees the breach allegation dropped in order to secure a plea to some substantive criminal offence. It is vital in any ASBO case to keep the police informed, to continue to support witnesses, and to provide the CPS with as much background information about the ASBO as possible in the event that there are any breach proceedings.
- ii. Appeals are to the Crown Court, and can be pursued by defendants as a matter of right. On an appeal, the whole matter is re-heard, with witnesses being required to attend a second time. Some Crown Court judges still don't see ASBOs as

serious, and there can be difficulties with the wording of the order.

## 2. The Anti-social Behaviour Injunction.

Section 153A of the Housing Act 1996 allows local authorities & RSLs to seek an injunction prohibiting certain types of conduct.

The conduct must satisfy two conditions:

- i. It must be capable of causing nuisance or annoyance to any person;
- ii. The conduct relates, directly or indirectly, to a housing management function of a relevant landlord. There needs to be some link between the conduct complained of and the management of the accommodation.

Clause (ii) generally prevents the measure being used to deal with general town-centre misbehaviour, unless it is somehow linked to the accommodation. As an example, causing a nuisance in the town-centre shops is not something an ASBI can be used to prohibit; shouting abuse at a disliked next-door neighbour while they do their shopping is.

The Court can grant an injunction against anyone engaging in or threatening to engage in this conduct, so long as the people affected include anyone with a right to live in the neighbourhood (whether as a local authority tenant or not), any person engaged in a lawful activity in the neighbourhood, or any person employed by the local authority in connection with its housing management functions.

Where there is violence or the threat of violence, or a significant risk of harm (“serious ill-treatment or abuse, whether physical or not”) to one of the

victims of the behaviour, the Court may additionally grant an exclusion order and/or a power of arrest.

Additional restrictions can be placed on a tenant who would be in breach of their tenancy agreement.

Punishment for breach requires that the Landlord bring proceedings for contempt of court, by issuing a Notice to Show Cause. A breach of the order must be proved, by compelling evidence, to the criminal standard – that is, the evidence must make the Court sure that the Defendant has breached the order (it must be shown to be “beyond reasonable doubt”). Once this has been done, the Judge can punish the Defendant, marking the disobedience of a Court order with a fine or a prison sentence of up to two years.

Advantages are:

- i. ASBIs tread a familiar path – County Court proceedings, with pleadings and witness statements on both sides;
- ii. The civil standard of proof applies – the Court demands only that each allegation needs to be “more likely than not”;
- iii. Control of the order usually remains with the Landlord;
- iv. Appeals are rare.

Drawbacks are:

- i. That the power is limited to the connection with housing management;
- ii. Minors – anyone under 18 – cannot be adequately dealt with for contempt; they cannot be imprisoned, for example.
- iii. Powers of arrest can be problematic. Police will often avoid assisting in incidents unless there is a power of arrest. Without

a power of arrest, breach proceedings are a matter for the LANDLORD to issue the Notice to Show Cause. When there is a Power of Arrest, and the police arrest the Defendant for an alleged breach, they have to present him to the Court within 24 hours. This can cause problems if the Landlord is not properly informed.

### 3. Possession Proceedings

If the individual responsible for ASB is a tenant, or lives with a tenant, possession proceedings leading to eviction may be appropriate.

Possession proceedings are usually based on Ground 1 or 12 (non-performance of a tenancy obligation), and Ground 2 or 14 (nuisance) provisions of the Housing Act 1985 or 1988 .

Often the threat of eviction is enough, sometimes backed up by a suspended (or postponed) possession order.

Advantages:

- i. Threat of loss of home may have greater impact than loss of liberty;
- ii. Can remove problem from the area

Disadvantages:

- i. Likely to be defended to a greater extent;
- ii. Problem is frequently those living at the Property not tenant. They may not be deterred.

**Demotion Proceedings, section 82A or 6A of the Housing Act 1985 or 1988.**

Often included as part of possession proceedings, it gives the court a power that allows the tenant to remain in the property but with reduced security of tenure for a period of 12 months

The jurisdiction to order a demotion is similar to the 153A ASBI – the tenant must have engaged or threatened to engage in conduct causing or likely to cause nuisance or annoyance, relating to a housing management function, and it must be reasonable to make the order.

The LANDLORD can invite the court to use its power to “demote” the tenancy from its secure or assured status. The secure or assured tenancy requires a court order to bring it to an end; the demoted tenancy is similar to an Introductory Tenancy, possession can be sought from the Court subject only to the landlord conducting a statutory review of the decision to seek possession. So long as this review has been carried out, the court must order possession on application by the landlord.

The tenant must be given notice of an application to demote; as well as pleading a demotion, the tenant should be warned in advance of the proceedings commencing that a demotion order can be applied for.

Advantages are:

- i. Possession can be gained with a minimum of fuss during the twelve month demotion period;
- ii. Tenants may feel that a demotion is less serious than a possession order, as the tenancy reverts back to being an assured tenancy at the end of the twelve months.

The main disadvantage is the need to conduct the statutory review; whilst it is unlikely to be problematic, the decision of a local authority landlord could be subject to an expensive Judicial Review if a tenant shows that the review process was *Wednesbury* unreasonable. For this reason, many local authorities have not actively pursued demotion as an option.

A Housing Association landlord may face challenge by way of judicial review. While the law at present is that for most purposes Housing Associations are not public bodies, this is subject to increasing challenge as central government seeks to move what were once public sector obligations towards RSLs.

### **Acceptable Behaviour Contracts, and other non-court methods**

Often the most cost-effective way to restrain an individual's behaviour is through early non-court intervention. Social Services may play a part, working alongside Housing Officers and the Police, to put together a strategy that avoids a situation reaching crisis point. This can most effectively be achieved where an individual's behaviour can be moulded to make it more acceptable by putting forward alternatives as well as spelling out the pitfalls.

One popular method is the Acceptable Behaviour Contract, where an individual is invited to sign an agreement with the local authority setting out how they are to behave in future.

Advantages are;

- i. Breach of an ABC will be a powerful piece of evidence in ASBO proceedings to show that the order is necessary, or possession proceedings to show that the order is reasonable;

- ii. The procedure is informal, fast and targeted to an individual's specific issues;
- iii. It's cheaper than going to court.

The disadvantages are:

- i. It carries no immediate consequences of breach;
- ii. It is often seen as something of a joke by the signatories to the Contract;
- iii. It doesn't carry the same degree of reassurance to the community as an ASBO.

### **Using different steps in combination**

The different measures can be used in a variety of combinations, whether dealt with in a chronological and escalating approach, or as a menu of options for the Court to choose from when deciding the case.

There are however some drawbacks.

Potential duplication of effort.

Confusion amongst case workers and witnesses.

Differing approaches by the different courts - Magistrates are often receptive to ASBO applications; County Court judges seem less so.

## Preparing for Court

1. Regardless of what route has been chosen, preparation is essential.
2. Good practice can win or lose a case
3. You have a policy – follow it.
4. Record keeping is essential.
  - e.g. pre-existing mental illnesses and other agency contacts
  - Diary sheets
  - Interview records – letters following up
  - Contacts with witnesses
  - Recording not just what is done but why.
5. Keeping participants informed
  - Sometimes neighbours can be more tolerant if they know there is a disability or other problem than if they think someone is being selfish. However, care has to be taken not to infringe the right to privacy.
  - Mediation
  - Involving other support systems
  - Ensuring Defendant can't say at Court that he never knew that such and such was a problem

- Explaining to victims why it's taking so long
6. Being open to changes of direction. Sometimes a decision is taken to take a particular route, e.g. serve a Notice of Seeking Possession but then perhaps a disability is noticed. At every stage of the proceedings it must be borne in mind that it is possible to stop and re-think. Court is not inevitable. If the decision is taken to proceed, record this, and the reasons why.

### **Documentation**

7. The Notice of Seeking Possession is an important document and needs to records accurately the alleged breaches.
8. The Particulars of Claim is the next step. The Particulars of Claim in any possession claim are very important. They are therefore worth investing time and effort in.
9. **How to plead breaches.**
  - a. It is not a breach that "Mrs X reported to the Claimant that the Defendant had told her to fuck off".
  - b. It is not a breach that the Claimant was told that the Defendant had told a neighbour to fuck off.
  - c. It is not even a breach that the Defendant "allegedly" told Mrs X to fuck off.
  - d. The way to plead it is quite simply "on 3<sup>rd</sup> January 2005 the Defendant told Mrs X, a neighbour, to fuck off".
10. It is important not to overload the pleading - some incidents are too trivial to plead. Put yourself in the Judge's place – would you want to

hear about “dirty looks” or “noisy washing up”? A degree of tolerance looks good. It is important not to simply rubber stamp the client’s or witness’s perceptions: act as a filter.

11. Chronological order is good. Sometime you don’t get the exact dates. The Claimant may have heard about it on Wednesday and it may have happened some time in the previous few days. It is no good pleading that it happened on Wednesday. So plead on or around Tuesday; between Saturday and Monday, but be as accurate as possible. Witness statements can elaborate this further.
12. The breach needs to be pleaded briefly. Cutting and pasting the witness statement is not good practice. The relevant facts from each incident must be abstracted and put into short sentences.
13. Keep breaches, reasonableness and outcomes separate. It is not a breach that the Defendant was warned about his behaviour. This is relevant as far as reasonableness goes, but it is not evidence of a breach. Put it in a paragraph headed “it is reasonable to order possession because:”.
14. That paragraph is absolutely indispensable in a disability case. You have to show that “it is reasonable to order possession because:”
  - a. Despite the Defendant’s disability there is a risk to health and safety of others - name those risks.
  - b. The Claimant has tried other ways to resolve the problem - show what has been done

- c. Other agencies have been involved - or have refused to become involved. Sometimes a possession claim is needed before other agencies will act!
  - d. Any reasons relied upon which do not relate to the disability - the need for social housing, the effect on the local community, the serious nature of the incidents, the damage to the landlord's property, the nature of the housing - all the things you might plead in a normal case.
15. Good practice may also be to state that the Defendant's human rights have been taken into account and he is still to be evicted!
16. Would a map assist? Sketch plans? These can be put in Particulars of Claim.
17. Use convictions – evidenced by certificates of conviction if at all possible. Convictions must be pleaded.

### Hearsay

18. Witnesses are often reluctant to come forward. The use of hearsay evidence is therefore to be carefully considered.
19. It should not be assumed that hearsay evidence is always acceptable (cf admissible). Although there have been cases such as *Leeds City Council v Harte* where the only evidence was hearsay, this does not mean, and Housing Officers should be discouraged from believing, that complainants don't need to give evidence.
20. It is particularly desirable in disability cases that the complainants should come forward. Their health and safety is the justification for the proceedings and the Court should have a chance to be impressed by

that. The weight to be attached to hearsay evidence is less – not merely for formal reasons but because the Judge may not have read it; because words on paper do not have the same impact as a weeping or intense witness; because the tenant may think that he can say what he likes about people who aren't there.

21. That is not to say that there are not occasions where it is necessary, because either the complainants are scared, ill or elderly. It may also be desirable for a housing officer to give evidence because there are a lot of witnesses to individual incidents, rather than main witnesses giving evidence as to a lot of incidents.
22. When drafting witness statements consider what aspects of it amount to hearsay.

*What is hearsay?*

23. Common examples of hearsay evidence:
  - a. When a husband gives evidence of what his wife has seen, or a mother on behalf of a child
  - b. When there is a joint diary and it is not quite clear who saw what
  - c. What a housing officer has been told
  - d. Copies of documents, diaries, notes computer print-outs, photographs and plans
  - e. And obviously anything someone is reporting someone else as saying. "Mrs A told me the Defendant told her to fuck off".

24. The CPR rules on hearsay evidence start from the presumption that hearsay is allowable. In *Moat Housing* the use of hearsay evidence was frowned upon. However, this was predominantly because of the particular facts of that case. The statement of principle at paragraph 131 is that hearsay is admissible in possession proceedings or for an application for an ASBO. The references are to *R v Manchester Crown Court ex parte McCann* [2002] UKHL 39 and *Solon SW HA v James* [2004] EWCA Civ 1847. Note the emphasis on ensuring that proper notice of hearsay is given.
25. Hearsay is allowable if a hearsay notice has been served: Civil Evidence Act 1995 section 2(1) (but note the saving provision in Section 2(4))  
When serving witness statements check them to see if they contain hearsay and if any do - serve a notice.

*CPR Rule 33.2*

*Notice of intention to rely on hearsay evidence*

- (1) Where a party intends to rely on hearsay evidence at trial and either—
- (a) that evidence is to be given by a witness giving oral evidence; or
  - (b) that evidence is contained in a witness statement of a person who is not being called to give oral evidence;
- that party complies with section 2(1)(a) of the Civil Evidence Act 1995 serving a witness statement on the other parties in accordance with the court's order.
- (2) Where paragraph 1(b) applies, the party intending to rely on the hearsay evidence must, when he serves the witness statement—
- (a) inform the other parties that the witness is not being called to give oral evidence; and
  - (b) give the reason why the witness will not be called.
- (3) In all other cases where a party intends to rely on hearsay evidence at trial, that party complies with section 2(1)(a) of the Civil Evidence Act 1995 by serving a notice on the other parties which—
- (a) identifies the hearsay evidence; and
  - (b) states that the party serving the notice proposes to rely on the hearsay evidence at trial; and

- (c) give the reason why the witness will not be called.
- (4) The party proposing to rely on the hearsay evidence must—
  - (a) serve the notice no later than the latest date for serving witness statements; and
  - (b) if the hearsay evidence is to be in a document, supply a copy to any party who requests him to do so.

*Contents of a notice*

- 26. Best practice is to serve one notice, at the time the witness statements are served, covering any and all statements which include hearsay. There is no prescribed form for a hearsay notice.
- 27. The hearsay notice has to include particulars sufficient to enable the other side "to deal with any matters arising from its being hearsay". The notice should give the reason why the witness is not being called: state briefly why the witness is reluctant to attend, such as illness, age or fear of reprisals.
- 28. The hearsay notice should if possible be backed up by witness statements: doctor's notes in relation to illness (gets the Court's sympathy as well); comments from HOs or children in relation to aged witnesses; comments from officers or concerned friends in relation to fear. In *Moat Housing* the Court was critical of the failure to specify *why* the witnesses claimed to be afraid of reprisals, but in practice this is rarely a cause for challenge.

*Magistrates Courts (ASBOs)*

- 29. In criminal cases, the procedure is governed by the Magistrates' Hearsay Rules. The rules require written notice to be given to the other

party and to the court. These are also applied in Crown Court: *R v (1)*

*Luke Paul Wadmore (2) Liam Philip Foreman* [2006] EWCA Crim 686

### Evidence for Court

Whether the application is for an ASBO, ASBI, Possession or other step, whether it is for an interim order or enforcement of an order already granted, every measure is prefaced on the understanding that the landlord has a case that it can prove, and prove using reliable, credible and admissible evidence.

#### **Video evidence**

Some form of first-hand evidence of the behaviour complained of is always going to be more compelling, more immediate and more understandable to a court than words on a page.

Undoubtedly the most striking sort of evidence is that which the court can experience first-hand. Although there is a time and a place for site visits, defendants cannot be relied upon to misbehave for the judge during such a visit. The alternative is for the court to see the behaviour first-hand by way of video recordings.

Video recordings are likely to come from three sources.

- i. Witnesses who are experiencing the behaviour first-hand.

The witness might have a camera of their own, used to support the witnesses' own written or oral evidence. Alternatively, a landlord might loan a camera to a witness where it is felt that useful evidence merits the effort and expense. There is no issue about the witness being identified, as the witness is going to be making a statement in any event, although the presence of a camera can provide a focus for further tension and misbehaviour. Accordingly, witnesses

need to be aware of the need to record matters sensitively – nothing is likely to be gained from following neighbours everywhere with a camera pointed at them!

ii. Targeted recording by housing officers or Police.

From time to time, it will be helpful for officers visiting a problem area to go armed with cameras or video recording equipment, to better record their own observations and interactions with defendants. Again, this backs up what is said in witness statements, as well as giving the court a fuller picture of what is being dealt with. Even a stills camera can help a judge identify a particular alleyway, or piece of graffiti.

iii. Covert surveillance

This is the most problematic, but potentially has the biggest payoff.

General Guidance:

The cameras should not purposely intrude on another's privacy. Cameras should avoid being pointed into other residents' properties. Activities in rear gardens should only be recorded where they are directly affecting others elsewhere, such as by damaging an adjoining fence, or nuisance behaviour that a neighbour should not have to tolerate.

The tapes should be copied, and the original kept safely and securely - working copies should be used. If there is any challenge to the editing of the tapes, the originals have been preserved in an unedited format.

Editing collections of tapes to show relevant incidents is not only acceptable, it will usually be vital. But the editing must be done fairly, and not by a witness who might be partisan. Where a relevant incident is caught on camera, the whole of the incident should be shown, not just those parts that show a defendant in a bad light.

#### Regulation of Investigatory Powers Act 2000

The act distinguishes between directed and intrusive surveillance. The former is where an individual or group is surveilled in relation to a specific investigation – the latter is where the surveillance is more general.

Codes of practice are available at [www.homeoffice.gov.uk/crimpol/crimreduc/regulation/index.html](http://www.homeoffice.gov.uk/crimpol/crimreduc/regulation/index.html).

Must be authorized.

Child protection. There is a common misconception that images of children cannot be recorded without a parent's consent – a misconception usually held by problem tenants. So long as the images are recorded for lawful purposes (including the gathering of evidence for use in a court case), there is no such prohibition. In a case where overt surveillance is to be used, defendants can be reminded of this in advance.

It is important to disclose everything – there may be many hours of footage where nothing happens. There is no need to send copies of each and every tape to the defence unless they ask to see it, but they should be told how much irrelevant tape exists so that they can ask for it if need be.

#### Police Logs

Police logs are much beloved by police witnesses, and largely unintelligible to anyone else.

If police logs are to be used in a case, they are made much more understandable when presented by a police officer who has made a statement that details in full what each log entry means.

There is nothing to be gained from exhibiting reams of logs which talk about the defendant answering bail.

It is often the case that action by the police has resulted in an arrest, but no charges or charges which were later dropped. The explanatory statement should give as much detail as to why.

Both the logs and the officer's statement will be hearsay. It must be covered by the appropriate hearsay notice, and its use tempered with the understanding that it is not a first-hand account.

The full logs are almost always disclosable. In such circumstances, it is usually appropriate to edit them to remove personal information like addresses, telephone numbers and names of individuals who are not witnesses or defendants.

### **Residents' diary sheets**

As part of the evidence-gathering, witnesses should be asked to keep either diaries of nuisance or fill-in log sheets.

These sheets support witnesses' statements, but they should not be used as a substitute for a properly detailed statement. Judges want to see handwritten

notes confirming that something happened when the witness says it happened; they do not want to read dozens of pages of handwritten notes to get the details of our case.

It is rarely appropriate to edit the log sheets. All of the log sheets need to be disclosed. However, only log sheets which disclose actual anti-social behaviour should form part of the case; a diary sheet saying “so and so looked at me today” is just as likely to give a poor impression of the witness as the defendant.

### **Evidence-gathering from witnesses**

Protecting & supporting witnesses through the court process.

Anonymous witnesses (*R v Ellis, Gregory, Simms & Martin*, reported Monday 22<sup>nd</sup> May has confirmed that the courts can hear evidence from anonymous witnesses in appropriate cases. However, the weight to be attached to anonymous witnesses who don't attend court is minimal.

Hearsay evidence has a place in any anti-social behaviour case. It is often not practical to call all of the witnesses affected by a defendant's behaviour. Evidence of procedure and record-keeping will almost always be hearsay.

However, local authorities are cautioned not to rely to heavily on hearsay to prove primary facts in a case. Traditionally hearsay was inadmissible in the criminal courts because of inherent weaknesses and dangers – without cross-examination, for example, there is no way to tell if the witness accurately recorded what another told him, for example. Although hearsay is admissible

in civil cases (and in many circumstances in a criminal case), the dangers persist.

The House of Lords in *McCann* expressly accepted that hearsay evidence could be used in an ASBO case, where matters have to be proved “beyond reasonable doubt”, but cases where hearsay is the only evidence to found a case must be few and far between.

### Drafting Anti-social Behaviour Orders & Injunctions

Local protocols – agreements between Magistrates’ Clerk to Justices, CPS and local authorities. Useful, important, but ensure the right people are involved. Helpful to set out what terms are likely to be used, as input from local authorities on what needs to be restrained and CPS as to what can actually be proved as a breach.

There has been a degree of confusion about what ought to go into an order;

Cases of *R v Cyril Stevens* [2006] EWCA Crim 255 and *Boness & Others v Regina* [2005] EWCA 2395. Lord Justice Thomas’ guidance to the courts.

The terms of each order must be precise, and capable of being understood by the offender – it is necessary to ensure that the terms are therefore tailored to the level of understanding of the defendant. An adult may be told he is “forbidden to loiter” in a particular area; a child might be better off told that he “must not hang about”.

Terms should be reasonable and proportionate –

Terms should be realistic and practical

Terms should be readily enforceable, in that they make it easy to identify and prosecute a breach – for example a term saying that a defendant is not to “attempt to enter” an area is useless

Exclusion zones should be clearly marked on maps; consideration must be given to how boundaries are expressed.

Individuals that a defendant is prohibited from associating with should be clearly identified.

ASBOs are not to be used simply to up-tariff a criminal offence; but there is nothing wrong in principle in reminding a defendant that certain acts are forbidden even if they are already crimes. A term saying that the defendant “must not commit a crime” is not to be used, as it is vague and doesn’t target the behaviour itself.

It is perfectly proper to target behaviour that leads to anti-social acts. A vandal, for example, can be prohibited from carrying a spray can of paint.

The Court can prevent a defendant from living “other than at the specified address”. It can also impose a curfew, up to the full length of the order. However, it is to be remembered that the restriction placed on the Defendant should be no more than is necessary to prevent a recurrence of the ASB.

The Courts have spent a lot of time striking down clauses, for lack of clarity or overreaching width, without giving much concrete guidance!

Finally, what appeals to a Magistrates’ Court at first instance can often raise the eyebrows of a Crown Court Judge on appeal.

Courts are reminded that they ought to record what facts were found giving rise to the order, usually in a preamble to the order itself, and the order must be explained to the defendant in court so that his understanding can be checked.

## Recent Developments

### Standard of Proof

- *R(N) v. Mental Health Review Tribunal* [2006] 2 WLR 850

### Terms of Possession Order

- *Harlow BC v. Hall* [2006] EWCA Civ 154
- *Bristol CC v. Hassan* [2006] EWCA Civ 636 (see attached order)

### Disability Discrimination Act 1995 & 2005

- Note extensive changes laid on 'public authorities' in 2005 Act;
- *Knowsley HT v. McMullen* [2006] EWCA Civ 539

### Mental Capacity

- Mental Capacity Act 2005 (in force 2007) Code of Practice awaited

### Human Rights

- *Price v Leeds CC; Kay v Lambeth LBC* [2006] UKHL 10

### The Future

- Renting Homes-The Final Report (Law Com No. 297);
- Clean Neighbourhoods & Environment Act 2005 (largely in force)
- Drugs Act 2005- Intervention Orders (s.20 NIF)

*Moat Housing Group South v Harris & Hartless* [2005] HLR 512

**RICHARD DEWSBERY**

**MICHAEL SINGLETON**

Whittall Street,  
Birmingham,  
B4 6DH

IN THE BIRMINGHAM COUNTY COURT

Claim No.

B E T W E E N:-

A LANDLORD

Claimant

-and-

TERRIBLE TENANT

Defendant

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draft/Order

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1. The Defendant is to give up possession of [address] ('the Property') to the Claimant.
2. The date on which the defendant is to give up possession of the Property to the claimant is postponed to a date to be fixed by the court on an application by the Claimant.
3. The Defendant must pay the claimant £[\_\_\_\_\_] for rent arrears and £[\_\_\_\_\_] for costs. The total judgment debt is £[\_\_\_\_\_] to be paid by instalments as specified in paragraph 4 below.
3. The Claimant shall not be entitled to make an application for a date to be fixed for the giving up of possession and the termination of the Defendant's tenancy provided:

- (i) that neither the Defendant nor any person residing at the Property nor any person visiting the property engages in 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,
  - (ii) Without prejudice to the generality of paragraph 3 (i) above the following forms of conduct shall be deemed to be likely to cause nuisance or annoyance justifying application for a date to be fixed for the giving up of possession and the termination of the Defendant's tenancy
    - a. Harassing or intimidating persons lawfully within the locality;
    - b. Unlawfully damaging property within the locality;
4. The Claimant shall not be entitled to make an application for a date to be fixed for the giving up of possession and the termination of the Defendant's tenancy so long as the Defendant pays the Claimant the current rent together with instalments of £[\_\_\_\_\_] per week towards the judgment debt.
5. The first payment of the current rent and the instalment must be made on or before [date].
- 4 6. Any application to fix the date on which the Defendant is to give up possession may be determined on the papers without a hearing (unless the District Judge considers that such a hearing is appropriate) provided that
- (a) the Claimant has written to the Defendant at least 14 days before making its application giving details of the [alleged breaches of paragraph 3] current arrears and its intention to request that a date be fixed; and

- (b a copy of that letter (and the Defendant's response, if any) [together with the rent account showing any transactions since the date of this order]

are attached to the application.

7. This order shall cease to be enforceable [on [date]] [when the judgment debt is satisfied].
5. That unless application is made for a date to be fixed for the giving up of possession and the termination of the Defendant's tenancy before 31<sup>st</sup> August 2008 (alleging breaches of paragraph 3 above occurring prior to 31<sup>st</sup> May 2008) this action shall be struck out and the Order cease to have any effect.