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CPD REF: CYL/STIC

Possession Proceedings and the Impact of the Disability Discrimination Act 1995

Introduction

The purpose of this paper is to sketch out the legislative and common law framework governing the relationship between the Disability Discrimination Act 1995 and housing legislation.

The following paragraphs offer a step-by-step guide of the stages that should be considered when seeking possession against a tenant who may or who has claimed that their landlord, by pursuing an order for possession, is unlawfully discriminating against them on grounds of their disability.

Grounds for Possession

The point at which the Disability Discrimination Act 1995 impinges upon possession proceedings is Ground 2, Schedule 2 Housing Act 1985 and Ground 14, Schedule 2 Housing Act 1988, namely that part of the legislation empowering a landlord to seek possession against a tenant on the basis of anti-social behaviour.

(1) Ground 2, Schedule 2 Housing Act 1985 (“Secure Tenants”)

“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 of:

- a. using the dwelling house or allowing it to be used for immoral or illegal purposes, or
- b. an arrestable offence committed in, or in the locality of, the dwelling house.”

(2) Ground 14, Schedule 2 Housing Act 1988 (“Assured Tenants”)

“the tenant or any other person residing in the dwelling-house has been guilty of conduct which is a nuisance or annoyance to adjoining occupier, or has been convicted of using the dwelling-house or allowing the dwelling-house to be used for immoral or illegal purposes.”

Reasonableness

Once Ground 2 or 14 is made out the court should consider whether an order for possession is reasonable in the circumstances of the tenant against whom the order is sought. This requirement exists at common law and in statute.

(1) Common Law

Lord Greene MR in **Cumming v Danson**¹ :-

¹ [1942] 1 ALL RE 653, CA at 655. When a claim is based upon nuisance and annoyance to neighbours the judge should also consider the interests of the landlord and neighbours. This proposition was

“...the duty of the Judge is to take into account all relevant circumstances as they exist at the date of the hearing...in a broad, common sense way...giving weight as he thinks right to the various factors in the situation.” Per Lord Greene MR in *Cumming v Danson* [1942] 1 ALL RE 653, CA at 655.

(2) Statute

If possession is sought against a **secure tenant**, the court must be satisfied under **section 84(2)(a) Housing Act 1985** that it is reasonable in the circumstances to make an order for possession.

Similarly, if the Defendant is an **assured tenant** the court is afforded a discretionary power pursuant to **section 7 Housing Act 1988** to make an order for possession if considered reasonable.

Further, **section 85A Housing Act 1996**² obliges the court, when considering the reasonableness of making an order, to give consideration to the effect, and likely continuing effect, which the nuisance or annoyance or its repetition has on persons other than the person against whom the order is sought.

Expert evidence from a psychiatrist that the tenant’s behaviour is attributable to mental illness is relevant to the issue of reasonableness.³

Guidance on this point is profitably sought from:-

- i. the Disability Discrimination Act 1995;
- ii. North Devon Homes Ltd v Brazier [2003] EWHC 574 (QB); [2003] HLR 59; and

upheld in Woking BC v Bistram [1993] 27 HLR 1 CA ; Kensington and Chelsea RLBC v Simmonds [1997] 29 HLR 507 CA ; and West Kent Housing Association Ltd v Davies [1998] 31 HLR 415, CA

² Inserted by section 16 Anti-Social Behaviour Act 2003.

³ Croydon LBC v Moody [1998] 31 HLR 738, CA.

- iii. Manchester County Council v Romano; Manchester County Council v Samari [2004] EWCA Civ 535 ; [2004] HLR 47;

If the tenant can prove the landlord's conduct constitutes unlawful discrimination this will be a relevant factor in determining if it is reasonable to make an order for possession.

Disability Discrimination Act 1995

When confronted with a potential argument of unlawful discrimination from a tenant in possession proceedings, the starting point is the Disability Discrimination Act 1995 ("the Act") which sets out the elements by which the tenant must advance his case as well as providing the means by which the landlord can resist it.⁴

(1) The Meaning of "Disability"

Section 1(1) reads:-

- "1. (1) Subject to the provisions of Schedule 1, a person has a disability for the purpose of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.
- (2) In this Act 'disabled person' means a person who has a disability."

⁴The following sources assist when interpreting the Act: Part I, sections 1-3 and Schedule 1 of the Disability Discrimination Act 1995; Disability Discrimination (Meaning of Disability) Regulations 1996; *Guidance on matters to be taking into account in determining questions relation to the definition of disability* issued by the Secretary of State pursuant to section 3 of the Disability Discrimination Act 1995.

(a) “mental impairment”

Paragraph 1(1), Schedule 1 provides that “mental impairment” includes an impairment resulting from or consisting of a mental illness only if the illness is a “clinically well-recognised illness.”

Paragraph 1(2) states that regulations may make provision for conditions of a prescribed description to be treated as amounting to, or not amounting to, impairments for the purposes of the Act.

The Disability Discrimination (Meaning of Disability) Regulations 1996 have prescribed the following as not to be regarded as “impairments” under the Act:-

- a. a tendency to set fires,
- b. a tendency to steal,
- c. a tendency to physical or sexual abuse of other persons,
- d. exhibitionism, and
- e. voyeurism.

An addiction (including a dependency) to substances such as alcohol or nicotine does not amount to an impairment under the Act unless it is originally the result of administering medically prescribed drugs or other medical treatment.⁵

(b) “long-term effect”

Paragraph 2(1), Schedule 1 provides that the effect of an impairment is a long-term effect if:-

- “(a) it has lasted at least 12 months;
- (b) the period for which it lasts is likely to be at least 12 months; or
- (c) it is likely to last for the rest of the life of the person affected.”

⁵ Regulations 2 and 3, Disability Discrimination (Meaning of Disability) Regulations 1996.

(c) “normal day-to-day activities”

Under paragraph 4(1), Schedule 1 “an impairment is taken to affect the ability of the person concerned to carry out normal day-to-day activities only if it affects one of the following:-

- (a) mobility;
- (b) manual dexterity;
- (c) physical co-ordination;
- (d) continence;
- (e) ability to lift, carry or otherwise move everyday objects;
- (f) speech, hearing or eyesight;
- (g) memory or ability to concentrate, learn or understand; or
- (h) perception of the risk of physical danger.”

D4 of the *Guidance on matters to be taking into account in determining questions relation to the definition of disability* (“the Guidance”) advises that this is not an exhaustive list.

The semantic meaning of “substantial”, “long-term” and “normal day-to-day activities” is addressed at sections A-C of the Guidance.

Section A1 advises that the requirement that an adverse effect be substantial reflects that “disability” be understood as a limitation going beyond the normal differences in ability which exists amongst people whilst a “substantial” effect is one which is more than “minor” or “trivial.”

Medical treatment is considered at paragraph 6(1), Schedule 1:-

“An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect.”

Section B6 of the Guidance advises that, if medical or other treatment is likely to cure an impairment, so that recurrence of its effects would be unlikely even if there were no further

treatment, this should be considered when looking to the likelihood of recurrence of those effects. However, if the treatment delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, then the treatment is to be ignored and the effect regarded as likely to recur.

(2) The Meaning of “Discrimination”

“Discrimination” is defined at Part III of the Act at the section entitled “Premises.”⁶ **Section 22(3)** is pertinent to claims for possession and reads:-

“It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises –

(a) in the way he permits the disabled person to make use of any benefits or facilities;

(b) by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities; or

(c) by evicting the disabled person, or subjecting him to any other detriment.”

(3) Justification

⁶This Part of the Act is not restricted to residential tenancies and can relate to business tenancies, *cf. Manchester County Council v Romano; Manchester County Council v Samari* [2004] EWCA Civ 535 ; [2004] HLR 47. at para 67.

Should the tenant present as disabled within the meaning of the Act, the Claimant must show that possession is justified under **section 24(1)(b)**:-

“24(1) For the purposes of [this part/section 22] [an employer/person] discriminates against a disabled person if –

(a) for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and

(b) he cannot show that the treatment in question is justified”

Treatment is only justified under **section 24(2)** if:-

“(a) in A’s opinion (the discriminator), one or more of the conditions mentioned in subsection (3) are satisfied; and

(b) it is reasonable, in all the circumstances of the case, for him to hold that opinion.”

The conditions under **section 24(3)** are:-

“(a) in any case, the treatment is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person);

...

(4) Regulations may make provision, for purposes of this section, as to circumstances in which-

(a) it is reasonable for a person to hold the opinion mentioned in subsection 2(a);

(b) it is not reasonable for a person to hold that opinion.

(5) Regulations may make provision, for the purposes of this section, as to circumstances (other than those mentioned in subsection (3)) in which treatment is to be taken to be justified.”

C20 and C21 of the Guidance is a useful consultative tool when considering justification:-

“Memory or ability to concentrate, learn or understand

C20 Account should be taken of the person’s ability to remember, organise his/her thoughts, plan a course of action and carry it out, take in new knowledge, or understand spoken or written instructions. This includes considering whether the person learns to do things significantly more slowly than is normal.

Perception of the risk of physical danger

C21 This includes both the underestimation and overestimation of physical danger, including danger to well-being. Account should be taken...of whether the person is inclined to neglect basic functions should as eating, drinking, sleeping, keeping warm or personal hygiene; reckless behaviour which puts the person or others at risk; or excessive avoidance behaviour without a good cause.”

Paragraphs 3.11 to 3.13 of the Code of Practice are clear that a discriminatory act may still be performed regardless of whether the service provider knew that the person was disabled.

Case Law

The following two cases currently serve as the most useful exploration of the court's approach to housing legislation and the Disability Discrimination Act 1995 when confronted with a claim of unlawful discrimination in possession proceedings where the tenant attributes their anti-social behaviour to a disability within the Act.

(1) North Devon Homes Limited v Christine Brazier⁷

Ms. Brazier occupied the Claimant's property as an assured tenant and sought to appeal the decision of Mr. Recorder Turner to grant possession for anti-social behaviour constituting a breach of her tenancy agreement.

It was common ground between the parties that Ms. Brazier suffered from a psychotic illness, possibly schizophrenia and was a disabled person within the meaning of the Disability Discrimination Act 1995. The trial judge found that most of her anti-social conduct was perpetrated because of her mental problems and that these prevented her from performing her obligations under the tenancy agreement.

On appeal, David Steel J did not accept that North Devon Homes had considered justification under section 24 of the Act. Further, Mr. Recorder Turner noted the neighbours' distress at Ms. Brazier's behaviour but found that these difficulties did not endanger "the health and safety of any person."

Mr. Recorder Turner found North Devon Homes' conduct to be unlawful under the Act but still granted possession on the basis that that, "it is illogical...to say that because it is unlawful under the Discrimination Act that that prevents me from making an order under the Housing Act."⁸

⁷ [2003] EWHC 574 (QB)

⁸ *Ibid*, paragraph 22.

David Steel J considered this reasoning to be a misconception and held that the Act does not bar evictions generally, but only those that are not justified by the specific circumstances set out at section 24.⁹

David Steel J allowed the appeal holding that, although the “degree of misbehaviour” is significant, the Act furnishes its own code for justified eviction which requires a higher threshold which, if not met, means the court is invited to exercise its discretion by way of promotion of unlawful conduct.

(2) Manchester City Council v Romano & Samari¹⁰

Romano

Ms. Romano occupied the Claimant’s premises as a secure tenant and appealed a decision issuing a warrant for possession for breach of a Suspended Possession Order. No medical evidence was placed before the court at the time of the SPO. These breaches were anti-social in nature and alleged to have caused nuisance and annoyance to Ms. Romano’s neighbour, Mr. Schofield.

On the first appeal, Ms. Romano adduced medical evidence suggesting she suffered from a recurrent depressive disorder of a type recognised by the ICD-10 and DSM-IV classifications of mental disease. Ms. Romano could carry out day-to-day activities but her depressive disorder made these tasks difficult. Irritability of mood and paranoid ideation had contributed to her misinterpreting other people’s intentions causing her to behave in a hostile and anti-social manner however the disorder in no part contributed to Ms. Romano’s playing of loud music or undertaking DIY during unsociable hours.

At this instance, the judge found that, at best, the medical evidence pointed to marginal effects of the illness on Schedule 1 activities thereby satisfying him that her mental impairment did not have a substantial effect on Ms. Romano’s ability to carry out any of the

⁹ *Ibid*, paragraph 23.

¹⁰ [2004] EWCA Civ 535 ; [2004] HLR 47

day-to-day activities in paragraph 4(1) of that Schedule. He found that Ms. Romano was not disabled for the purposes of section 1(1) of the Act.

Ms. Romano appealed to the Court of Appeal. The court found that Mr. Schofield's evidence, if heard in the court below, would properly lead to the conclusion that his health was endangered through sleep deprivation and, had a section 22 point been taken so that the Claimant's opinion to seek possession had been tested at trial, it would have been held to have been objectively reasonable.¹¹

Ms. Romano's appeal was dismissed.

Samari

Ms. Samari occupied the Claimant's premises as a secure tenant. In June 2002 the Claimant secured an injunction prohibiting Ms. Sumari from committing specified anti-social acts. Possession proceedings were issued and, at trial, Ms. Sumari relied upon three medical reports all written by the same author.

The first medical report dated 14th October 2002 suggested that Ms. Samari suffered from a personality disorder within DSM-IV criteria. Her chaotic lifestyle, interacting with her personality disorder, produced violent behaviour, depression and anxiety.

The second report dated 11th June 2003 remarked that her aggressive behaviour related more to her underlying personality disorder than mental illness and that she was competent in managing her affairs and understanding terms of an injunction order.

The third report dated 27th July 2003 concluded that Ms. Samari suffered a mental impairment that had a substantial and long-term effect on her ability to carry out normal day-to-day activities under the Act.

¹¹ *Ibid* paragraphs 93-94.

At trial the judge accepted Ms. Samari suffered a mental impairment that was a long-term condition under paragraph 2(1), Schedule 1 of the Act but that it did not affect her ability to carry out normal day-to-day activities. The judge found that the fact that she did not react appropriately to particular circumstances did not mean she had not learned what constituted acceptable behaviour. Further, the judge found that Ms. Sumari's conduct was triggered by anger and not by mental impairment.

The judge held that Ms. Sumair was not disabled for the purposes of the Act and made an order for possession.

On appeal to the Court of Appeal it was accepted that Ms. Samari fell within paragraph 4(1)(g), Schedule 1 of the Act in that if, by reason of her illness Ms. Samari was unable to learn how to cope with stressful situations and to react appropriately this brought her within that part of the Schedule.

The court however, found that the effect of Ms. Samari's behaviour endangered the health of neighbours thereby justifying the Claimant's decision to seek possession.

Ms. Samari's appeal was dismissed.

Conclusion

These are the procedural steps in the preparation of a case that should be considered when seeking possession against any tenant who can feasibly raise an argument of unlawful discrimination under the Disability Discrimination Act 1995 on the basis that their anti-social behaviour or failure to comply with their tenancy agreement is caused by a disability within the legislation.

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CPD REF: CYL/STIC

Possession proceedings and the Disability Discrimination Act 1995

Preparing for Court

1. Possession claims are complicated enough without adding an extra layer, namely a disability. In any case there are three things to deal with
 - a. Breaches – what has the tenant done?
 - b. Reasonableness – is it reasonable to order possession

- c. Outcomes. What is the Court going to order? (Physical disability is not normally causative of nuisance behaviour - but it can have a huge impact on potential outcomes.)
2. At every stage of case preparation those three aspects of the case need to be borne in mind.

Pre-Court preparation

3. It may not be immediately evident that there is a disability. However, in the vast majority of cases there is evident mental illness. Often this has been disclosed on referral and it is a question of checking records. Even if there is no diagnosis, the behaviour can be so obviously abnormal as to trigger questions. The landlord needs to be pro-active.
4. The client needs to be aware of the potential difficulties and try to deal with them outside the Court process
 - a. Information - sometimes neighbours can be more tolerant if they know there is a disability than if they think someone is being selfish. However, care has to be taken not to infringe the right to privacy.
 - b. Mediation
 - c. Involving other support systems
 - d. Recording what is done and why.
5. Regard should be had to the Housing Corporation's Guidance: *Tenancy management, eligibility and eviction* at all stages. Associations should pursue alternatives, retaining eviction as a last resort. (In *Moat Housing v Hartless* the tenancy agreement specifically referred to this Guidance, but any Housing Association is bound by it in any event.)
6. Sometime the decision is taken to serve a Notice of Seeking Possession before any 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.

7. This involves a certain amount of education of the landlord and an explanation of why it is necessary.

Documentation

8. The Notice of Seeking Possession is an important document and needs to records accurately the alleged breaches. At this stage, however, disability issues need not be expressly referred to.
9. The Particulars of Claim is the next step. The Particulars of Claim in any possession claim are very important. In many claims these days the pleadings take a secondary role: in possession claims they tend to take a front stage place. They are therefore worth investing time and effort in. IN disability cases it is all the more important.
10. It goes without saying that they need to set out the grounds relied upon and the breaches. Where there is a disability it is all the more important to ensure that the breaches are clearly set out.
11. *How to plead breaches.*
 - a. It is not a breach that AMrs 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 Aallegedly= told Mrs X to fuck off.
 - d. The way to plead it is quite simply Aon 3rd January 2005 the Defendant told Mrs X, a neighbour, to fuck off=.
12. 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.
13. 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.

14. The breach needs to be pleaded briefly. Cutting and pasting the witness statement or Notice of Seeking Possession is not good practice. The relevant facts from each incident must be abstracted and put into short sentences.
15. 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 Ait is reasonable to order possession because:≡.
16. That paragraph is absolutely indispensable in a disability case. You have to show that Ait 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.

Hearsay

17. One difficulty which may be more acute in a disability case is a reluctance of witnesses to come forward. The use of hearsay evidence is therefore to be carefully considered.

18. It should not be assumed that hearsay evidence is always acceptable. 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.

19. 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.
20. 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 be all the more necessary in a disability case as quite often the level of nuisance and the corresponding impact is high.
21. 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.
AMrs 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.

25. Hearsay is only allowable if a hearsay notice has been served: Civil Evidence Act 1995 section 2(1). 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.

Time for service

26. The Rules do not allow for service of a hearsay notice later in the day. However,

the Rules do not impose a sanction for a failure to serve a notice at the time of serving the witness statements and therefore the Court may be fairly relaxed about a late application. In the interests of justice, the Court should certainly allow the service of a hearsay notice when there is a problem which arises after the date of service of statements, such as illness. However, the Court will bear in mind the possibility that the other party may want to exercise the power to require the witness to attend for cross-examination.

27. It is permissible to call as a witness someone whose statement has been covered by a hearsay notice. It is therefore possible to serve a hearsay notice at the time of serving the witness statement and still bring the witness to Court. This is helpful in cases of reluctant witnesses who may firm up later. If in doubt, serve the notice.

Failure to serve notice

28. Hearsay evidence is not made inadmissible by a failure to serve a notice: the failure to abide by the Rules goes to weight not admissibility. The Court has a residual discretion to take hearsay evidence into account and in anti-social behaviour cases may be more generous in exercising that discretion. This does not apply to committal proceedings. It is not impossible to commit on hearsay evidence alone: just very, very difficult.

29. Hearsay notices are not required for hearings other than trials.

Other procedures

30. The opponent has the right to react to a hearsay notice by making an application that the witness be called to be cross-examined.

CPR Rule 33.4

Power to call witness for cross-examination on hearsay evidence

(1) Where a party—

(a) proposes to rely on hearsay evidence; and

(b) does not propose to call the person who made the original statement to give oral evidence,
the court may, on the application of any other party, permit that party to call the maker of the statement to be cross-examined on the contents of the statement.

(2) An application for permission to cross-examine under this rule must be made not more than 14 days after the day on which a notice of intention to rely on the hearsay evidence was served on the applicant.

31. The rules are silent as to what happens if a counter-notice is served and the Court orders the witness to attend, but the witness fails to attend. However, the most likely outcome is that the party serving it will be refused permission to use that statement. This is not because the evidence is inadmissible but because the witness has refused an order of the Court.

32. One of the most ignored rules is 33.5:

Credibility

(1) Where a party—

(a) proposes to rely on hearsay evidence; but

(b) does not propose to call the person who made the original statement to give oral evidence; and

(c) another party wishes to call evidence to attack the credibility of the person who made the statement,

the party who so wishes must give notice of his intention to the party who proposes to give the hearsay statement in evidence.

(2) A party must give notice under paragraph (1) not more than 14 days after the day on which a hearsay notice relating to the hearsay evidence was served on him.

Contents of a notice

33. All in all, the best practice is to serve one notice, at the time the witness statements are served, covering any statements which include hearsay. There is no prescribed form for a hearsay notice.

34. 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.

35. 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. (Each of these statements is technically hearsay - should they have a hearsay notice...?)

Magistrates Courts (ASBOs)

36. In criminal case, the procedure is governed by the Criminal Procedure rules Part 34. The rules as presently drafted require written notice to be given to the other party and to the court.

- In the magistrates' court the prosecution must give notice at the same time as providing primary disclosure
- In the Crown court the prosecution must give notice not more than 14 days after- committal, consent or preferment of a bill of indictment, notice of transfer or service of case.
- The defendant must give notice not more than 14 days after the prosecution have served primary disclosure
- Any objection to the introduction of hearsay must be made by notice given within 14 days of the service of the hearsay notice.

The Criminal Procedure Rules and the forms for giving and opposing notice of intention to introduce hearsay evidence are available on the [Court Service](#) website.

See Annex. It is not clear if this form is to be used in civil proceedings in the Mags. The old rules were contained in the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999 and these may subsist. However, the form appended is probably as good as any.

Teaching my grandmother to suck eggs

37. Other points for good presentation/preparation
 - a. Would a map assist? Sketch plans?
 - b. Don't staple documents inside a ring binder.
 - c. Consider a trial plan in longer case – can some witnesses be warned for day 2, for example?
 - d. More use of convictions – evidenced by certificates of conviction if at all possible. Convictions must be pleaded.

Criminal Procedure Rules

34.1 When this applies

This Part applies in a magistrates' court and in the Crown Court where a party wants to introduce evidence on one or more of the grounds set out in section 114(1)(a) to (d) of the Criminal Justice Act 2003 ⁽¹⁾, and in this Part that evidence is called "hearsay evidence".

Section 114 of the 2003 Act provides that a statement not made in oral evidence in criminal proceedings is admissible as evidence of any matter stated only on certain conditions. The meaning of "statements" and "matter stated" is explained in section 115 of the 2003 Act. "Oral evidence" is defined in section 134(1) of that Act. For the introduction of hearsay evidence in the Court of Appeal, see rule 68.20.



34.2 Notice of hearsay evidence

The party who wants to introduce hearsay evidence must give notice in the form set out in the Practice Direction to the court officer and all other parties.



34.3 When the prosecutor must give notice of hearsay evidence

The prosecutor must give notice of hearsay evidence—

- (a) in a magistrates' court, at the same time as he complies or purports to comply with section 3 of the Criminal Procedure and Investigations Act 1996 ⁽²⁾ (disclosure by prosecutor); or
- (b) in the Crown Court, not more than 14 days after—
 - (i) the committal of the defendant, or
 - (ii) the consent to the preferment of a bill of indictment in relation to the case, or
 - (iii) the service of a notice of transfer under section 4 of the Criminal Justice Act 1987 ⁽³⁾ (serious fraud cases) or under section 53 of the Criminal Justice Act 1991 ⁽⁴⁾ (certain cases involving children), or
 - (iv) where a person is sent for trial under section 51 of the Crime and Disorder Act 1998 ⁽⁵⁾ (indictable-only offences sent for trial), the service of copies of the documents containing the evidence on which the charge or charges are based under paragraph 1 of Schedule 3 to the 1998 Act.



34.4 When a defendant must give notice of hearsay evidence

A defendant must give notice of hearsay evidence not more than 14 days after the prosecutor has complied with or purported to comply with section 3 of the Criminal Procedure and Investigations Act 1996 (disclosure by prosecutor).



34.5 Opposing the introduction of hearsay evidence

A party who receives a notice of hearsay evidence may oppose it by giving notice within 14 days in the form set out in the Practice Direction to the court officer and all other parties.



34.6 Methods of giving notice

Where this Part requires a notice to be given it may, with the consent of the addressee, be sent by fax or other means of electronic communication.



34.7 Court's power to vary requirements under this Part

The court may -

- (a) dispense with the requirement to give notice of hearsay evidence;
- (b) allow notice to be given in a different form, or orally; or
- (c) shorten a time limit or extend it (even after it has expired).



34.8 Waiving the requirement to give a notice of hearsay evidence

A party entitled to receive a notice of hearsay evidence may waive his entitlement by so informing the court and the party who would have given the notice.

**Notice of intention to introduce hearsay evidence
under s.114, Criminal Justice Act 2003**
(Criminal Procedure Rules, rr 34.2, 68.20(1))

This form shall be used to give notice of intention to introduce hearsay evidence on one or more of the grounds set out in s. 114(1), Criminal Justice Act 2003.

Details of party giving notice

Surname: State the name and address of the party giving notice of hearsay evidence. (If in custody give address where detained.)

Forename(s):

Address:

Case Details

The Court at Case Reference Number Name of Judge: Enter the name of the Court and the case no.

Name of Judge:

Date the trial or proceedings :

Name of prosecuting agency (if relevant):

Name of defendant(s):

Charges: Give brief details of the charges to which this notice applies.

To the named recipient(s) of this notice:

I hereby give you notice of my intention to introduce hearsay evidence, details of which are set out below, in these proceedings.

Grounds for introducing the hearsay evidence

On which of the following grounds do you intend to introduce the hearsay evidence?

- (a) Any statutory provision makes it admissible; Tick as appropriate

Specify below which provision of the CJA 2003 or other statute, or which rule of law preserved by s.118 CJA 2003 you rely on to introduce the evidence.

Where box (d) above is ticked, you must specify below which of the factors set out in s. 114(2), CJA 2003 are relevant and explain how they are relevant.
- (b) Any rule of law preserved by s 118, Criminal Justice Act 2003 makes it admissible;
- (c) All parties to the proceedings agree to it being admissible; or
- (d) It is in the interests of justice for it to be admissible.

Further details of grounds:

Details of hearsay evidence

The details of the hearsay evidence are as follows: Give brief details of the evidence that you want to introduce as hearsay evidence.

A complete copy of that evidence must be attached to this notice, if it has not already been served on the other parties.

Extension of time

Are you applying for an extension of time within which to give this notice?

If yes, state your reasons:

Signed:

Dated: