

Panic on the streets

Drugs and gangs

Jim Shepherd

1. Housing lawyers are increasingly involved in representing clients who have been accused of drug use or drug dealing in their home. In this talk I intend to summarise the law in this area in order to assist advisors to deal with these serious and often demanding cases.
2. In addition I intend to look at measures to tackle gang activity on estates. In particular I will look at new legislation which has introduced the concept of the “Gangbo”.
3. Finally I will briefly look at the recent proposals for reform in ASB.

DRUGS

4. There are a range of remedies that a landlord may use in dealing with alleged drug activity by tenants or their visitors.

Breach of a contractual term

5. Tenants of social landlords are usually bound by tenancy clauses preventing them from using the premises for an *illegal or immoral purpose*, including drug use or supply. Such clauses will either be freestanding or will form an adjunct to the general ASB provisions. For example:

Neither you nor your visitors nor any person living with you shall use or threaten to use the premises , the building and/or the Estate for any illegal, immoral or unlawful activity including bringing into and/or storing, and/or possessing in the property illegal drugs (whether or not for your personal use).

Clause 4.14 of Tenancy agreement of Midland Heart

Examples of behaviour which will or is likely to, or is capable of, causing a nuisance and/or annoyance include: Selling drugs

Clause 4.17 of Tenancy agreement of Midland Heart

6. Increasingly however the tenancy clause has become redundant and in court proceedings the focus is on the statutory grounds for possession in relation to nuisance and illegal/immoral user. The relevant statutory grounds are contained in: Rent Act 1977, Sch.15, Case 2; Housing Act 1985, Sch.2, Ground 2 and Housing Act 1988, Sch.2, Ground 14. The grounds are discretionary and, under each, the court must, before granting possession, be satisfied that it is reasonable to grant possession (see further below).

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—

(i) using the dwelling-house or allowing it to be used for immoral or illegal purposes, or

(ii) an indictable offence committed in, or in the locality of, the dwelling-house.

(Ground 2 of Schedule 2, Housing Act 1985).

Guilty of conduct causing or likely to cause a nuisance or annoyance (First limb)

7. If there are allegations of drug use / dealing which are causing a nuisance on the estate (e.g by the high numbers of visitors, the association of the tenant with undesirable

characters, witnessed drug deals, people seen with weapons, noise and threatening behaviour) the landlord can rely on the first limb of the statutory ground.

8. The ground imputes the tenant with responsibility for the actions of any others living in or visiting the premises – not just members of the same household- even if the tenant is powerless to stop the behaviour. Accordingly a vulnerable tenant whose home is being “cuckooed” by drug dealers is liable to be caught by the ground unless he/she can argue that the perpetrators are not invited visitors.
9. It may be that the landlord is alleging drug dealing and that this is denied by the tenant. Whilst the standard of proof is the civil standard – balance of probabilities – it is generally accepted that the standard is flexible depending on the seriousness of the allegations made:

Nevertheless, the judge having set the problem to himself, he answered it, I think, correctly. He reviewed all the cases and held rightly that the standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of probability that is required..

Per Lord Denning in Hornal v Neurberger Products Ltd [1957] 1 QB 247 at 258.

10. But see also *re B (Children) [2009] 1 AC 11* where it was held that the same standard of proof applies to all civil proceedings. It is not affected by the seriousness of the allegation or the gravity of the consequences, if it is proved, although regard must always be had to the *inherent probabilities* when reaching a decision.
11. Often in a case involving alleged drug dealing the landlord will rely on hearsay evidence on the basis that witnesses are too intimidated to come to court. It is vital that the blanket use of such evidence is challenged where possible. The court will need to be reminded about the inherent dangers of relying on hearsay evidence particularly in terms of the potential injustice to the Defendant.
12. In *Moat Housing Group –South Ltd v Harris [2006] QB 606*, CA Brooke LJ stated the following:

134. The claimants relied on a large amount of hearsay evidence at the trial, and their "live" witnesses also gave hearsay evidence of which appropriate notice had been given. The reasons why the makers of the original statements did not attend trial

varied greatly. ZP, for instance, did not attend on the second day of the trial because she was said to have child care difficulties. KL did not attend because she was 22 weeks pregnant and had almost lost her child the previous week: her doctors had told her to rest and not to have any stress. A number of anonymous witnesses told either Mr Macdonald or Ms Brotherwood that they did not wish to identify themselves for fear of reprisals (without, in many cases, being at all specific about the reason for their fear); by implication, this was the reason why it was not reasonable or practicable for them to attend court.

135. The willingness of a civil court to admit hearsay evidence carries with it inherent dangers in a case like this. As Mr Macdonald said, rumours abound in a small housing estate, and it is much more difficult for a judge to assess the truth of what he is being told if the original maker of the statement does not attend court to be cross-examined on his/her evidence. The emphasis placed by section 4(2)(b) of the 1995 Act on contemporaneity merely goes to highlight the importance of a landlord giving a tenant contemporary notice of any complaints that are made against his/her behaviour, so that the tenant is not faced in court with serious complaints made by anonymous or absent witnesses about matters that took place, if at all, many months previously.

140. While nobody would wish to return to the days before the Civil Evidence Act 1995 came into force, when efforts to admit hearsay evidence were beset by complicated procedural rules, the experience of this case should provide a salutary warning for the future that more attention should be paid by claimants in this type of case to the need to state by convincing direct evidence why it was not reasonable and practicable to produce the original maker of the statement as a witness. If the statement involves multiple hearsay, the route by which the original statement came to the attention of the person attesting to it should be identified as far as practicable.

13. *Moat* was followed in **R (Cleary) v Highbury Corner Magistrates Court** [2007] 1 WLR 1272 in the context of crack house closure orders under Anti-Social Behaviour Act 2003, May LJ stated the following:

*In my view, it may too easily be supposed that people who give information about drug dealers should not be required to come to court to give evidence. In individual cases, the fear may be genuine. But an easy assumption that this will always be so and that hearsay evidence is routine in these cases risks real injustice. After all, defendants to an application for a closure order may risk being dispossessed from their home for up to 6 months, and the statute for obvious reasons expects both that witnesses will be identified and that they may have to attend for cross-examination. In this context, paragraphs 131–140 of the judgment of Brooke LJ in *Moat Housing Group South Limited v Harris* [2005] EWCA Civ 287 are in point. Brooke LJ was rightly critical of anonymous hearsay witnesses stating that they do not wish to identify themselves for fear of reprisals without, in many cases, being at all specific about the reasons for their fear. The willingness of a civil court to admit hearsay evidence carries with it inherent dangers. It is much more difficult for a court to assess the truth of what they are being told if the original maker of the statement does not attend to be cross-examined. More attention should be paid by claimants to the need to state by convincing direct evidence why it is not reasonable and practicable to produce the original maker of the statement as a witness. Magistrates should have these matters well in mind. The use of the words "if any" in section 4 of the 1995 Act shows that some hearsay evidence may be given no weight at all. Credible direct evidence of a defendant in an application for a closure order may well carry greater weight than uncross-examined hearsay from an anonymous witness or several anonymous witnesses.*

31. It may be that hearsay evidence of this kind is technically admissible under the 1995 Act whatever its deficiencies. But a magistrates' court is much more likely to be satisfied of the matters in section 2(3) of the 2003 Act if the application is supported by direct evidence of witnesses available for cross-examination; and, if there is to be hearsay evidence, if Brooke LJ's admonitions are followed, and if what is served and adduced is first hand and complete as it might be a full version of a direct witness statement leaving out details of identity. If what is relied on is oral statements to a police officer, the officer should give direct evidence of what was said and the circumstances in which it was said.

Convicted of using the dwelling-house or allowing it to be used for immoral or illegal purposes (Second Limb Part (i))

14. The use of premises for the supply or use of illegal drugs constitutes illegal use of premises: see *Bristol City Council v Mousah* (1997) 30 H.L.R. 32, CA; *S. Schneiders & Sons Ltd v Abrahams* [1925] 1 K.B. 301, CA and *Abrahams v Wilson* [1971] 2 Q.B. 88, CA.

15. Under the Rent Acts, it has been held that it is not necessary that the user be a part of the offence, but use of the premises must be more than incidental, as where the offence merely happens to be at the premises:

*Giving the case the best consideration I can, I come to the conclusion that the conviction need not be for using the premises for one or another immoral or illegal purpose, and that it is enough if there is a conviction of a crime which has been committed on the premises and for the purpose of committing which the premises have been used; but that it is not enough that the tenant has been convicted of a crime with which the premises have nothing to do beyond merely being the scene of its commission, per Scrutton L.J in *S. Schneider & Sons v Abrahams*[1925] 1 K.B. 301 at p.310,.*

Applying Scrutton LJ.'s test, the position in regard to the finding of dangerous drugs on the demised premises I think is simply this: If the drugs are on the demised premises merely because the defendant is there and has them in his or her immediate custody, such as a pocket or a handbag, then I would say without hesitation that that does not involve a " using " of the premises in connection with the offence. On the other hand, if the premises are employed as a storage place or hiding place for dangerous drugs, a conviction for possession of such drugs, when the conviction is illuminated by further evidence to show the manner in which the drugs themselves were located, would I think be sufficient to satisfy the section and come within Case 2. One must not forget that at the present time landlords may incur heavy penalties if their premises are used for the smoking of cannabis, and one must not lightly deprive a landlord of an opportunity of obtaining possession against a tenant who runs the

landlord into that kind of risk (Per Lord Widgery in *Abrahams v Wilson* [1971] 2 Q.B. 88, CA).

16. In a recent county court case *LBHF v Harris* (Willesden CC, 25th January 2011) the Circuit Judge relying on *Wilson* was unwilling to find that the tenant was in breach of the immoral/illegal purposes limb where her son had unwittingly left some cannabis in a bag at the premises (without the knowledge of the tenant) prior to him being excluded under an injunction.
17. Single acts may constitute *user*, but it will be that much harder to establish: *Abrahams v Wilson*.

***Indictable offence committed in, or in the locality of, the dwelling-house* (Second Limb Part (ii)).**

18. This provision was introduced under Housing Act 1996 specifically because it could be particularly useful for a landlord who is concerned about drug dealing where the trafficking is taking place in the common parts of the estate rather than a house or flat: DOE Circ 2/97 para 28 (iii).

Reasonableness

19. Once the ground is made out the court must consider whether it is reasonable to grant a possession order and if so whether it is reasonable to suspend that order.
20. Under the Housing Acts the court is directed to consider in particular:
 - The effect of the nuisance or annoyance (drug dealing/activity) on persons other than the tenant i.e. neighbours.

- Any continuing effect the nuisance or annoyance is likely to have on such persons and
- The effect that the nuisance or annoyance would be likely to have on such persons if the conduct is repeated.

(Housing Act 1985,s.85A and Housing Act 1988,s.9A).

21. This provision puts landlords in a significantly strong position when bringing possession proceedings against a tenant whose drug activity has caused a nuisance to neighbours, even if that activity falls short of allegations of drug dealing. This is particularly the case if there is no real prospect of an improvement in the drug user's conduct in the future.

22. It is vital therefore that cogent evidence is provided which gives the court some reassurance as to future conduct. Drug tests should be carried out over a period of time so that a pattern of improvement can be shown. Alternatively if the drug user's addiction is so entrenched there must at the very least be some acceptance by them of the consequences of their conduct and some prospect (supported by evidence from doctors/probation officers etc) that there will be improvement in the future. Without this evidence it will be exceptionally difficult to challenge a "front loaded" possession claim in which there is evidence from neighbours (whether hearsay or otherwise) expressing deep concern about the consequences for them if the tenant is allowed to remain in his/her home or return to his her home in the case of a "crack house" closure order.

Caselaw on drugs and reasonableness

a) Cases which assist the landlord

Bristol City Council v Mousah (1998) 30 HLR 32, CA: the premises were subject to repeated drugs raids by the police. Surveillance established a steady stream of visitors calling at the house. A number of people were arrested in the absence of the tenant and drugs including crack cocaine were found hidden on the premises, together with paraphernalia including foil, pipes and cling film. The Judge found the ground for possession (breach of contract based on a drug dealing prohibition) proven even on the higher standard required to establish illegal behaviour [see above] but refused to grant a possession order on the basis of the tenant's circumstances. In reversing this decision and imposing an outright order the Court of Appeal made the following well known pronouncements:

The public interest, in my view, is best served by making it abundantly clear to those who have the advantage of public housing benefits that, if they commit serious offences at the premises in breach of condition, save in exceptional cases, an order for possession will be made. The order will assist the housing authority, who, under section 21 of the Act, have the duty to manage the housing stock and have the obligation to manage, regulate and control allocation of their houses, for the benefit of the public. In my view the public interest would best be served by the appellant being able in a case such as this to relet the premises to someone who will not use them for peddling crack cocaine.

(Beldam LJ)

Of more significance is the fact that the Judge found as a fact that the respondent had persistently permitted the premises in question to be used for the purpose of the supplying of a class A drug, namely crack cocaine. In reaching that strong finding, he undoubtedly, correctly applied a high standard of proof. This was a serious

criminal offence and a serious matter. in my judgment it can only be in exceptional cases or circumstances that it would be reasonable for an order for possession not to be made when a serious criminal offence has been persistently committed, as was undoubtedly the fact in this case.

(Otton LJ)

Sandwell v Hensley (1994) 26 HLR 349, CA: Tenant was a secure tenant. In 2005 police officers found an extensive and sophisticated cannabis cultivation operation involving the use of hydroponics in his home. He pleaded guilty to a charge of being knowingly concerned with the cultivation of cannabis. In possession proceedings the judge made a suspended order referring to evidence that the Defendant appeared to have ceased his offending behaviour. The Court of Appeal allowed Sandwell's appeal and substituted an outright order. Where an individual commits a criminal offence, a possession order should only be suspended in exceptional circumstances where there is cogent evidence to demonstrate that the offender's particular conduct has ceased. Local authorities and providers of social housing have a duty to keep areas free of criminal conduct where possible, and unless a court is provided with evidence demonstrating real hope that an individual has changed his or her ways, those landlords are entitled to an outright possession order.

b) Cases which may assist the tenant

i) Drug specific

Stonebridge Housing Action Trust v Gabbidon [2002] EWHC 2091 (Ch): the premises on the Stonebridge Park Estate had been used for drug dealing, including Class A drugs. Nonetheless the Judge found it was reasonable to suspend the possession order because the tenant had not personally been involved in the dealing and there was no evidence of recent incidents. Unsurprisingly the court also confirmed that *Mousah* was not authority for the proposition that proven drug use

must result in an outright order. It was open to the court to suspend an order in appropriate circumstances.

***North Devon Homes v Batchelor* [2008] EWCA Civ 840:** 61 year old tenant in poor health convicted of possession of cocaine with intent to supply, possession of cannabis and money laundering for which she was imprisoned for 18 months. At first instance the court accepted that she was looking after drugs for her son and decided that it was not reasonable to make a possession order. The Court of Appeal were unwilling to interfere with this finding.

***Arena HA v Crossland* June 2002, *Legal Action*, 26, *Wigan CC*:** Tenant arrested for possession of cannabis with intent to supply: not reasonable to grant an order.

***Tai Cyndogaeth Cyfnedig v Griffiths* February 2003 *Legal Action* 36, *Swansea CC*-** tenant convicted of possessing significant amounts of amphetamines and cannabis resin on four occasions between July 2000 and May 2001 – suspended possession order.

***LBHF v Forbes* (*Willesden County Court DJ Morris*) 13-14th April 2011** The Defendant was the secure tenant of premises in which he had lived in for 31 years. There had been no nuisance issues before June 2010. In the period between June 2010 and October 2010 the council received complaints from residents on the estate who believed that the Defendant was dealing drugs. The police raided the Defendant's home and found a small amount of heroin. The Defendant who was a heroin addict was charged with possession of a Class A drug. He pleaded guilty to the charge. The police with the assistance of the council obtained a Closure Order for three months. The Closure Order was extended for a further three months by the Magistrates Court. The evidence relied upon to obtain the Closure Orders was principally that of anonymous witness statements by residents on the estate who believed that the Defendant was dealing drugs at the premises and in the locality. There was also covert

CCTV surveillance evidence showing the number of visitors to the premises. The same evidence was relied on at the possession trial along with further anonymous witness statements confirming the improvement on the estate as a result of the Closure Orders. During the period of the Closure Orders the Defendant made strenuous efforts to address his drug addiction although at the date of the trial there had been some relapse because he was of no fixed abode. Following a 2 day trial District Judge Morris decided on a balance of probability that the Defendant was a drug user who had allowed his home to be used by others for drug taking which had caused a nuisance to his neighbours. The District Judge was satisfied however that the Defendant was not a drug dealer. He made a suspended possession on strict terms with a review after three months so that the Defendant's progress in dealing with his drug addiction and the nuisance could be further assessed.

ii) General

***Greenwich v Grogan* (2001) 33 HLR 140 CA (particularly for young tenants):** not in the public interest to evict where there is an increased risk of further offending if the tenant is evicted to live an insecure life without support.

***Sheffield v Shaw* [2007] EWCA Civ 42:** where there were sincere expressions of remorse.

***Wandsworth v Hargreaves* [1984] 27 HLR 142, CA; *Kensington v Simmonds* [1997] 29 HLR 507; *Greenwich v Grogan* [2000] 33 HLR 12, CA; *Portsmouth v Bryant* [2000] 32 HLR 906, CA; *Gallagher v Castle Vale Action Trust Ltd* [2001] 33 HLR 72:** In considering whether suspension is appropriate it is important to take into account such matters as the extent to which the conduct in question is by others rather than by the tenant, the lack of likely recurrence, the absence of misconduct for a period of time and the tenant's efforts to improve his/her behaviour.

Application of the law

23. In practice the caselaw favouring the landlord usually holds sway. There is little positive to rely on in terms of case-law if you are representing a tenant who has been accused of drug use in the premises (the “tenant” cases above have largely been decided on their own facts). There is even less if you are representing the tenant who is accused/convicted of drug dealing from the premises even if they have turned over a new leaf.

24. It is inevitable that courts will take a dim view of using social housing for any type of drug activity (no matter what drug) and realistic pronouncements by the Judge at first instance in *North Devon Homes v Batchelor* [2008] EWCA Civ 840 will remain unique. He said:

Insofar as the possession of cannabis is concerned, whilst of course this remains a criminal offence now of Class C, if every tenant of a dwelling house within the public sector was to be visited by a possession order because it was reasonable to make one, the courts would inevitably be swamped with such claims.

25. This is why it is essential that practitioners prepare their case as fully and carefully as possible with:

- Detailed evidence from the tenant outlining:
 - i) The background to their tenancy;
 - ii) The circumstances of their drug use/activity;
 - iii) The current or proposed treatment program ;
 - iv) Any issues as to vulnerability particularly in the cases involving drug activity by others
 - v) What assurances can be given to neighbours as to future behaviour?
 - vi) The evidence should also contain an offer of terms that the tenant is willing to comply with.

- Supporting evidence from medical practitioners; social workers and probation officers if possible backed by drug use testing.
- Evidence from friends/family confirming what support can be provided in the future to ensure that the tenant complies with the terms of suspension.
- Any evidence that the landlord has failed to comply with their policy obligations in supporting the vulnerable tenant with drug and alcohol problems.

Note: In my experience any attempt to divert attention away from the tenant's conduct by arguing along the lines that "I am not the only drug user on the estate – the place is full of them" will usually fail to gain sympathy.

Alternative remedies

26. Local authority and RSL landlords now have a number of remedies in addition to possession proceedings that could be used in drug cases. These include: anti-social behaviour injunctions (Housing Act 1996, ss153B Injunction against unlawful use of premises); demotion orders (Housing Act 1985, s.82A and Housing Act 1988, s.6A); extension of introductory tenancy (Housing Act 1996 s.125A); anti-social behaviour orders (Crime and Disorder Act 1998, s.1); withholding of consent to mutual exchange in the case of secure tenancies (Housing Act 1985, Sch.3, Ground 2A); and, suspension of right to buy (Housing Act 1985, s. 121A).

Closure orders

27. It is increasingly the case that the closure order is the prelude to possession proceedings in a case in which there is serious drug use/dealing. Although civil

practitioners may be precluded from representing a client in a Closure Order application in the Magistrates Court for funding reasons it is important that they are familiar with the proceedings because there is often an overlap in the evidence used by the landlord.

28. “Crack House” Closure Orders under the Anti- Social Behaviour Act 2003 are civil orders issued under the civil jurisdiction of the magistrates’ court which prevent anyone entering, or residing at a property. The order lasts for an initial period of three months. An application can be made to extend the period to a maximum of six months.
29. For a Closure Order to be obtained there must be a link between the use of Class A drugs and ASB at the premises.
30. The remedy is extremely draconian- once the order is granted the occupants will lose any right to remain and the premises are boarded up often within the day- there is no packing up time. There is also no proper protection for vulnerable tenants who have been “cuckooed” and are ejected with the perpetrators. They are left to take their chances with a homelessness application – see the concerns expressed in the Roof article Crackdown (2/1/07) at <http://www.roofmagazine.org.uk/features/crackdown>.
31. The applications are made by the police often with the assistance of the landlord. The officer concerned needs no more than a reasonable suspicion that Class A drugs are present and that the address is associated with serious nuisance or disorder (e.g. constant coming and going, verbal and physical intimidation of neighbours, sale of drugs). Under s.1(8) ASBA there is no requirement for there to have been a conviction for drug use, production or supply.
32. Initially the police will serve a closure notice on the occupiers of the premises. The notice must then be converted into a closure order by the Magistrates Court within 48 hours of service.
33. Under s.2(3) ASBA the applicant must satisfy the court that:
 - (a) The premises in respect of which the closure notice was issued have been used in connection with the unlawful use, production or supply of a Class A controlled drug; and

(b) The use of the premises is associated with the occurrence of disorder or serious nuisance to a member of the public; and

(c) The making of the order is necessary to prevent the occurrence of such disorder or serious nuisance for the period specified in the order.

34. Under s.2(6) ASBA the magistrates may adjourn the hearing of the application for a maximum of 14 days in order to allow the occupier, person who has control of the premises or any other person with an interest in the premises to show why a closure order should not be made.

35. A person commits an offence if he/she remains on or enters the premises in contravention of the closure notice or if he/she obstructs a constable or an authorised person (S.4 (1) and (2) ASBA).

36. A person guilty of one of these offences is liable on summary conviction to prison not exceeding 6 months or a fine or both (s.4 (3) ASBA). They won't however be guilty of an offence if they have a reasonable excuse for entering or being on the premises (e.g. for the recovery of essential possessions?): s.4(4) ASBA.

37. Under s.5 ASBA the police can make an application to extend the order where there are reasonable grounds for believing that it is necessary to extend the period for the purpose of preventing the occurrence of disorder or serious nuisance. These applications invariably will be supported by evidence from neighbours confirming how much their lives have been improved by the closure order. The extension can be for a further period of three months – up to a maximum of 6 months. Usually where an extension is granted it will be very difficult to resist a subsequent possession order – but not impossible! – see *Forbes* above.

38. Note that if in a drugs case there are evidential difficulties proving the use of Class A drugs but there is nonetheless evidence of ASB and significant and persistent disorder or nuisance it is open to both the police and the local authority to apply for an ASB Closure notice under ASBA Pt 1A although such orders are supposed to be a last resort (Home Office Guidance).

Relevant case law

Chief Constable of Merseyside v Harrison [2007] QB 79: - civil standard of proof.

Dumble v Commissioner of Police [2009] EWHC 351 (Admin): hiatus of 16 days in disorderly conduct not sufficient to amount to a permanent cessation such that closure order not appropriate.

R (Taylor) v Commissioner of Police [2009] EWHC 264 (Admin): Magistrates can award costs where application for closure order dismissed.

R (Smith) v Snaresbrook Crown Court [2008] EWHC 1282: There is no requirement for exceptional circumstances for an extension of the Closure Order.

Chief Constable of Cumbria v Wright [2007] 1 WLR 1407: the nuisance and disorder must be derived from the drug use.

***Turner v Highbury Corner Magistrates Court* [2006] 1 W.L.R. 220:**
Magistrates can adjourn for longer than 14 days if it is necessary in the interests of justice.

***R (Cleary)v Highbury Corner Magistrates Court* [2007] 1 WLR 1272:**
hearsay evidence – see above.

GANGS

39. Part 4 of the Police and Crime Act 2009 which deals with Injunctions for gang related violence (“Gangbos”) came into force on 31st January 2011. Gangbos were introduced by the previous government to counter the effect of the decision in *Birmingham City Council v Shafi and another* [2009] 1 WLR where the Court of Appeal decided that s.222 of the Local Government Act 1972 was not available (save in exceptional circumstances) to deal with alleged gang violence because of the alternative remedy (ASBO) under the Crime and Disorder Act 1998.

40. The legislation is supported by statutory guidance issued by the Home Office (made pursuant to s.47 PCA): *Injunctions to Prevent Gang Related Violence* available at: <http://www.official-documents.gov.uk/document/other/9780108509599/9780108509599.pdf>.

41. The Civil Procedure Rules Part 65 (CPR 65.43-65.49) and Practice Direction have also been amended to accommodate the *Gangbo*.

42. Civil legal aid is available to defend Respondents: Guidance, para 7.8

43. Gangbos aim to break down violent gang culture, prevent violent behaviour of gang members from escalating and engage gang members in positive activities to help them leave the gang: Guidance para 2.1.

44. Which courts can grant a Gangbo?

Gangbos can be sought in the county court or High Court: s. 49 (1) PCA.

Note that in London unless the court orders otherwise the application for a Gangbo must be heard at West London County Court (See CPR 65PD para 1.2)

45. Who can apply for a Gangbo?

Police/Transport Police

Local Authority: s.37 PCA.

46. Who can be subject to a Gangbo?

Under the PCA the provisions are aimed at adults. The Crime and Security Act 2010 contains provisions for 14-17 year olds and these provisions will be piloted later in the year.

47. What consultation requirements are there?

The applicant must consult any local authority and any chief police officer, that the applicant thinks it appropriate to consult, and any other body or individual that the applicant thinks it appropriate to consult: s.38 PCA. See further consultation requirements in Guidance Ch 3.

48. What conditions need to be met before a Gangbo will be granted?

- a) The court must be satisfied on the *balance of probabilities* that the Respondent has engaged in, or has encouraged, or assisted, *gang related violence*.

- b) The court must think it is necessary to grant the injunction to prevent the Respondent from engaging in, or encouraging or assisting, gang related violence and or to protect the Respondent from gang- related violence: s. 34(2) and (3) PCA.

Note that hearsay evidence will be admissible depending on the normal rules of court: Guidance. Para 4.4. The danger of using hearsay evidence in a case where it is complained that the perpetrator is a member of a group or gang of youths perpetrating nuisance was recognised in *F v Bolton Crown Court* [2009] EWHC 240 (Admin) where Simon J stated the following at [11]:

*The judge in this specific case pointed out, during the course of the hearing, that reliance on the evidence of police officers who had no knowledge of the facts advanced might in future lead to difficulties. The difficulties might be said to have occurred in this case. At least in relation to many of the incidents relied on by the prosecution (although not in relation to the five occasions identified by the Crown Court), the claimant's participation in contradistinction to his presence, was not clear; and, because of the nature of the evidence, could not be investigated. Nor are the objections in this case only procedural. In my view, in cases such as the present, the court should have in mind the factors set out in section 4(2) of the Civil Evidence Act 1995 in deciding what weight to give to hearsay evidence (see *Moat Housing Group - South Ltd v Harris and Hartless* [2005] EWCA Civ 287)*

49. What is *gang related violence*?

It is violence or a threat of violence which occurs in the course of, or is otherwise related to, the activities of a group:

- (a) that consists of at least 3 people

- (b) Uses a name, emblem or colour or has any other characteristic that enables its members to be identified by others as a group; and

- (c) Is associated with a particular area: s, 34 (5) PCA.

Note that *violence* includes violence against property.

The provisions are intentionally broad to ensure that gang injunctions can be used effectively in response to the different violent gangs encountered in different local areas: Guidance Para 2.2

The provisions are unlikely to catch inter personal disputes which are not gang related.

50. What will the injunctions prohibit?

In particular the injunction may prevent the Respondent from:

- (a) Being in a particular place;

- (b) Being with particular persons in a particular place;

- (c) Being in charge of a particular species of animal in a particular place;

- (d) Using the internet to facilitate or encourage violence: s. 35 (2) PCA.

51. What requirements can the injunction impose?

In particular the injunction can require the Respondent to:

- (a) Notify the person who applied for the injunction of the Respondent's address and of any change to that address.

- (b) Be at a particular place between particular times on particular days;

- (c) Present himself or herself to a particular person at a place where he or she is required to be between particular times on particular days.

- (d) Participate in particular activities between particular times on particular days: s.35 (3) PCA. e.g. mediation with rival gang members; attending anger management; or coaching and counselling: Guidance para 5.3.

Note that the requirement in para (b) can't be such as to require the Respondent to be at a particular place for more than 8 hours in any day: s.35 (4) PCA.

Note also that the prohibitions and requirements included in the injunction must so far as practicable, be such as to avoid:

- a) Any conflict with the Respondent's reasonable beliefs, and

- b) Any interference with the times at which the Respondent normally works or attends any educational establishment: s. 35(5) PCA.

In addition applicants are required to carry out a risk assessment to determine whether proposed prohibitions may put the Respondent at risk of harm – e.g if a curfew causes him to lose the immediate protection of his gang: Para 3.3.1 Guidance.

52. How long can a Gangbo last for?

The maximum period is 2 years. The court can order review hearings to consider whether the injunction should be varied or be discharged (as to which sees.42 PCA). If the injunction is more than one year in duration the court must hold a review hearing within the last 4 weeks of the 1 year period: s. 36 (1) –(5) PCA.

53. Is it possible to make an application without notice for a Gangbo?

Yes, in which case the consultation requirements do not apply unless the court adjourns the proceedings. If that happens the consultation must be done before the full hearing: S.39 PCA. Without notice injunctions should not be routine and will only be appropriate if urgent relief is necessary; if there is a risk the Respondent may flee if given notice or if giving notice will put witnesses at risk: Guidance , Para 7.1

Note that the court can also grant interim injunctions: Ss.40 and 41 PCA.

54. Can the court attach a power of arrest?

Yes the power of arrest can be attached to any prohibition in the injunction or any requirement in the injunction other than one that has the effect of requiring the Respondent to participate in particular activities. The power of arrest can last for a shorter period than the injunction itself: s. 36 (6) and (7) PCA.

55. What are the arrest/remand powers?

These include the power to:

- a) Arrest without a warrant and present to court within 24 hours where a power of arrest has been attached: s.43 PCA. Including remand powers if the matter is not dealt with.

- b) Issue a warrant of arrest providing the judge has reasonable grounds for believing that the Respondent is in breach of any provision in the injunction: s. 44 PCA. Including remand powers if the matter is not dealt with.

- c) Power to remand for medical examination and reports: s.45 PCA

Note that further provisions on remands are made within Sch 5 of the PCA.

56. What happens in a Gangbo is breached?

This is dealt with as a civil contempt of court- punishable by up to 2 years in prison and/or an unlimited fine: Contempt of Court Act 1981,s.14 (4A).

A breach will not cause the Respondent to receive a criminal record but note that a Gangbo will be recorded on the Police National Computer and an enhanced Criminal Records Bureau check could disclose the Gangbo if the local police force considered it relevant to the job being applied for: Guidance ,para 10.2.

57. What has been the response to the legislation?

Against

In their briefing on gang injunctions Liberty stated that experience with such injunctions in America suggest they have not been effective and worse still they are

counter-productive and have led to discrimination and stigmatisation of many innocent, minority ethnic young people. Research undertaken of young people living in gang areas revealed that young people are subject to labels, attracting police attention as a result of keeping the wrong company rather than involvement in criminal activity.

For

Southwark council were the first council to obtain a Gangbo preventing the Respondent from entering a large area of Peckham; mixing with more than two other people anywhere in Southwark; associating with other known gang members in the Borough and producing offensive videos. The Respondent was also ordered to attend meetings with a gang mentor.

The Respondent was 18 and was alleged to have encouraged gang related violence through music videos posted on You Tube

PROPOSED REFORM OF ASB REMEDIES

58. The Home Office Consultation document: *More effective Responses to Anti-Social Behaviour* is available at <http://www.homeoffice.gov.uk/publications/consultations/cons-2010-antisocial-behaviour/asb-consultation-document?view=Binary>. Consultation has recently closed. The government want to reform ASB remedies by *radically simplifying and improving the toolkit*. Proposed changes include:

- a) Repeal of ASBOs and replacement with Criminal Behaviour Orders (attached to criminal conviction) and Crime Prevention Injunctions.
- b) Replacement of all closure orders with one Community Protection Order for dealing with place-specific anti-social behaviour from litter or noisy neighbours to crack house closures.

- c) Introduction of a community trigger – that introduces a new collective duty on members of a Community Safety Partnership- including the police and local authority- to deal with persistent ASB.

59. Associated with these proposed reforms is the worrying announcement by the Housing Minister Grant Shapps that he had plans to introduce a new mandatory ground for possession where an individual is found guilty of housing related ASB – such as a breach of a Crime Prevention Injunction i.e. *one strike and your out!*

Jim Shepherd

Doughty Street Chambers

j.shepherd@doughtystreet.co.uk

May 2011

Defending anti-social behaviour possession claims

Strategies - a practical guide

Dominic Preston - Doughty Street Chambers

1. Introduction

1.1 Anti-social behaviour possession claims come in all guises: HA 1988 section 21, non-secure temporary accommodation (HA 1996, s. 188, 193, 204), introductory, demoted or 'starter' tenancies, secure tenancies or assured tenancies invoking breach of discretionary grounds (Sched 2 HA 85 or 88) or in breach of tenancy terms.

1.2 Whatever legal defence might be available - reasonableness, judicial review or Article 8 - **no** defence will succeed unless the court believes that no further nuisance will occur if the Defendant is allowed to remain in the premises.

1.3 This paper addresses how to conduct a case so as to bring about that result in the judge's mind. To that end follow some basic rules:

1. know 'the drill' - main points are:
 - (1) It's not the past but the future that matters; and
 - (2) only the client can win the case;
2. Tell the client the 'the drill' - again and again and again
3. Develop *with the client* a fully fledged strategy **at the beginning of the case.**

2. **Discretionary cases - a (de minimus) review of the case law:**

2.1 In discretionary cases (HA 1988, sch. 2, grounds 12 and 14; HA 1985, sch. 2 grounds 1 and 2) the court must answer the following questions:

- (1) did the conduct complained of occur;
- (2) did the conduct found to have occurred breach the terms of the tenancy or is it the subject-matter of a nuisance ground in schedule 2 (85 or 88 Act);
- (3) if so, is it reasonable in the circumstances to make a possession order (HA 1988, s. 7(1));

(4) If so, is it reasonable for the court to postpone the operation of the possession order on terms, for instance as to compliance with the terms of the tenancy agreement.

2.2 *Reasonableness - relevant factors include (S. 9A of the HA 99; s. 85A of the HA 85; case law):*

- the effect that the nuisance or annoyance has had on persons other than the Defendant;
- any continuing effect the nuisance or annoyance is likely to have on such persons having regard to the potential outcomes of the case;
- the effect that the nuisance or annoyance would be likely to have if the conduct is repeated.
- The difficulty of getting witnesses (*Canterbury CC v Lowe* (2001) 33 HLR 53).

2.3 *Guiding principle:* Where postponement is being considered, a court should **only** postpone *if there is a realistic likelihood of the tenant ceasing any nuisance or annoyance: Manchester CC v Higgins* [2006] HLR 14.

2.4. *Judging likelihood of repetition.* Whether cessation is likely is to be judged by (see *Higgins*):

- the tenant's attitude to the alleged conduct;
- the degree to which the tenant accepts or denies responsibility;
- the degree to which any remorse is shown;
- the genuineness of that remorse;
- and whether warnings have gone unheeded.

2.5 *Don't forget human nature.* A judge who does not believe you about the past, won't believe your promises about the future. If your defence is 'my client didn't do it', it is highly unlikely that you will be able to run a successful reasonableness defence.

2.6 *The really bad cases.* Some conduct may be so bad that suspension is inappropriate in any event, particularly having regard to the courage it takes to give evidence against a perpetrator, the effort and resources required to bring a claim and the need to bring the conduct complained of to an end: *Canterbury CC v Lowe* (2001) 33 HLR 53.

3. The elements of any strategy

3.1 The factors that dictate any strategy are:

- time available
- client's attitude: acceptance, denial, remorse, rationality
- the extent of the complaints
- gaps in any complaints and explanations for those gaps - can you take advantage of the gaps, can you engineer any more.
- client's motivation, needs and concerns.
- children and third parties involved in the complaints
- vulnerability
- landlord's attitude to vulnerability - heinous or holy?

3.2 Common dilemmas in developing a strategy:

- denial v. admittance
- remorse v. retaliation
- client's fault or 3rd party's fault (children/partner/visitors)
- lifestyle fixed v. lifestyle can change
- time to allow change v. time to dig deeper
- vulnerable or not.

3.3 Common threads to any strategy - all based on getting time

- build in time. Defence, directions, trial.
- Make the client understand the parameters of the law - unless they understand the hole they are in they won't take steps to stop digging.
- Make any 3rd parties understand the parameters of the law - it might not be the client who needs to understand what is required of them
- 'Get of rid of the spare' - not necessarily Voldemort style - if that's the only way to save the client.
- Admit as much as you can - if you have a finding against you, you need something on which to hang your remorse. Admissions, even partial, might give you enough.
- Get the client/visitor etc to stop. Abstinence makes the heart grow fonder.

4. **The first conference**

4.1 *An entrenched client?* Referral might be because of a criminal case, a closure order or from an advice agency, an alcohol or drugs charity. Highly likely to be a long history. Client will have become entrenched in the most common attitude: It's not me, it's everyone else. The key to success (like any addiction!) is acknowledgement. From the start of your engagement with the client you must work towards getting the client to engage with what is said in a self-critical manner. Move from blaming others to seeing what they can do save themselves.

4.2 *At the first conference.* Claimants and courts like a 'quick result'. Time is not on your side. You therefore need a strategy that will work and can be pursued right from the start. The key is convincing the client of the need to stick to whatever strategy you decide on at the first conference. Tips:

- Try and get as much advance disclosure from the other side as you can. The client's side of the story can't be challenged without it. Without challenging the client, you are a hostage to fortune;

- Tell the client the drill at the beginning.
 - Its not the past that counts, it's the future. Explain the law and how it works. i.e. a finding of breach does *not* automatically mean eviction. Only if the judge thinks it won't stop is eviction the likely outcome
 - Cases that win are those in which you don't have to call everyone a liar. A judge needs to feel you can understand and relate to others.
 - Cases that win are those in which you get empathy, understanding and trust from the court.
 - Court process is not about what happened but about what the judge thinks might have happened. We don't deal in truth but in risk assessment/likelihood. Hard for a client to understand this but essential to change their attitude.
 - As the judge wasn't there, there is at least a high risk that the judge will find against your client. Most landlord come heavily prepared and numbers matter - 6 witnesses v. 2 is a bad score. It's not truth that counts but the likely findings of the judge.
 - A judge who finds against your client, won't trust their promises about the future. Why give the judge the opportunity to find against you if the better option is to admit where you can and get the judge to trust you about the future. Partial admissions is better than none.
 - When giving answers to questions there's never just one side. The client needs to understand that judges are sophisticated about what they see. If they understand a motive for past behaviour and believe that motive has gone, they will believe that abstinence is possible.
 - Explain that you are not interested in the rights and wrongs of what is happening on the estate, and **only** in keeping their home for them. If they want something else, they're in the wrong place.

- When taking the client through the evidence, see if there are themes (a particular gripe with a neighbour, the son but not the daughter etc, tensions between members of the family). Take the client to the themes first and not the specifics - easier to scratch at the truth. Themes *might* give you insight into how to end a particular problem.

- When taking them through specific allegations - encourage openness.

- Come to a clear strategy. Make the client face difficult choices. The client *must* understand from the beginning that only they can prevent eviction and only by signing up to the strategy on offer:
 - Having your day in court v. keeping your home
 - Attacking witnesses v. gaining judge's sympathy
 - Changing behaviour patterns to reduce friction (e.g. stopping night time visitors) v. losing the home.
- Make keeping the home the client's number one priority. Only the client can turn it around. To do so, they need to change their mindset about their priorities.

4.3. Identify vulnerabilities at the beginning.

4.3.1 Vulnerabilities might include mental health, physical health, children with difficulties, alcohol, drugs. If they are causative of the nuisance, they might be causative of it as well. Impacts in the following ways:

- Potential sympathy
- Potential support from external sources.
- Potential control and change over the causative element the disturbance (e.g. drug/alcohol rehab)
- Potential Equality Act issues - proportionality. A layer of additional defence but in no way absolute.

4.3.2 Strategies that might arise out of vulnerability:

- Does the landlord have any policies that require it to assist the vulnerable (e.g. *Barber v Croydon London Borough Council* [2010] HLR 431). Have they complied with those policies;
- Has the landlord adopted a last resort approach - were referrals to other agencies made, injunctions or ABCs considered, mediation explored;
- Is this a case in which alternative accommodation is the only real option - e.g. mental health issues where the Defendant is as much a victim as the neighbours. I.e. a judge is likely to order no possession in the absence of a managed transfer or pathway to alternative accommodation.
- Agencies like to help and don't want to be landed with the problem on eviction. Ask them for a reports/assistance/witness evidence on clients progress rehab etc.
- For children, consider youth workers, referrals to social services, care plans, mentors, college courses/apprenticeships, youth clubs. Anything that looks like they might become a responsible member of society and 'grow out of their current phase'.

4.4 *Conference with third parties.* If the behaviour that needs to change is someone else's, you need to get to them so that they understand the above. If it's their home that is being threatened, you have a good chance, but only if they understand the stakes.

4.4.1 Consider having the conference at the client's property to understand the geography, to see the family tensions first hand, to see where the complainants live. What you see may impact on the strategy you adopt.

4.5 *Legal aid* - Unless this is a case in which there is a likelihood of success by full denial (rare), if there is no acknowledgment, likely remorse etc and the case is a bad one such that there is no real strategy to play for, consider carefully whether there is any point in funding the case in the light of the funding code.

5. **The defence.**

5.1 If the detail of the allegations are lengthy, consider using a scott schedule with six columns:

1. item no.;
2. allegation;
3. page nos for evidence in support allegation;
4. defence;
5. page number for evidence in support of defence;
6. notes.

5.1.1 At this stage only columns 1, 2 and 4 will be completed but having a scott schedule in word format at an early stage may save time later and might assist the court at an early stage.

5.2 Make sure you take the client through the defence carefully. Avoid being a hostage to fortune or forging ahead with a strategy to which the client is not signed up. Credibility at trial is crucial - don't open yourself up to an own goal.

6. **The directions**

6.1. Claimant's like short, sharp directions leading to a single day trial within three months. This is generally completely unrealistic. Tips on directions:

- You need time for your client to change the facts on the ground (i.e. to stop any complaints). Don't be afraid to build time into any directions and don't be bullied. Better you try for time and don't get it than not even try.
- You may need both lay and professional witnesses - be realistic about how long it will take you to get them. Short timescales may positively destroy your client's case if you feel that there isn't enough time to get the 8 witnesses he says can help.
- You may need expert reports (e.g. on mental health). Expert's will need time to get the reports back to you.
- You will need time for questions to the expert - see CPR.
- Can you really give a proper time estimate for trial on the first return date - unlikely. Ask for allocation questionnaires, listing questionnaires to be included).
- Don't agree to directions that don't fit with the case that your client needs to run.
- Ask for disclosure from the Claimant in advance of the Defence. They will have the documents and getting sight of them will ensure you get to the nub of the issues early on.
- Don't have an unrealistic time-estimate. At the very least don't *agree* an unrealistic time estimate - let the judge order it so that when the hearing date has to be vacated you don't come up against a refusal on the ground that you were remiss on the first time estimate you gave.

Dominic Preston

15th May 2011