



ANTI-SOCIAL BEHAVIOUR: **From the basics, to discontinuance and committal**

ANTI-SOCIAL BEHAVIOUR INJUNCTIONS: The basics, discontinuance and committal

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The Basics: Practical Tips for Defending ASBIs

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The Test - Injunctions

Section 1 Antisocial Behaviour, Crime and Policing Act 2014:

- (1) A court may grant an injunction under this section against a person aged 10 or over (“the respondent”) if two conditions are met.*
- (2) The first condition is that the court is satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour.*
- (3) The second condition is that the court considers it just and convenient to grant the injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.*

Legal Aid

ASBIs:

- Injunction applications under section 1 of the Anti-Social Behaviour, Crime and Policing Act 2014 are within scope and will fall in the housing category if related to housing (Para 36, Part 1, Sched 1 of LASPO 2012).
- When applying for Legal Aid, relevant scope limitation is normally “ASBO”.

Breach/Committal:

- Proceedings relating to breach of ASBI/committal fall under criminal legal aid.
- Can either refer client to criminal practitioner, or apply by email/through CCMS for Individual Case Contract (ICC) and a Criminal Representation Order to cover breach proceedings where there are already possession proceedings.

Without Notice Applications

The usual rules apply to ASBIs: *Southern Housing Group v Berry & Berry* (Clerkenwell & Shoreditch CC, Feb 2021) and *Birmingham City Council v Afsar and others* [2019] EWHC 1560 (QB).

- Full and frank disclosure (*Tugushev v Orlov* [2019] EWHC 2031, §7):
 - Full disclosure of all material facts (including vulnerability/disability of D, counter-allegations)
 - Draw attention to adverse evidence and arguments
 - Duty to make reasonable inquiry
- Duty to make a note of the without notice hearing and serve it on the D (*Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd* (The Times, 10 November 1999), in White Book at 25.3.10).
- If an interim order is made, it should be the minimum required to prevent harm (*Murray v Chief Constable of Lancashire* [2015] EWCA Civ 1174).
- Question whether hearing needed to be without notice at all – reasons should be included in the C’s evidence.

If rules aren’t followed, apply to discharge and get your costs.

Directions

- Applications for ASBIs are made under Part 8, but not all of the Part 8 rules apply (*CPR 65.43(6)*).
- No need for D to file acknowledgement of service, or to file/serve evidence in response alongside acknowledgment of service.
- If matter proceeds under Part 8, D can only put in evidence in reply – so no opportunity to put in formal defence.
- Consider whether Part 7 more appropriate, particularly where you have a legal defence that should be formally pleaded (e.g. disability discrimination) or where there are ongoing possession proceedings.
- If proceeding under Part 8, ask for standard disclosure, Scott Schedule, and opportunity to put in evidence in response. While housing file is useful, standard disclosure should get you full record of allegations against complainants etc.

Interim Orders

- Court has power to grant interim injunctions if it considers it just to do so (*s. 7 ASBCPA 2014*).
- The more stringent the terms sought, the more likely the balance of convenience will lie with the D.
- If allegations are serious, consider offering an undertaking or a pared down interim order (e.g. no powers of arrest, no exclusion, tighter terms).
- Make clear on face of the order from interim hearing that no findings of fact have been made.

Powers of Arrest and Exclusion

Neither should be treated as routine – only available when there is use/threatened use of violence or significant risk of harm (*s. 4 and s.13 ASBCPA 2014*).

Powers of Arrest:

- Appropriate where there is persistent breach of court orders (*Lewis v Lewis* [1978] Fam. 60 per Ormrod LJ).
- Especially inappropriate where events justifying its inclusion are from a long time ago (*Horner v Horner* [1982] Fam. 90 per Ormrod LJ).

Exclusion:

- The Revised Guidance for the ASBCPA 2014 states that it is not expected that the power of exclusion will be used often, that applications for exclusion from the home should only be made in extreme cases, and that the court should “*pay special attention to issues of proportionality*” (p. 32).
- Social Landlords should at least attempt to find alternative accommodation, especially when sought on interim basis.

Evidence

Hearsay is normally admissible, but court should pay attention to factors in section 4 Civil Evidence Act 1995 before applying any weight (or face an appeal! See: Moat Housing Group-South Ltd v Harris and another [2006] Q.B. 606).

Look out for:

- Anonymous hearsay (again admissible, but court should be cautious: Welsh v Stokes [2007] EWCA Civ 796).
- Multiple hearsay.
- Lack of explanation of where hearsay came from, how it was recorded, who recorded it.
- Whether the source had any reason to mislead, and whether there is any good reason why the evidence could not have been given directly.
- Poorly particularised allegations – they need to allege *something happened*, not just that Defendant is generally a nuisance.

Settlement

- Where you can, make admissions.
- If capacity not an issue, consider open offer of undertaking.
- Where allegations are too serious for undertaking to be realistically accepted, consider open offer of injunction with less adverse terms (e.g. no exclusion/powers of arrest).
- Try to include recitals about steps landlord will take before seeking to restore proceedings/apply for breach in cases.
- If other side does not agree to recital and client is disabled, make written request for reasonable adjustments.

Practical Tips

- Get the policies!
- Ask for disclosure of any complaints made against the complainants – whether by your client, or by other neighbours.
- Consider the layout of client's building – are there neighbours close by who have never complained?
- If noise alleged, tell client to lay down rugs.
- If building has poor sound insulation, consider instructing sound insulation engineer.

QUESTIONS?

Resisting anti-social behaviour injunctions: from the basics to discontinuance and committal

Capacity and the Equality Act 2010

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Capacity - Generally

- Mental Capacity Act 2005
 - Presumption of capacity unless established otherwise.
 - Not to be treated as unable to make decisions unless all practicable steps taken to help him without success.
 - Not to be treated as unable to make decision merely because makes unwise decision.

Capacity - Generally

- Section 2(1) MCA 2005:

*For the purposes of this Act, a person lacks capacity **in relation to a matter if at the material time** he is unable to make a decision for himself **in relation to the matter** because of an impairment of, or a disturbance in the functioning of the mind or brain.*

- Capacity is issue-specific and time specific.

Capacity - Generally

- Section 3 MCA 2005:

For the purposes of section 2, a person is unable to make a decision for himself if he is unable –

- (a) to **understand** the information relevant to the decision,*
- (b) to **retain** that information,*
- (c) to **use or weigh** that information as part of the process of making the decision, or*
- (d) to **communicate** his decision (whether by talking, using sign language or other means).*

Capacity - Generally

- In summary:
 - *the diagnostic test* – is there an impairment or disturbance of the functioning of the mind or brain?
 - *the functional test* – is the person unable to understand, retain or use/weigh relevant information, or to communicate their decision?
 - *the causal nexus* – is the inability because of the identified impairment or disturbance?

Capacity to litigate

- The test is capacity to conduct the case generally, not simply to conduct the case on one particular basis: *Dunhill v Burgin* [2014] UKSC 18.
- Consider client's ability to understand chances of success, to give proper instructions, and to approve compromise, which would require "*insight into the compromise, an ability to instruct his solicitors to advise on it, and an understanding of their advice and an ability to weigh their advice*": *Bailey v Warren* [2006] EWCA Civ 51

Capacity to litigate

- *Lindsay v Wood* [2006] EWHC 29895 (QB) para 20.

“A person may understand the relevant information, be able to retain it, and intellectually be able to acknowledge its significance, but be unable to give it any proper weight, because of an overwhelming phobia, obsessive thoughts, compulsive behaviour or abnormally impulsive behaviour attributable to an impairment or disturbance of the mind”

Capacity to comply with an injunction

- *Wookey v Wookey* [1991] 3 All ER:
 - The court should not make an injunction that cannot be enforced.
 - If D incapable of understanding what he was doing, or that it was wrong, then should not grant injunction.
- Key questions:
 - Can D understand terms of injunction?
 - Can D understand what he is doing when he breaches the injunction, i.e. the nature of his acts?
 - Can D understand it would be wrong to breach the injunction?

Capacity to comply with an injunction

- *Pender v DPP* [2013] EWHC 2598 (Admin)
 - Even if a D is capable of understanding the nature and requirements of the injunction, if they are unable comply with the terms of the injunction, no injunction should be made.
- *CF Wooley*
 - The court will not normally refuse an injunction because of the D's likely disobedience.
- Key question:
 - Can the D comply with the terms of the injunction?

Capacity – Homelessness Application

- *WB v W District Council* [2018] EWCA Civ 928
 - The test as to whether a person has capacity to make a homeless application is whether they have capacity to:
 - (a) Make decisions about where they should live; and
 - (b) Capacity to enter a tenancy agreement, which means they must be able to understand and comply with the terms of a tenancy agreement

Letter of Instruction for Expert

- Must contain sufficient summary of factual background and legal proceedings.
- Set out the law.
- Clearly differentiate between questions as to capacity to litigate and capacity to comply with injunction.
- Make sure you address necessary causal connection: link between impairment / disturbance and inability.

Consequences of lack of capacity

- Lack of capacity to litigate -> will need litigation friend.
- Lack of capacity to comply with injunction -> no injunction should be made by Court.
 - Invite Defendant to discontinue in light of expert evidence.
 - Seek costs on discontinuation.
 - Start preparing for potential possession claim.

Equality Act 2010 – Defence to ASBI

- Section 15(1) EA 2010

A person (A) discriminates against a disabled person (B) if –

- (a) A treats B unfavourably because of **something arising in consequence of B's disability**, and*
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

- Disability defined in section 6 EA 2010.

“something arising on consequence of B’s disability”

- causal link between the “something” and the disability: *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* (2016) UKEAT/397/14
- “the causal link... may include more than one link” - the disability causes something, which causes something else, which causes the unfavourable treatment: *Pnaiser v NHS England* (2015) UKEAT/0137/15
- disability need only be an “effective cause” amongst a number of causes: *Risby v Waltham Forest LBC* (2016) UKEAR/318/15

Letter of Instruction for Expert

- Does D have a disability within the meaning of section 6 EA 2010?
- If yes, to what extent is the ASB complained of a thing “*arising in consequence of D’s disabilities*”?
- Address impact on D of injunction / exclusion.
- Address possible support / treatment which might assist D to maintain tenancy.
- Possibly address suitability of current accommodation.
- Possibly address capacity to make a homelessness application.

Questions

Resisting anti-social behaviour injunctions: from the basics to discontinuance and committal

Committal Proceedings

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Overview

- What are committal proceedings?
- What happens after arrest for an alleged breach?
- Legal Aid
- Committal hearing
- Sentencing
- Costs

What are committal proceedings?

- Contempt of court
- Power of arrest: s.9 Anti-social Behaviour Crime and Policing Act 2014
- Warrant for arrest: s.10 Anti-social Behaviour Crime and Policing Act 2014 (r.23 CPR 1998 and r.65.46 CPR 1998)
- Rule 81.4 – requirements of an application for contempt
- In public and robed (r.81.8(1) and r.81.8(2))

Legal Aid

- Criminal legal aid as they are “criminal proceedings” (s.14(g) Pt 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012)
- An application for a criminal representation order will be necessary (CRM14)
- County Court not empowered to grant legal aid (as High Court is under s.16 LASPO 2012)
- Can either refer client to criminal practitioner, or apply by email/through CCMS for Individual Case Contract (ICC) and a Criminal Representation Order to cover breach proceedings where there are already possession proceedings.
- ICC criteria: (i) Interests of Justice; (ii) Substantial involvement in original proceedings; (iii) continuing to act represents value for money.

What happens after arrest?

- s.9(3) ASBCPA 2014 – 24 hours
- r.65.47(2) CPR 1998 – deal with breach or adjourn – no more than 28 days
- Remanded on bail or in custody? Bail Act 1976
- May remand for medical reports (Paras 5 and 6, Sch. 1 ASBCPA 2014)
- Must not remand for more than 8 clear days (para 4, Sch. 1 ASBCPA 2014)
- Requirements may be imposed on bail (para 9, Sch. 1 ASBCPA 2014)

Return date/Committal hearing

- Before a circuit judge
- In order to prove a breach it must be shown that:
 - D was aware of the terms of the injunction
 - That D acted (or failed to act) in a manner which breached the order
 - And that D knew of the facts that made the conduct a breach(Christopher Clarke J in *Masri v Consolidated Contractors International Co SARL* [2011] EWHC 1024 (Comm)).

Return date/Committal hearing

- Warrants can be made to secure attendance (r.81.7(2) – but does not affect the right to silence (r.81.7(3))
- A trial can take place in absence of the Defendant (r.39.3)
- This is an exceptional course (*Lamb v Lamb* [1984] FLR 278)

Sentencing

- The court may impose the following sentences (s.14 Contempt of Court Act 1981 and r.81.9(1)):
 - Unlimited fine;
 - Maximum two year custodial sentence (may be suspended r.81.9(2));
or
 - No order.
- No community order or rehabilitation orders
- Adjournment?

Sentencing

- Regard will be had to relevant sentencing guidelines:
 - Breach Offences: Definitive Guideline (operative from 1 October 2018)
 - Imposition of Community and Custodial sentences: Definitive Guideline
 - Reduction in Sentence for a Guilty Plea: Definitive Guideline
 - Offences Taken Into Consideration and Totality: Definitive Guideline
- A finding of breach may give rise to a mandatory ground for possession (Part 5, ASBCPA 2014)

Costs

- Entitled to costs if successful as usual
- No costs protection under s.26 LASPO 2012

What now?

- Appeal?
- Purging contempt (r.81.10 following r.23)
- Variation/discharge of injunction