

Anti-social behaviour Seminar

21 May 2014

Issues to consider when defending Anti-Social Behaviour cases.

Introduction

The focus of this presentation is on the practical approach to running Anti-social Behaviour possession cases, and helpful strategies to adopt for junior housing lawyers.

The Claimant

- A recent trend by Local Authorities and Housing Associations appears to be to issue injunction proceedings (seeking a power of arrest in circumstances of breach) against the Defendant and to then immediately issue possession proceedings if this occurs consider the following;
 - Is it reasonable to have issued possession proceedings in the first place or would it have been appropriate to wait to see if the injunction could have worked to stop the nuisance/ ASB complained of?
 - Consider early Part 36 offers (see below). If it is possible to reach an agreement to avoid possession proceedings, warn the Defendant of the consequences of failing to improve their behaviour. The risk of eviction is likely to increase if the Claimant returns the matter to Court and can demonstrate that it has given the Defendant a chance to improve their behaviour, but that the Defendant has failed to do so and is therefore unlikely to comply with any other Court Order.
- The Claimant will often seek to rely on hearsay evidence (Civil Evidence Act 1995 see s.1 and s.4) but note the obligation to serve a hearsay notice (CEA s2, CPR 33.2), and reason for non-attendance of witnesses (CPR 33.2).
 - If it is considered that a witness is unlikely to attend trial, you can apply to the court for a witness summons to secure their attendance. However, doing so may make the witness hostile. If it becomes necessary to summons a witness, remember to serve the summons in good time.
- Often the Claimant will serve a bundle with its pleaded case, containing evidence and statements, which can often include redacted documents, unsigned documents, diary sheets etc. It is important to consider these carefully and to identify any technical problems with the Claimant's case; Eg, do these documents demonstrate that the Claimant complied with its own

policies? Are they relying on CCTV evidence? If so, what do you want to do about it? (see below)

- The Claimant will focus on the impact that the Anti-Social Behavior has had / is having on others. E.g. the effect on neighbours, see section 85A of the Housing Act 1985 and s9A Housing Act 1988.

Defending a case

It can often be overwhelming receiving bundles of documents relying on serious allegations and knowing where to start! Great thought will need to be considered in view of the recent changes.

In respect of a secure, assured or protected/statutory tenancy, the Claimant must prove that one of the grounds for possession is made out. Generally, grounds which rely on the tenant being at fault are discretionary grounds although as Tessa has pointed out in Part 1 of the seminar there will now be many cases where landlords have the power to seek possession on mandatory grounds. However, assuming landlords are pursuing possession under discretionary grounds the Court must be satisfied that the ground is made out and that it is REASONABLE and PROPORTIONATE to make a possession order. Proportionality Defences are likely to take on greater significance in relation to defending ASB possession claims brought under mandatory grounds.

Front loading

1. Front loading, consider the following;

- Has the Claimant complied with its procedural requirements in issuing the Claim?
- Consider whether you have enough time to put forward a fully pleaded Defence, if so, do it before the first hearing, although you may find this if often not possible.
- Try and agree Directions before the first hearing. Is it possible to argue a Part 20 counterclaim under the Protection from Harassment Act if there are counter allegations?
- Think carefully as to the timetable and what Directions are likely to be necessary (see below).

Disclosure documents

2. Obtain documentation from the Claimant at an early stage including;

- The tenancy agreement,
- Full housing files, etc.
- Policies and procedures are very important documents to obtain when considering

whether the Claimant has complied.

- Negotiate with the Claimant - it is in everyone's best interest for the Defendant to put in a fully particularised Defence from the outset. Can a Schedule of Incidents be agreed? It's helpful to both parties if the issues can be narrowed down early on, to save time and / or costs.

Directions

3. The timetable- issues to consider;

- What track is appropriate? Be realistic, consider the amount of evidence likely to be tested, the number of witnesses to attend, the time it will take to examine expert evidence if relevant.
- What Directions do you consider necessary? If you intend to rely on expert opinion, state the area of expertise that is required and the issue that needs to be addressed. See attached draft directions you may wish to consider when dealing with experts at **Appendix 1**.

The Defendant

4. Find out background information about the Defendant:

- Obtain evidence from the Defendant to find out the impact of losing their home.
- Consider who else lives at the property including the impact on non-tenants, children, partners and the effect eviction would have on their lives.
- Consider obtaining urgent medical evidence (GP records, reports). Are there any agencies involved in supporting the Defendant, or should there be? Do you need to signpost the Defendant to obtain support from local agencies? Consider what information could be available from schools, social services, the probation service. Also consider whether the Defendant engages with these services. If not, what are the barriers to engagement? Time keeping, cost of travel to appointments - how can these barriers be overcome to improve engagement.
- What does the Defendant have to say about the allegation(s)?
 - Do the instructions make sense? (see Capacity below)
 - Is there anything the Defendant can do to immediately improve the situation i.e. STOP the behaviour complained of. The Defendant will need to demonstrate that they are taking the allegations seriously and are capable of improving behaviour. For example, if complaint is regarding loud music, speak to the Defendant and try and get them to use alternative methods

like headphones, or listening to music between certain hours of the day, the idea being that you consider practical solutions to stop the nuisance complained of.

Capacity

5. Are there any capacity issues?

➤ Your experience/training will help you to try and identify a Defendant who make lack capacity - look out for signs such as;

- Is there any known history of mental health impairment?
- Are there substance misuse issues?
- Are there any self harm issues?
- What, if any, medication is the Defendant taking? Are there any side effects to it? Or has the Defendant decided to end a course of prescribed medication? If so, can they be encouraged to return to their GP to discuss the reasons for doing so and if an alternative can be prescribed?
- Sometimes it can be quite obvious i.e. the Defendant does not appear to follow what you are saying at all, changes the subject to talk about something else or does not appear to understand the seriousness of the situation.
- Has the Defendant previously been detained and/or sectioned?
- Are they previously known to the Community Mental Health Team (CMHT)?
- What is the behaviour complained of? Are the circumstances unusual?
- Has the Defendant's behaviour changed? Have they become erratic, has the number of allegations increased rapidly, what is happening in the Defendant's life at the present time, have they become more forgetful?
- Has the Defendant previously transferred due to behaviour or problems at previous tenancy?

Get to know the Defendant at an early stage – preparing the Proof of Evidence early on in the case will help you understand the Defendant better and what they are likely to say at trial.

CPR 21- this is outside the scope of this presentation but you will need to be familiar with it if issues of capacity arise.

6. In relation to capacity, there is a Presumption of Capacity. The party alleging incapacity has the burden of rebutting the presumption. You will probably need a medical opinion to support a lack of capacity argument, although lay evidence is admissible. (See CPR 21 in relation to capacity, appointing a litigation friend and steps required by the parties if a settlement has been reached and disposing of proceedings)

- Who can act as Litigation friend - family, friends, neighbours, support worker, advocates **IF** there is no one else, the Official Solicitor can be asked to act as Litigation Friend. You will need to contact the office of the Official Solicitor and provide as much information as you can in support of the referral, including any medical evidence to support that the Defendant lacks capacity.
- If a Litigation Friend is instructed, the pleadings/applications, notices will always need to state this i.e 'XX, by his Litigation Friend the Official Solicitor'.
- Funding implications - inform LAA if a Litigation Friend is appointed.
- If Official Solicitor is instructed remember that your instructions will come from the Official Solicitor and you will cease to take instructions from the client. In practice it means that you ask the Defendant their version of events and keep detailed attendance notes. If the matter proceeds to trial and say for example the Official Solicitor is instructed, it will usually be the solicitor who is required to serve a witness statement confirming what you were 'informed' by the Defendant.

Other agencies

7. Is it possible to involve other agencies in the proceedings?

- Are there sufficient concerns to require a Social Services Assessment?
- In some cases, delays can be invaluable to give the Defendant time to get the support s/he may require and more chance of stopping the nuisance.

Equality Act 2010

8. Is it possible to plead Equality Act 2010 in the Defence? Only do so if you genuinely consider that there is an impairment.

Buy time

9. Ensure you have sufficient time to prepare the Defence case. Don't allow the Claimant to push

you into a tight timescale, which they will try to do. You need to make sure that that you have enough time to prepare the Defendant's case and obtain evidence in support of the Defence and/or provide an explanation for the Defendant's behaviour.

- Build-up a period of good behaviour if at all possible if by the time of the trial, you are able to demonstrate that the situation has improved, allegations are less frequent or showing signs of either improvement or possibility of improvement, then you are more likely to be able to persuade a Judge to give the Defendant a further opportunity and reduce the chance of eviction.

Criminal proceedings

10. Find out as soon as possible whether there criminal proceedings underway. If so, find out who is representing the Defendant, what stage those proceedings are at and communicate with the criminal lawyer – ideally before serving a Defence. Why? Because you need to find out whether any admissions have already been made by the Defendant? Do not forget the burden of proof tests;

- Criminal - beyond reasonable doubt
- Civil - balance of probabilities

If the allegation is proven in a Criminal Court, you are unlikely to succeed in denying the same allegation in the County Court, as the Judge is likely to accept the outcome of criminal findings, if proven.

Expert evidence

11. Consider whether it is necessary to obtain technical evidence, for example, a sound expert? If it supports the Defence and is likely to strengthen the Defendant's case, eg, if the Claimant is alleging a noise nuisance and intends to rely on sound recordings which have been carried out, then examine the evidence. On the face of it it may seem reliable, but investigate it further.

- Request disclosure of it, including readings.
- Is it reliable evidence? Who carried out the tests/readings, what is their experience in the field, do they have the requisite expertise, what instrument/equipment was used, over what period of time was the evidence obtained, were reading obtained from the appropriate locations? Is independent evidence needed to verify the findings?

Who can give evidence for the Defendant

12. Who can give evidence for the Defendant? Are there any neighbours to support the Defence, or any other person willing to give evidence?

13. Obtain information concerning the complaint – read the bundle of evidence early so you know the case against the Defendant. If the written evidence seeks to rely on CCTV evidence, then consider the following;

- Take the Defendant's instructions. What does the Defendant say you will see on the footage/hear on audio? Does the Defendant have an explanation? If so, write to the other side to make sure the evidence is not destroyed. Find out who is storing it, ask them to preserve it and ask for disclosure of it.
- Alternatively, if the Claimant does not disclose it with the bundle, you may not want to highlight it. This may make things much worse for a Judge to watch in Court. This is why you must obtain the Defendant's instructions on this.

Preparing witness evidence

14. In preparing witness evidence, draw out

- The mitigating factors - set them out clearly. You must be careful not to just make 'blanket denials' as this can weaken the Defence.
- If an allegation is true, admit it, apologise for it and explain how the situation will be improved going forward.
- Always refer back to the pleaded cases, consider 'reasonableness' and proportionality.
- Consider the legal arguments, has the Claimant complied with its own policies? If not, set out what the Claimant has failed to do and what should have been done.
- Consider obtaining statements from the Claimant's employees/tenancy support workers. Often the Claimant will try and control the evidence by its employees, but there is no property in a witness (although think about what evidence they are able to give and whether you really want to call them to give evidence – the worst witness is a hostile witness).
- If you have you pleaded Equality Act 2010 and set out the impact on the client's day to day life if evicted?

Schedule of Incidents

15. If Claimant seeks to rely on numerous allegations, negotiate with the Claimant and see if the parties can agree to narrow the issues by testing an agreed number of allegations. This is often the best way to deal with cases if a large number of allegations have been made. It is helpful for a Judge if the case is organised in this way and can focus attention the main issues.

- When preparing witness statements, it is always best to respond to the allegations in full.

Alternatives to Possession Proceedings

16. What are the alternatives to Possession? Is it possible to put forward any alternatives?

- Mediation or round table meeting – multi- disciplinary meeting.
- Injunction/undertakings – can it remedy the problem? Issues to consider;
 - Does the Defendant have capacity to comply with terms? The risk is that there is a power of arrest attached to an Injunction Order. Also there is a risk the Defendant can be remanded in custody while waiting for assessment to be carried out, if it is considered necessary for a mental health assessment to be carried out s155/156 HA 1996. You should ensure that all assessments are carried out during proceedings, to avoid the Defendant agreeing to an injunction if they are likely to breach the terms or if there is any doubt regarding their capacity to understand proceedings.
- Consider whether the tenancy be managed by the Defendant if for example;
 - Social Services Assessment - s47 (3) NAA 1948/s 213(1) Housing Act 1996. To identify whether services are available to support the tenant to manage the tenancy. There should be a joined up approach between Social Services and the Housing Department.
 - What about referring them to agencies who can continue to help the Defendant to cope long term or with advocacy needs, for example, CMHT, Age UK, Mind, Voice Advocates, i.e. reducing the chance of further nuisance behaviour. Other options for example, tenancy support worker, getting the Defendant involved in day centres, hobbies or local community activities, some Defendants are simply lonely!
- Getting the Defendant a diagnosis and treatment, i.e. detox programme or someone to simply help them understand their tenancy agreement and what is expected of them.
- Alternative suitable accommodation – possibly supported or sheltered.
- Alternative to possession proceedings, Court of Protection – has the power to make decisions on personal welfare and property affairs issues, including deciding where a person should live. It is always the persons' best interest that the COP will consider taking into consideration their wishes and feelings. The idea being that the Court of Protection is a specialist Court designed to deal with vulnerable individuals who lack capacity.

Settlement

17. Consider making a Part 36 offer early. Consider whether this was an isolated incident, first breach, length of tenure, etc. Is it possible to offer an alternative solution instead of the time/cost of dealing with a possession trial? The Claimant has a public law duty, including making reasonable adaptations if Equality Act 2010 bites. Consider if the allegations are likely to be proved against your client. Should you be making an offer of a SPO? Give the Defendant a chance to show the situation is improving. What else can improve the situation? Compliance with recommendations of expert opinion. Possession is meant to be a last resort, consider if this is the case. It's not impossible to get a costs order against the Claimant and it is always worth considering settlement at each stage, as there is a duty to protect the public purse. Also advise the Client of costs consequences. In relation to Part 36 offers look at CPR 36.10 in particular.

Pre-possession- legal help

- It is possible to avoid possession proceedings if representations can be made early, they are often successful if the complaint is an isolated incident - beware! It is unlikely that you will have had sight of the evidence gathered by the Claimant. If you can make an admission and apologise early, the Claimant can sometimes agree to monitor the situation without issuing proceedings.

Undertakings/injunctions

- Take care drafting these, you not want them to be wider than necessary. You need to take into account individual circumstances.

Practical points

Warn the Defendant of the realities of the situation at an early stage, get other agencies involved as soon as possible if they are not already involved (if appropriate);

- Make admissions at the earliest opportunity- showing a willingness to accept responsibility at the earliest opportunity and if possible offer alternative options to a Possession Order.
- Was the Defendant warned? Could they have been warned to improve behaviour before possession proceedings were issued? Clearly if not, then it will place the Defendant in a much stronger position than if efforts to control behaviour have already been attempted by the Claimant and /or other agencies, i.e. the police and the Defendant has failed to improve the situation.
- Has the Claimant complied with its own policy? Could the Defendant have received support sooner which could have avoided the situation? Can this support be obtained now; if so is it possible to adjourn/suspend to monitor the situation?

- Try to avoid outright denials if possible, the Defence will be stronger if you can give an explanation.
- If an outright Order is made against the Defendant and the situation significantly improves between the trial and enforcement of possession order, it might be possible to try and suspend a warrant of eviction. However this is very difficult to do, as you would need to demonstrate a significant change of circumstances.
- Possession proceedings should only be issued as a last resort. Is this claim necessary, proportionate and reasonable?
- An important point to remember is that if you are dealing with a vulnerable person and the reports/assessments are sensitive in nature, you need to make sure when you are serving these that the Claimant treats these confidentially. For example, you may wish to avoid them sharing this information with neighbours who have complained of the ASB behaviour, especially if the Defendant stands a chance of remaining in their home and continue to be a neighbour after proceedings.

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