

Issues to consider in defending anti-social behaviour cases

Manjit Mandair, Osbornes Solicitors LLP

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Introduction

- The purpose of this presentation is to consider practical approaches and strategies in running Anti-social Behaviour possession cases. It is aimed at junior housing lawyers.

The Claimant: Getting started

- Is it reasonable to have issued possession in the first place?
- Hearsay evidence (Civil Evidence Act 1995 see s.1 and s.4) but note obligation to serve 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 witness summons to attend.
- Bundles will often contain redacted documents, unsigned documents, diary sheets etc. Need to consider these carefully and find fault with the evidence.
- The Claimant will focus on the impact the Anti-Social Behaviour has on others. Affect on neighbour's see section 85A of the Housing Act 1985 and s9A Housing Act 1988.

Defending a case: Knowing where to start

- 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, those grounds which rely on the tenant being at fault are 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.

Front Loading

- Has the Claimant complied with its procedural requirements in issuing the Claim.
- Can you file and serve a fully pleaded Defence, if so do it before the first hearing.
- Try and agree Directions before the first hearing. Is it possible to argue a Part 20 counterclaim under Protection from Harassment if counter allegations.

Disclosure Documents

- Tenancy agreement,
- Full housing files etc.
- Policies and procedures

Directions

- What track is appropriate?
 - be realistic
 - consider the amount of evidence likely to be tested
 - number of witnesses to attend
 - 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 what area of expertise are required and the issue that needs to be addressed.

The Defendant: Background Information

- Obtain evidence from the Defendant to assess the impact of losing their home.
- Consider who else lives at the property including the impact on non-tenants
- Consider obtaining urgent medical evidence (GP records, reports etc)
- Are there any agencies involved in supporting the Defendant (or should there be)?
- Does the Defendant engage? if not, identify the barriers?
- What does the Defendant have to say about the allegation(s)?

Capacity Issues

- Is there any known history of mental health impairment? has the Defendant previously been detained, sectioned, or known to Community Mental Health Team?
- Substance misuse issues ?
- Are there any self harm issues?
- What if any medication are they taking or should be taking- are there any side affects?
- Observe behaviour
- What is the behaviour complained of? – are the circumstances unusual?
- Has the Defendant's behaviour changed e.g. become erratic, become forgetful?
- Has the Defendant previously transferred due to behaviour or problems at previous tenancy?
- There is a Presumption of Capacity- the party alleging incapacity has the burden of rebutting the presumption.



Tip: get to know the Defendant at an early stage – prepare POC early on in the case will help you understand the Defendant better and what they are likely to say at trial.

Other agencies

- 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 increase the chance of stopping the nuisance.

Give yourself sufficient time

- Do not allow the Claimant to push for a tight timescale if it does not give you sufficient time to:
 - gather evidence to be obtained
 - To build up a period of good behaviour

Criminal proceedings

- Are criminal proceedings underway?
 - If so find out who is representing the Defendant, what stage those proceedings are at and communicate with criminal lawyer – ideally before serving a Defence.
- Do not forget the burden of proof tests;
 - Criminal- beyond reasonable doubt,
 - Civil balance of probabilities
- If allegation proven in Criminal Court you are unlikely to succeed in deny the same in the County Court Judge as Court likely to accept the outcome of criminal findings, if proven.

Expert Evidence

- Consider whether it is necessary to obtain technical evidence?
- If it supports the Defence it is likely to strengthen the Defendant's case.
 - Request disclosure of it, including readings
 - Is it reliable evidence? i.e. via an expert/ professional
 - What instrument/equipment was used, over what period of time was the evidence obtained, were readings obtained from the appropriate locations? Is independent evidence needed to verify the findings.

Who can give evidence for the Defendant?

- Are there any neighbours to support the Defence? or any other person willing to give evidence?
- If the written evidence seeks to rely on CCTV evidence then consider;
 - 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 make sure the evidence is not destroyed, find out who is storing it, 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. May make things much worse for a Judge to watch in Court.

Preparing witness evidence

- Consider 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 and apologise for it. 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.
- Have you pleaded Equality Act 2010 set out the impact on the client's day to day life if evicted.

Schedule of Incidents

- If a Claimant seeks to rely on numerous allegations negotiate with the Claimant and see if the parties can agree to narrow the issues.

Alternatives to Possession Proceedings (1)

- Conduct mediation or round table meetings or a multi-disciplinary meeting
- Injunction/undertakings – can it remedy the problem and does the Defendant have capacity to comply with terms?
- Can the tenancy be managed by the Defendant with support in place?
 - Social Services Assessment- s47 (3) NAA 1948/s 213(1) Housing Act 1996. To identify whether services are available to support the tenant manage the tenancy. There should be a joined up approach between Social Services and housing Department. For example, tenancy support worker, getting the Defendant involved in day centres, hobbies or local community activities, some Defendants are simply lonely!
 - What about referring to agencies who can continue to help the Defendant long term to cope or with advocacy needs for example, CMHT, Age UK, Mind, Voice Advocates, i.e. reducing the chance of further nuisance behaviour.

Alternatives to Possession Proceedings (2)

- 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.
- The Court of Protection (COP) 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 COP is a specialist Court designed to deal with vulnerable individuals who lack capacity

Settlement

- Consider making a Part 36 offer early. Consider was this:
 - Isolated incident / first breach of tenancy
 - length of tenure
- Is it possible to offer an alternative solution instead of time/cost of dealing with a possession trial?
- The Claimant has public law duty, including making reasonable adaptations for vulnerable tenants.
- Compliance with the recommendations of expert opinion.

Pre-possession- legal help

- It is possible to avoid possession proceedings if representations can be made early and can succeed if the complaint is an isolated incident.
- Beware! It is unlikely that you will have had sight regarding evidence gathered by the Claimant. If you can make admission and apologise early the Claimant can be more reasonable.

Undertakings/injunctions

- Careful drafting these! You do not want them to be wider than necessary and 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 not already involved;
- Make admissions at the earliest opportunity
- Was the Defendant warned regarding their behaviour
- Possession proceedings should only be issued as a last resort- is this claim necessary, proportionate and reasonable

DPA 1998:

- 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 serving these that the Claimant treats these confidentially. For example, you may wish to avoid neighbours who have complained of the ASB behaviour sharing this information.
