HOARDERS – THE COUNTY COURT STAGE

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1. **Introduction**

1.1. *Hoarders are a varied bunch*: Their habit might be specific (newspapers, animals) or general (everything), it might be caused by sheer bloody mindedness, a coping mechanism for psychological issues, more serious personality disorders, neglect through infirmity or brain damage. It might be treatable or untreatable. It might be impacting on the locality (smells, fire risks) or it might simply represent a risk to property or to the hoarder himself (e.g. gas or electricity cut off to avoid fire risk but causing harm to hoarder).

1.2 *Legal proceedings:* Landlords, local authorities and neighbours are all potential claimants or prosecutors as a consequence of hoarding. Their powers and interests are different, but the two main weapons brought to bear on the problem by landlords wanting a quick fix tend to be injunctions and possession proceedings.

1.3 *Vulnerability:* One common theme amongst hoarders is that they tend to be vulnerable having often ingrained and determined views in which they do not recognise that what they are doing is anyone else’s business. In that context breach of injunctions are likely as are possession orders and eviction.

1.4 *The legal advisor’s conundrum*: disability, vulnerability, lack of capacity, mental health problems will very often elide as issues in a given case but they do not always overlap completely. This paper seeks to set out how those issues might play out and what strategies need to be considered.

1.5 In considering those strategies distinctions might need to be made between:

(1) those clients who **do not** lack capacity to make decisions about their tenancy, their hoarding behaviour or the litigation;

(2) Those clients who lack capacity to make decision about their tenancy and their hoarding but do not lack capacity to litigate;

(3) those clients who lack capacity to litigate but do not lack capacity to manage their tenancy or make hoarding decisions.

2. **Injunctions: Overview of relevant issues**

2.1 In hoarding cases there are usually two types of injunctions sought:

* access (for clearing, gas or other appliance safety checks, or general maintenance);
* injunctions requiring work by the tenant, e.g. clearing up, cleaning, maintenance of garden, hygiene, reducing number of pets, vermin clearance etc.

2.2 Often a prelude to possession, the strategy options in injunction cases (assuming conduct is proven and entitles claimant to injunction) are limited: avoidance because of inability to comply can lead to possession proceedings; Agreement to comply can lead to failure and imprisonment – and possession.

2.3 Some relevant case law:

* The court will only grant an injunction if it is necessary to do so. It is not ‘necessary’ to grant an injunction if the defendant does not have the capacity to understand the injunction or does not have the ability to comply with the injunction: *Wookey v Wookey* (1991) 2 FLR 319. Injunctions are intended to work on the mind of the defendant. If he is incapable of responding to the threat of imprisonment, no injunction will be made;
* It is not necessary for the defendant to understand the finer points of procedure. It is enough that he understands what the injunction is asking him to do and that he understands that if he disobeys the order he will be in trouble and go to prison: P v P (Contempt of Court) Mental Capacity (1999) 2 FLR 897;
* Even if someone understands an order, it will not be ‘necessary’ to make it if he cannot comply with it because of his mental health condition: see *R (Cooke) v DPP* [2008] EWHC 2703 (Admin). This must not be confused with a *likelihood* that a breach will occur. The question is whether the defendant is *capable* of complying with the order.

3. **Possession claims: Overview of defences where social landlord seeking possession on discretionary grounds.**

3.1 Where possession is sought pursuant to a discretionary ground for breach of tenancy, ASB or waste[[1]](#footnote-1) the court must consider whether it is reasonable in the circumstances to make a possession order (HA 1985, s 84(2); HA 1988, s. 7). An alternative to possession might be to adjourn the claim (pursuant to HA 1988, s. 9(1); HA 1985 s. 85). If a possession order is considered reasonable, the court must go on to consider whether it is reasonable to postpone/suspend the operation of the possession order and on what terms (HA 1985, s 85; HA 1988, s. 9(2) and (4)).

3.2 *Exercise of discretion to suspend:* Where the conduct is ASB affecting neighbours (e.g. smell, fire risk), the court must consider 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, and the effect that the nuisance or annoyance would be likely to have if the conduct is repeated. It must also consider the difficulty of getting witnesses to court if the conduct were repeated (HA 1985, s. 85A; HA 1988, s. 9A).

3.3 *Strategies available:* Where the nuisance has a serious consequence on the neighbours, then absent cessation an outright possession order is almost inevitable: A possession order should only be suspended or postponed if there is a realistic likelihood of a cessation of the nuisance or annoyance - *Manchester CC v Higgins* [2006] HLR 14.

3.4 In those circumstances, where the hoarding is likely to be proven, the only strategies available for avoiding possession are:

(1) to show that the hoarding is not affecting neighbours. A risk to self and a risk of damage to property remains important but represents a lowering of the bar to avoiding possession;

(2) to show that the hoarding will cease. Either through the client’s change in behaviour, or if the behaviour is related to a medical condition, by showing that medical or social intervention will assist him. Potential sources of information for that purpose:

(i) a medical report with prognosis and recommendations;

(ii) proof of social services intervention following an assessment;

(iii) proof of Community Mental Health intervention following an assessment;

(3) If the Defendant is incapable of doing the clean up himself, to show that there is an alternative means by which the property can be cleared up. For instance:

(i) *with the Defendant’s agreement*, third party intervention – Social services, friends, voluntary organisations. Can the Defendant be persuaded to allow others to intervene?

(ii) *without the Defendant’s agreement,* can others be persuaded to remove the Defendant, clear the Property and put him back in without his consent?

(4) to persuade the court that if the Defendant must go, he should not go without suitable alternative accommodation being available[[2]](#footnote-2).

3.5 The exercise of discretion – assistance from statute and case law:

(1) *HRA 1998, Article 8, proportionality*:

* Only applies if the landlord is a public authority (HRA 1998, s 6). Most social landlords will be public authorities although the point is not straightforward: *R(Weaver) v London & Quadrant HT* [2010] 1 WLR 363;
* In discretionary cases proportionality (in HRA terms) and the reasonableness of a possession order are conjoined issues: see *Manchester CC v Pinnock* [2010] 3 WLR at [55] to [56]. Pleading proportionality does not add much, save that in *Pinnock*, Lord Neuberger said at [65]:  *‘…the suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty, and that the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases seem to us well made.’*

(2) *Possession and the Public Sector Equality Duty.*  Section 149 of the Equality Act 2010 provides that a ‘public authority’[[3]](#footnote-3) shall, in exercising its functions, have due regard to the need to advance equality between those with and those without a disability (s. 149(1)(b) and (3)(b)). In doing so the authority must have regard to the particular disabilities of a disabled person (s. 149(4)). Compliance with those duties may involve treating a person more favourably than someone else would otherwise be treated (s. 149(6)). Note:

* The duty is no mere tick box exercise. It requires the public authority to actively engage with the requirements of the duty: *Barnsley MBC v Norton* [2011] EWCA Civ 834;
* It is only a duty to ‘have due regard’ … ;
* It cannot trump the absence of any likelihood of nuisance to others coming to an end, although it might buy time to allow a managed transfer to alternative accommodation (see *Brent v Corcoran* [2010] HLR 43 at [19]-[21]; *Barnsley MBC v Norton* [2011] HLR 46).

(3) *Discrimination under Equality Act 2010.* Sections 6, 15 and 35 will apply provided the defendant has a disability[[4]](#footnote-4), and there is a discrimination. A person discriminates if they treat someone with a disability less favourably because of something arising in consequence of the disability *and* it cannot be shown that such treatment is a proportionate[[5]](#footnote-5) means of achieving a legitimate aim (s. 15)[[6]](#footnote-6). Not only must there be a disability, the defendant’s conduct must also be *caused by or contributed by* the disability: the hoarding causatively linked to the disability.

3.6 *Alternatives to possession – where Defendant has capacity (both to litigate and to make decisions about his tenancy).* Other powers that might be used in a particular case:

(1) Local authorities have the power to act unilaterally if they wish in some circumstances, e.g. filthy and verminous premises (see Public Health Act 1936, s 83 and 287(2); see also Public Health Act 1961, s. 36).

(2) Local authorities also have removal powers where a person is suffering from chronic disease or being aged, infirm or physically incapacitated are living in insanitary conditions and are unable to devote themselves to or are not receiving proper care and attention: National Assistance Act 1948, ss 21 and 47. Such powers could be exercised temporarily whilst the landlord clears out the property and restores it to good condition;

3.7 Unfortunately there are a number of difficulties with those provisions as a means of preventing possession by pushing the court to encourage an alterative means of bringing the hoarding to an end:

* The list of pre-conditions before they can be used are extensive and the facts of a particular case may not suit them;
* The landlord may not be a local authority and it may therefore be necessary to persuade a third party (the local authority) to act which can be difficult where they are not a party;
* Where the claimant has not thought of the option themselves, there may be no opportunity to suggest it as an alterative. In particular, the defendant may not wish you to push for that option – he’s quite happy with his hoarding and doesn’t want a clear-out! Absent a lack of capacity, you may not be able to advance that alternative.

3.8 Absent lack of capacity, an intransigent hoarder will struggle to defend a possession claim. If he refuses to allow you to advance a case which pushes for alternatives to possession, you may be in difficulties …

4. **Possession claims: Overview of potential defences in ‘as of right claims’.**

4.1 Where the claimant has a mandatory entitled to possession (e.g. non-secure tenancy terminated; assured shorthold and section 21 claim) the defences are much more limited:

(1) HRA, Article 8 and proportionality.

* Where the landlord is a private landlord, highly unlikely to succeed even if the defence is theoretically available: *Manchester Ship Canal Developments Ltd v Persons Unknown* [2014] EWHC 645 (Ch); *Malik v Fassenfelt [2013] EWCA Civ 798, [2013] 3 E.G.L.R. 99*.
* Where landlord is a public authority available but still exceptional: *Manchester CC v Pinnock* [2011] 2 AC 104; *Hounslow LBC v Powell* [2011] 2 AC 186. Personal circumstances will not be enough. *Corby BC v Scott* [2012] HLR 23 at [31] to [33]:

*I consider that Corby BC v Scott emphasises that, in such a case, a judge: (i) should be rigorous in ensuring that only relevant matters are taken into account on the proportionality issue; and (ii) should not let understandable sympathy for a particular tenant have the effect of lowering the threshold identified by Lord Hope in Powell [2011] 2 A.C. 186 at [33] and [35]. As for West Kent HA v Haycraft, it seems to me to emphasise the significance of the height of that threshold, or, to put it another way, how exceptional the facts relied on by any residential occupier must be, before an art.8 case can have a real prospect of success.*

* A hook is needed – the most likely hook is a failure to comply with existing policy (akin to JR even if not on all fours – see below)

(2) A JR defence might be available: *Doran v Liverpool City Council* [2009] EWCA Civ 146 at [49] to [50]; *Doherty v Birmingham City Council* [2008] UKHL 57, [2008] 3 WLR 636. But such a defence will only succeed if there is a failure to follow policy or some other obvious breach of public law: *Central Bedforshire Council v Housing Action Zone Ltd and Taylor* [2010] 1 WLR 446 at [40]; *Barber v Croydon LBC* [2010] HLR 26; *Eastland Homes v Whyte* [2010] EWHC 695 (QB)[[7]](#footnote-7).

(3) Discrimination under the Equality Act 2010, ss 6, 15 and 35 (see above for consideration):

* In an as of right case, proportionality will be harder to establish but will still potentially be available. E.g. no eviction until local authority have found alternative accommodation for a vulnerable defendant.
* Proportionality not the same as HRA proportionality: staged (including whether better alternatives available to meet legitimate aim) and *Pinnock* presumptions are merely factors: *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15

5. **The game changer – lack of capacity to manage tenancy or make ‘hoarding’ decisions**

5.1 The following are worth emphasis:

(1) *Capacity is issue specific*.

* The ability to make litigation decisions does not equate to an ability to make tenancy decisions and vice versa.
* Equally, the inability to make tenancy decisions does not equate to an inability to make litigation decisions and vice versa.
* However, if there is an inability to make tenancy decisions, in particular about whether to stop hoarding, there is likely to be an inability to litigate where the litigation concerns whether or not to stop hoarding. Ultimately the issue is one for the court on the available medical evidence.

(2) *The presumptions at MCA 2005 ss 1(2) to (4):*

* A person must be assumed to have capacity unless it is established otherwise;
* A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success
* A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

5.2 The advantages if a person lacks capacity – the unlocking of options:

(1) Instructions will now be from a litigation friend. If those instructions are in the client’s best interest, there is likely to be a greater degree of flexibility in arguing for alternatives to possession, e.g. help from others, community care etc;

(2) The Court of Protection jurisdiction is now available in which the court can make decisions about what is in the client’s best interest and can authorise third parties to take steps (including if required deprivation of liberty) to secure the client’s best interest;

(3) The county court is likely to take the view that the better forum for deciding what should be done to resolve the hoarding and the problems it creates, rests with the COP. Possession proceedings can be stayed or dismissed to allow that to happen.

(4) The COP can make far more nuanced decisions. E.g. it can direct that alternative accommodation is available pending the clean up or that before the defendant is asked to (temporarily) leave, social workers attend on several occasions to explain what is happening and to give the defendant an opportunity to go peacefully.

5.3 **Beware:** The COP strategy depends on the defendant being without capacity during the entirety of the proceedings. In particular:

(1) Some landlords still try for possession where there is a risk of the defendant regaining capacity on the ground that when he regains capacity, no monitoring can continue;

(2) Don’t ignore the need for community care support which might continue even if the defendant regains capacity and which might ameliorate his behaviour.

1. For secure tenancies: Housing Act 1985, Sch. 2, grounds 1, 2, 3, 4; For assured tenancies: Housing Act 1985, Sch. 2, grounds 12, 13, 14 and 15. [↑](#footnote-ref-1)
2. Although there is authority suggesting that it is not for the court to consider whether or not there is alternative accommodation available on the tenant’s eviction (see *Lewisham LBC v Akinsola* (1999) 32 HLR 414 at 417 decided in the context of anti-social behaviour) such authority is moot and may not have survived the statutory changes since it was decided, notably the Equality Act 2010 and the Human Rights Act 1998 and the judgment in *Pinnock*. [↑](#footnote-ref-2)
3. Equivalent test for HRA 1998, s. 6; *R(Weaver) v London & Quadrant HT* [2010] 1 WLR 363 [↑](#footnote-ref-3)
4. A person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day to day activities (Equality Act 2010, s. 6). [↑](#footnote-ref-4)
5. When considering whether such discrimination is proportionate, the physical, mental and social well-being of a neighbour is a legitimate aim for the purposes of section 15 EA 2010 (see *Manchester CC v Romano* [2004] EWCA Civ 834). In that context, an absence of any real prospect of a cessation of the harm being caused will render any eviction proportionate: *Brent v Corcoran* [2010] HLR 43 at [19]-[21]; *Romano*. [↑](#footnote-ref-5)
6. The obligation not to discriminate applies to eviction or taking steps to evict (s. 35(1)). [↑](#footnote-ref-6)
7. See also *R v Newham LBC, ex p. Bibi* [2001] EWCA Civ 607; (2001) 33 H.L.R. 84; *Leicester CC v Shearer* [2014] HLR 8 [↑](#footnote-ref-7)