Housing Law Practitioners' Association

Minutes of the Meeting held on 11 May 2016
University of Westminster

Anti-Social Behaviour Update

Speakers: **Andrew Lane, Cornerstone Barristers**
Edward Fitzpatrick, Garden Court Chambers

Chair: **Sarah Stephens, Anthony Gold Solicitors**

Chair: Good evening everyone. My name is Sarah Stephens, Partner at Anthony Gold and HLPA Exec member. Can I first ask if there are any corrections to the Minutes of the last meeting? If not, I would like to introduce our two speakers for tonight who are going to be discussing Anti-Social Behaviour. First we have Andy Lane, Cornerstone Barristers. Andy has extensive experience of all aspects of housing law with particular expertise in anti-social behaviour type work. He represents both landlords and tenants in this work. We then have Ed Fitzpatrick from Garden Court who is a HLPA Exec member as well. He also specialises in all aspects of social housing law representing mainly tenants and provides extensive training on housing law issues.

Andrew Lane: Ed and I will be covering the topic in two parts. I will speak about absolute ground and Ed will cover anti-social behaviour, possessions, injunctions etc. It would be nice to try to link something in with this talk with the Housing and Planning Bill, which obviously gets Royal Assent tomorrow, but I can't really think of how to do that. It may create a lot of problems but I think in anti-social behaviour probably not much is changing.

We have had absolute grounds now for eighteen months. I have only dealt with one myself. One of the reasons for that, as we'll see, is that my work is almost exclusively local authorities and housing associations and a lot of local authorities and housing associations are holding back because they need to change their policies. There are not many defences to these matters, but there are policy defences and public law defences and obviously they need to get their policies right so they can justify reliance on the absolute ground.

I will look briefly at:

- The Notice Seeking Possession and Review procedure, both in terms of the Statutory Review procedure for local authorities and the voluntary, although very much encouraged, review procedure for housing associations;
- The five conditions, ie if you want to use the absolute ground you have to fit it into one of the five conditions that the Anti-Social Behaviour Crime and Policing Act provided for;
- The first hearing, because often that's what distinguishes this claim from claims that Ed will be talking about, in other words the idea is that these matters get dealt with at a first hearing, just like a s21 Notice or a Notice to Quit; and
- Defences. I don't want to give away too many secrets because you may be against me, but I will deal with defences and possible defences and also, of course, matters that aren't defences. You

may have a different view but issues like the Human Rights Act are generally not really a credible defence.

Absolute Grounds

The whole point of the Anti-Social Behaviour Crime and Policing Act as far as the first five or six parts were concerned was to try to streamline the many different measures - I think there were nineteen - dealing with anti-social behaviour, not just with tenants but generally, and trying to narrow that down to six or seven.

It was also, if you read the Consultation - and again depending on how much you accept this - it was very much seen as a victim centred approach, in other words a feeling that in many cases victims weren't being given a proper hearing or were being required to go through hearings again and again when in fact they should really only have to go through it once.

I've mentioned the fact that you can use the absolute ground from 20 October 2014 although, of course, one of the most common grounds we'll see shortly is the breach of a s1 injunction, and the s1 injunction did not come in until March so that particular condition, Condition 2, hasn't really taken off as yet. You not only have to get that s1 injunction but you need to have a breach of the injunction and have a committal hearing at which that breach is confirmed.

So, this is a mandatory ground. This is attempting to short-circuit matters which the government say should be short circuited and they have, as far as assured tenancy is concerned, issued prescribed notices. Now somebody's going to tell me why they haven't done the same for local authorities. It seems a bit of a mystery to me, but they haven't. So the first thing you need to look at, obviously, is that you have the right notice, because the notice needs to refer, if it is an assured tenancy, to the new Ground 7A, and therefore the notices needed changing. There are also changes, as you'll see in a minute, to the various time limits that apply.

So there is a new notice and what you should have in the notes are the relevant parts of some of the legislation in terms of the amended 1985 Act and 1988 Act. For example I've referred at the second bullet point to 83ZA3 which you can see at p14 of your notes and what that says is, remember this is for secure tenancies for local authorities, so this is where there is no prescribed notice, but the notice must state that:

- The court will be asked to make an order under s84A - which is the mandatory ground
- For the possession of the dwelling house - we'll that's fairly obvious, the tenant needs to know why he's being threatened with court proceedings
- It must set out the reasons for the landlord's decision to apply.

Of course, it's one thing to say: I rely on Condition 2 - that this tenant has had an injunction under s1 of the 2014 Act, they have breached that injunction and that breach has been confirmed by committal proceedings held on 26 June 2015. It's one thing to say that, but there is some suggestion there that you ought to go further than that. In other words, yes you satisfy the condition, that's fairly obvious and almost taken as read, but why are you seeking possession on a mandatory ground and not using for example Ground 12, Breach of Tenancy; or Ground 14, Nuisance and Annoyance or Indictable Conviction.

So you would always want to look to see that the notice has been filled in properly and it may say: We are seeking possession under the mandatory ground because this isn't the first time the person has acted in this way; or we're doing it because of the particular seriousness of the offence; or we're doing it because our policy has a zero tolerance towards drugs. Whatever

it is. But it ought to have something about not just what condition you're relying on, but the reasons why you as a landlord are applying under the absolute ground.

- You must inform the tenant of any right they may have to request a review of the landlord's decision. In other words, as with demoted tenancies there is a statutory review procedure.

Now the notice, like all notices, has changed from 6 April so there are still some landlords who don't realise this. One who I will not name said, when I referred to the Notice Seeking Possession, oh, you mean the one in 2015. It has changed from 6 April 2016, but obviously it's substantially to the same effect. If for whatever reason, and I've had one of these recently, the landlord decided almost to craft their own Notice Seeking Possession - it wasn't a local authority, it was a housing association - as long as it has all the information and is seen as being substantially to the same effect, ie alerting the tenant to the fact that this is a mandatory ground; alerting the tenant to the fact that they can go and seek advice; alerting the tenant to the fact that there is a review procedure; alerting the tenant to the fact that the landlord is seeking this absolute ground because of X, Y and Z; and alerting perhaps the tenant to the fact that it can't start proceedings for 28 days - as long as it includes all this information it will probably be acceptable. It is important because the court has no power to dispense with the requirement for the notice, so frequently with the kind of cases that Ed will be dealing with when we're talking about discretionary grounds, the Ground 1 and 2 for local authorities and 12 and 14 for Housing Associations, often that point only comes up at trial, by which stage you just dispense with the requirement, and the court should dispense with the requirement if it's only raised at that late stage. There's no power - the same as Ground 8 for rent arrears - for the court to dispense with the requirement. So if you have it wrong, or haven't served it, or as in a recent case, for example, it was thought that the person had been convicted under s4 of the Protection from Harassment Act only it became quite clear from their exhibit it was actually s2, you have to say: Well that's not a serious offence and therefore I can't use the serious offence ground and I can't dispense with the requirement to rely on another serious offence which we haven't pleaded. So there is no power to dispense with a requirement, either under the 1985 Act or the 1988 Act.

<u>Reviews</u>

Reviews are very much set out in the regulations. They're not particularly enlightening in the sense that they're fairly obvious but there is no Statutory Review procedure for assured tenancies. There is the Guidance for the Act: the Reform of Anti-Social Behaviours Powers Statutory Guidance for Frontline Professionals, which basically says is if you're a housing association or a housing trust or whatever under the 1988 Act you don't have to have a statutory review procedure but you'd be stupid not to. It's the same in effect as starter tenancies. My experience, and certainly my advice to housing associations, is to have a review procedure. It deals with a lot of public law arguments, assuming you do it properly, to have a proper review procedure. You don't have to in the strict sense of the word but the guidance says you should. Local authorities have to advise the tenant of their rights in the notice and the tenant has seven days - so this is meant to be a quick process, because the idea of the review process is that you get a notice seeking possession that doesn't allow the landlord to issue proceedings for 28 days, and within that time you're meant to have had notice of a review and held the review. So within seven days of service of the notice the tenant should request, in writing, a review. I should hasten to add, of course - and I'm sure I don't need to mention this - there will be some cases where local authorities and housing associations quite properly don't insist upon written notice - maybe because of language or other issues for the tenant - so the Equality Act may come into that. I would always caution landlords about being too precise about insisting on their rights. There's

no point. If somebody wants a review they want a review. If they ask for it on Day 8, to be honest it's sensible to allow it.

The tenant is entitled to an oral hearing. They're entitled to be represented at that oral hearing. They're entitled to ask questions of any witnesses. But remember this isn't like seeking an oral hearing to decide whether the person has committed the 73 acts of anti-social behaviour pleaded by the landlord in the notice, this is basically deciding: has the landlord been able to satisfy one of the grounds for possession? In other words did they commit a serious offence? We will come onto the grounds shortly. Have they breached a criminal behaviour order? Have they breached a s1 notice; Have they breached a noise abatement notice? Have they had their property closed for more than 48 hours because of a closure notice/closure order? They need to be able to show that and they need to be able to talk about why, even if they satisfy one of those conditions, the landlord is seeking possession, because the conditions don't just try to restrict the behaviour of the tenant, but also the behaviour of the tenant's visitors and their household.

If, for example, you have a visitor who is a known drug dealer who, for whatever reason, decides it would be a great idea to deal drugs on the premises, that could satisfy the condition for an absolute ground which would put the tenant's tenancy at risk. Now the tenant might say: well look, I accept that the condition is satisfied - my visitor committed a serious offence, I can't deny that - but there's no evidence that that visitor has been backwards and forwards to my property. It's not a regular occurrence. There's no evidence there's been any other drug dealing allegations made against me or anyone in my household, so why are you taking this strong action against me? If you want to take action, why not get a s1 injunction and exclude certain people from the premises. Why not even get a possession order on discretionary grounds and, again, as a suspended term, exclude certain people from the premises. Isn't that a more proportionate and reasonable approach? So satisfaction of the conditions will not necessarily be the only issue of concern at an oral hearing. It will be: yes, we accept the condition has been satisfied, but why are you seeking possession because of it?

Where no oral hearing is requested, the tenant must be invited to make written representations, and be given at least five days' notice. So there's not much time, and you know better than I do the difficulty of people wanting to seek advice fitting in with those timescales.

You'll get five days' notice at least of the hearing. As I've said, you can call and question witnesses. If it's going to be decided by an officer of the local authority or association then, like homelessness, it has to be decided by a senior officer to the person who made the original decision.

Now I'll just pause there to say that in many cases it's difficult to know who made the decision to seek possession, because nobody ever owns up to it. There is no witness statement confirming that this is our process for seeking possession and it has to go before a board or a senior manager. This, at least, I suspect will encourage associations to be more precise about their decision making processes, because if it's an internal review by an officer it has to be a senior officer, so you have to be able to identify who made the decision to issue the notice in the first place.

You are meant to make your decision prior to the time provided in the notice before which you can't seek possession, and that is the same time as for a Notice to Quit, so a minimum of 28 days or, in fixed term tenancies, a month. So you're meant to do all that. Give the Notice; give the possibility to the tenant of invoking the review procedure; holding the review process, including an oral hearing if that's what they want, within 28 days, or a month.

However, and I will not go through the cases in any detail, but just to say a landlord will not be penalised for being decent and saying: You need a bit more time to prepare your case, we're not going

to say: But we need to do it by 12 May, because that's the date on the notice. Courts are unlikely to penalise a landlord for giving the tenant extra time. It may be a more interesting argument if, of course, the reason for the delay is incompetence, but not if it's just that they want to make sure that the tenant has proper opportunity, or maybe the tenant has requested more time because they need to call a witness who isn't available within the time period.

The other issue, of course, and we've seen it in cases like *Barnsley v Norton* and *Central Bedfordshire v Taylor*, is that it may not be too late to correct your policy or your procedure. Authorities to date, like *Barnsley v Norton* and *Central Bedfordshire v Taylor* and the case cited of *McDonagh* indicate that you may not have been wonderful prior to the service of the notice but you can correct it if you can say we then did look into this in more detail and we still confirmed our decision.

Other Grounds

Serious Offences - They're defined in the 1985 Act which is very confusing when you deal with the 1988 Act, but they are in the 1985 Act. It's against the tenant household or visitor. There are locality provisions. We're talking about offences being committed post 20 October and the notice must be given within twelve months of conviction. So what you can't have in three or four years' time is a landlord suddenly doing a sweep of the estate and saying, We notice that in 2015 you were done for burglary, so we're going to issue a notice. You have your twelve months from the date of conviction. If the person appeals it's twelve months from the date when the appeal was decided or discontinued.

The most common one is probably going to be the Breach of the s1 injunction. You'll remember this replaced ASBIs. One of the most useful tools, as Ed will describe, in a landlord's armoury. Very easy to get and very straightforward, but it is a very important provision, and it's talking about breaches of negative requirement. Because, as you know, when they abolished ASBOs they changed ASBIs to allow positive requirements, but it's only breaches of negative requirements which allow Condition 2 to be satisfied. There was a feeling that what was going to happen would be for more people to argue for undertakings, because obviously if you breach an undertaking it's just as serious as breaching an injunction, it still leads to up to two years imprisonment and possibly to a fine, although in most cases there's no point fining people. It doesn't lead to this, so you might be committed to prison but it doesn't count for condition 2. My experience is that, apart from one particular judge in Romford (she didn't quite get the law right, but she was close enough) this isn't really the judge's view. The judge's view tends to be that it's up to the landlord to decide what action they take. They look at cases like *Newcastle v Morrison* and say of course you could have done that, or you could have done that, but if you have the facts to satisfy an injunction that's fine. Again, that will depend on the proactive nature of the judge. I had a judge once who just said: I'm not going to make an injunction, this man made a serious mistake, he's apologised for it and I'll wait until you've agreed an undertaking, so of course we agreed an undertaking.

So that's fairly straightforward, but it does depend on a committal hearing or, if it's an under 18 it has to go to the youth court for a decision on breach of the injunction, and if a committal order is made you go straight to the Notice procedure.

Breach of a CBO - the Criminal Behaviour Order - again it has to be a negative requirement. Again the locality provisions and it's post 20 October.

Closure Order - I had a case *Poplar HARCA v Byrne* which went to the court of appeal. The police had taken the Byrnes, brother and sister, to court for a Closure Order. They obtained a Closure Order, got an extension, they appealed - and all in all it was sixteen days in court including Peter Byrne's sister saying we can't really speak and then you have transcripts of his evidence - so he can certainly speak

in the evidence. But because it was the police who took them to court there was no *res judicata* so we had to issue separate proceedings for possession, and prove the facts again in order to get the Possession Order against them. In the end they failed to comply with some direction and the Order was made because they were debarred from defending. The Government's representatives came to that hearing as they were keen to know why we had taken sixteen days of court time, proven all these breaches once for the purposes of the Closure Order and now had to do it all again, because it had to be Poplar HARCA now, and not the police. That's a complete waste of time and, of course, now you don't have to do that. If you obtain a Closure Order against somebody it's fairly straightforward to get it in the mandatory order.

I know one local authority in south London who do a lot of Closure Orders, but they don't do absolute grounds because their policy hasn't yet changed to allow them to do that. A little frustrating but they still have to go on Grounds 1 and 2.

And the one I always think is a bit odd - Statutory Nuisance. What I don't like about this provision is that it seems to me there are various degrees of noise. I've certainly dealt with possession cases on discretionary grounds where there was noise, and it was certainly disturbing the neighbours, but there was no deliberate intent to disturb the neighbours - somebody just wasn't particularly good at controlling children or controlling each other. Whereas I can understand the Serious Offence; I can certainly understand the Closure Order - absolutely right in my view; and the injunction depends on the nature of the injunction - this one is beyond me. But, if there's been a breach of an Abatement Notice or an Order to Abate a Nuisance, the landlord can move to an absolute ground.

So those are the five conditions. The only reason I've dealt with first hearings is because the idea is that they should be dealt with at first hearings. It's like dealing with any mandatory ground and, as we know, 55.82, although it's very common for people to turn up saying I want to file a defence, and not doing it within 14 days - we did have an argument with one council recently who said there is no time requirement for filing a defence in possession claims. I said I would be quite happy to adjourn this to allow you to file a defence, but there is a requirement of 14 days, and you're outside it. You can certainly take part in the hearing, but what you can't do is insist on the right to file a defence at that stage. You have to show that you have substantial grounds to defend it.

So somebody, for example, who comes along and says: I accept I had a s1 injunction against me, I accept I went for committal and I accept everything's right. I received the notice, I didn't ask for a review so that's fine, I accept the condition is satisfied, I just think it's a bit unfair because I've lived there for five years. Well, that should be dealt with at the first hearing. There's no point allowing a defence to be filed at that.

Someone obviously who has a more substantial issue, maybe an Equality Act issue, maybe a Public Law issue may have a Public Law defence: I was never told about my right to have a review, for example; or I was told about my right to have a review but they wouldn't allow my representative to come in; or my representative was allowed to come in but they weren't allowed to ask any questions; or I didn't see the papers, I didn't know what allegations they were relying on, nobody showed me, I didn't know what they were talking about.

Human Rights Act: in any event the most sensible defence to any mandatory ground is not a Human Rights Act defence, which in large part is pointless, but is a Public Law defence. Because, of course, if you have a Public Law defence, it's not in accordance with the law, it doesn't satisfy Article 8(2) and therefore you get it anyway, but it's actually a Public Law defence that the sensible pleadings rely on. Obviously you can argue, as in *Macleod v Peabody Trust*, that Peabody for those purposes weren't

exercising public function, but the reality is that all local authorities are public bodies, most housing associations are exercising a public function. I might plead something about saying we're not taking the point of first instance, but I think in reality *Macleod* makes little difference. It will still, in most part, be very much a case of housing associations exercising public function. That may change, of course, with more affordable rents, it may change with housing companies being set up by local authorities, it may change with certain shared ownership schemes. So I'm not saying it's an absolute rule but it's still largely good law.

Barber v Croydon as you will know is the authority that basically says if you don't follow your policy as a landlord you could be in difficulties.

Aherne v Southern Housing Group was meant to be at the Court of Appeal on Tuesday or Wednesday but they couldn't find a tribunal, which is of course a common problem for county court, but apparently is now a problem in the Court of Appeal. It's a case where it was accepted that the policy wasn't followed - it's a starter tenancy - but the argument that the judge accepted at trial was that it wouldn't have made any difference anyway, so he did not accept a public law defence. Of course that's a perfectly reasonable judgment if you're in the high court on a judicial review - we see that all the time with judges - and it's OK in homelessness appeals. I've had a homelessness appeal where the other side has succeeded on a ground of appeal but we won the appeal because there was no point in sending it back - but that's because statute allows. What they're arguing in *Aherne* is that the county court is a creature of statute and has no right, if there has been a breach of policy, to do anything else than they did in *Barber v Croydon* which is dismiss the claim and send it back. Now you might say but *Barber v Croydon* says they can just start again. Make sure they follow the policy this time and just start again. The difficulty in *Aherne* was that it was one of those starter tenancies which, after a period of time, automatically converted to an assured shorthold tenancy. As you might imagine Southern Housing were not keen on that. So we don't know when it's going to be heard.

The Equality Act I'm sad to say is dreadfully pleaded. S15 is the obvious one of course, for disability discrimination, but even there you have to be a bit sensible about it. Is the act complained of in consequence of the disability? Now putting aside whether you have a disability for the purposes of the act, and you can normally prove that with certain psychiatrists anyway, you have to prove that. So if you're saying: I didn't do these things - we're talking about anti-social behaviour - well that's your defence. If you're saying: I did these things but it was because of my disability, maybe I'm a schizophrenic and I shout out, so it's not my fault - that's a perfectly valid proposition to put forward, and then the landlord has to demonstrate that they've acted proportionately. As *Akerman-Livingstone* said, that's not a *Manchester v Pinnock* proportionate, which is just people like me saying, well there's nothing exceptional about this case, let's move on, it's a much more structured approach to proportionality and a much more considered view. You're unlikely to get a valid Equality Act defence dealt with at a first hearing, and certainly if I'm asked should we agree directions I would normally say yes if it's been a properly pleaded Equality Act one.

There will be people here better qualified than I am to talk about s149. It's one of those very important but nebulous concepts. I think I may have actually used that phrase in the notes. I don't know what it means. I was saying to one local authority recently don't put too much in writing. Some people like to think they have to do these long documents saying that we've considered the public sector equality duty etc. Well you can't just pay token service to it, as we've seen in *Hotak* in homelessness. But it's unlikely to be, in the end, determinative. Just to give you one very quick example, we had a series of possession actions where we're moving a load of people for the local authority from one estate to another. They're knocking it down. Obviously, as always, there are two or three people who won't leave because they want a bigger place or they want a different place or have genuine concerns as to

where they're being placed, and one of the issues was the Equality Act. I have to say, the District Judge, a former member of this group, said to my opponent, well, what did you want them to do? If I accept what you say, that they didn't really have due regard to a person's disability etc, what would they have done differently? They're going to knock this place down anyway, you don't dispute that. They're going to move your client, you don't dispute that. Your client has homelessness rights to ensure they have suitable accommodation, you don't dispute that. What would they have done differently? And it's a very good question that I think many people struggle to answer.

As I've mentioned before, *Barnsley v Norton* says that even if I was concerned that my client the landlord hadn't really done much about the Equality Act I would get them to do it even post issue. Of course, that may change. People's circumstances change. *Dacorum v Sims* was a Notice to Quit and we had a number of reviews after issue because they kept coming forward with evidence as to he's now got this, he's now got that, so we said we'll have a look at this to see whether it changes our decision to seek possession based on his wife's Notice to Quit. *Barnsley v Norton* at the moment, subject to *Aherne*, is good authority to say that you can look at these matters post issue, so it really shouldn't be a very probative defence, but again it's probably going to succeed at a first hearing to get into a second hearing.

Remember with s149 you don't have to prove you have a disability for the purposes of the act. I know there's *Swan v Gill* which I was involved in, in the Court of Appeal, where it said that you did, but this was wrong.

I know that's a quick run though of some of the issues and I hope that my notes are reasonably comprehensive to fill the gaps that I haven't been able to deal with in a short talk.

Edward Fitzpatrick: Just following on from what Andy was saying about absolute orders, it does seem to be the case that it's been a slow start in terms of cases percolating through the system. I was asking in Chambers about anyone who has ongoing cases and there are a couple that haven't come to trial or are on their way to trial. One involves a case where an injunction was granted and breached, but the argument is that at the time of the injunction it shouldn't have been granted because the defendant lacked capacity.

There was another one where the association amended their grounds to include an absolute ground and that was wrong, so that didn't go too far. Then in relation to another case there is an issue as to whether or not the defendant had been informed about absolute grounds.

The guidance that Andy referred to, which is the voluble guidance on Anti-Social Behaviour Crime Policing, applies to injunctions. It also applies to absolute orders and in relation to them it does say: The new absolute ground is intended for the most serious of cases of anti-social behaviour and landlords should ensure that the ground is used selectively. So that may be a ground for challenge.

Secondly, in relation to informing the tenant, it says: Landlords should ensure that tenants are aware from the commencement of their tenancy that anti-social behaviour or criminality, either by the tenant or by people living with the tenant, could lead to the loss of the home under the new absolute ground. In fact I think one of the cases that's been argued was unfortunately an abatement case and they pleaded guilty to a breach of noise nuisance but said they did not know at that point it could lead to mandatory grounds for possession.

In relation to the injunctions under the long winded Anti-Social Behaviour Crime and Policing Act 2014 the first issue is in terms of granting the injunction and it's very similar to the ASBI regime.

- The conditions have to be satisfied in the balance of probabilities.

- You can get an injunction against a person aged 10 or over engaged or threatening to engage in anti-social behaviour.
- The second condition which is, again, a bit untested, and I'll come onto, is whether or not the court considers it just and convenient to grant the injunction for the purpose of preventing a respondent from engaging in anti-social behaviour.
- In relation to anti-social behaviour, well the definitions are hardly new to us. We have the reference to being likely to cause harassment alarm and distress. That's been previously defined as putting someone in fear of one's safety and, in the case of *Jones* to do with the Crime and Disorder Act 1998.
- In terms of nuisance and annoyance, we're all familiar with that from the Housing Acts and annoyance has been defined as a wider term than nuisance and it's what disturbs someone's reasonable peace of mind.

In relation to the application of that (B) is obviously the easiest to prove - conduct capable of causing a nuisance or annoyance. Now s21(B) provides that that only applies where you're dealing with a housing provider, local authority or chief officer of the police. In terms of the distinctions made between what is capable of causing a nuisance or what conduct has caused, the reality is most of the cases we deal with we're not involved in such fine distinctions because there has been a history of anti-social behaviour that is evidence.

Under s21(7) of the Act one should be mindful that a court may take into account conduct occurring up to six months before the commencement day of the Act, 23 March 2015, so you could argue that if there is reliance placed on a long history that that's unfair, although it may be argued that that depends on whether or not there is a need for an injunction.

In terms of dealing with the way in which these injunctions are envisaged, and Andy touched on it, there are two aspects to it. There is the prohibition, and then there is the requirement, and requirement for the respondent to do anything described in the injunction, and this allows for a more hands on approach by the courts.

Going back to the guidance, there are examples given as to in what sort of situation you might make a requirement, and examples are the respondent attending alcohol awareness classes for alcohol related problems and some judges in the past were well versed to doing. In fact I was in a case with Andy where the now retired Judge Hornby adjourned for our client to attend AA on a regular basis which, unfortunately, he didn't do and we got back to court. The judge had said that if you don't do that you'll end up sleeping in a box, and after that you may end up in a box you can't get out of and our poor client didn't understand at all what he was on about, but some judges can be creative in terms of the orders that they're willing to make.

Other examples are irresponsible dog owners attending a dog training class provided by animal welfare charities and the respondent attending mediation sessions with neighbours.

In relation to that side of things, it's important to remember that the act requires, under s31, that the order must specify the person who is to be responsible for supervising the compliance with the various requirements, which could be an individual or an organisation. That means the court must receive evidence about the suitability and enforceability from the individual specified, and the person specified will then have a duty to make the necessary arrangements in connection with the requirement to promote the respondent's compliance with the requirement. So again it's difficult to see how the average social landlord is going to take this on board and organise how you will deal with

the lack of control of your pet. There is also a duty to inform the person who has applied for the injunction if there is a failure to comply with the relevant requirement.

In terms of the other kinds of orders you can have, you can have exclusion zones, which we're all pretty familiar with anyway under ASBIs; non association orders; curfews; prohibition on clothing such as hoods - if that's deemed necessary. So the powers are quite wide.

In the notes I've set out information regarding similar powers of arrest that apply and there are also provisions in relation to remand for medical examination.

Probably the most interesting aspect is that clearly in terms of the injunction there is no actual defence specified under s1. The second requirement is how will that operate, and I don't think, again, there have been many cases that have percolated through the system on that. It's a discretion on the part of the judge as to whether it's just inconvenient to make the order.

Obviously if there has been a long break, there's been no anti-social behaviour for six months, that presents a good reason to say it's not just inconvenient. If the landlord hasn't followed their own policies in terms of dealing with anti-social behaviour, if they haven't engaged. If the tenant's vulnerable and there are other steps that can be taken.

The other issue that still comes up is the question of undertakings and my experience is the same as Andy's, some judges will say: why don't you go out of court and deal with this by undertakings, we don't have to hear all the evidence, and put pressure on the claimant to come up with a practical solution. If someone's willing to give undertakings the argument is, well do we have to go through all this. It's not just two different types of power before the court, it's the fact that very often you're saying: we'll offer these undertakings because we didn't do X, Y and Z and we're not admitting to it and if you want to spend all day trying to prove it then we've got a contested hearing. So it is very often worth looking at whether or not it's amenable to that, one can also see whether or not you can adjourn a case on terms for a period of time or if, more realistically, there has been a change in circumstances. Perhaps, the son who has been causing havoc on the estate has moved well out of the area. So one can be quite creative as to what you can do at the actual hearing.

But obviously as we know the next step where the court grants the injunction is the question of committal. In terms of the injunction the other factor to bear in mind is that if you have a contested hearing, and this is very important, if there is determination as to specific incidents then you will be estopped from denying those incidents at a possession trial. They've proved their case in relation to those particular dates. So that's another good reason to avoid a contested hearing.

In relation to committal proceedings there are a couple of factors. The courts are required to take into account the Criminal Sentencing Council Guidance, which is likely to change quite soon, but at the minute we've got December 2008, and that sets out some issues that are quite helpful. One looks to see what the injunction was to prevent, so if it was to prevent someone threatening their neighbour and there is a breach, but secondary to that there is not to cause nuisance and if the breach involved something that's different from the mainstay of the allegations, then under the guidance that's a factor to be taken into account.

The case of *Willoughby* is very good in terms of considering broadly the objectives in terms of what the committal's there for, the punishment, but taking into account the aggravating and mitigating factors in the case. Very often there's a gradation. For your first breach you're likely to get a suspended sentence, second breach you get a short shock sentence, and then it goes up in steps from

that. In terms of *Willoughby* there was a very heavy sentence imposed at the second instance of breach and that was halved by the court of appeal.

One can also, and it's not something that people do very commonly, apply to purge one's contempt under CPR81.34 and I've only heard of one person doing it - I think it was Michael Paget in a case involving a farmer who kept refusing to remove various items from his land, but I don't think the High Court were very helpful when he attempted to purge his contempt.

Andy Lane: I think there was also a recent case - it wasn't a housing case - where I think the Court of Appeal decried the judge's approach to it by saying that inviting the person there and then to say sorry is too early. It really has to come from the contender, it should not come from the court, it has to be a genuine sense of contrition.

Can I also just say that Her Honour Judge Hammerton, who I think is now retired, reminded me of a case of *Hammerton v Hammerton*, ironically, neither of which was her, which says that you shouldn't deal with committal proceedings in the sense of having the final hearing at the same time as possession proceedings. It used to be the practice, and I'm sure we've all been to these hearings, where you'd have your possession trial, one, two, three days, and at the end of it you'd say: oh, by the way there is a committal aspect as well because this person also breached No 1, 2 and 3 of the injunction, can we now deal with that, and normally the landlord didn't really care about it because they were hoping to get the outright order. You shouldn't deal with it at the same time and *Hammerton v Hammerton* makes it quite clear they should be dealt with separately.

Ed Fitzpatrick: That's interesting because very often you get a trade-off - we won't defend the possession claim if you don't nail us to the wall on the committal. But it is right there are a couple of cases to do with how seriously you must take a committal. There has to be a proper hearing and if someone needs representation they should have an opportunity to get representation, and there have been quite a few cases where the higher courts have decried knee jerk judges in the county court.

Regarding terms of issues of capacity, this is obviously the first thing we have to consider where we're faced with clients facing an injunction, and *Wookey v Wookey* is still good authority. The question is whether the respondent understood the nature and requirements of the order sought and it was not to be granted if the respondent is incapable of understanding what he was doing, or that it was wrong. It's been held since that it's not a requirement that they understand in great detail the nature and extent of the court's jurisdiction, as long as they understand the requirements as to obedience in terms of the order. There is a case I've cited in the notes, *Fairweather v Commissioner of Police* which is fairly common where you have a situation where someone's suffering from a serious personality disorder. The result of that is they're unlikely to be able to comply with an injunction, but if otherwise under the *Wookey v Wookey* guidance they understand enough about the order and what they are required not to do, that in itself is not enough to mean that the court should not make an order. You get in difficult situations where sometimes the only thing to do is to consider moving from the property or not resisting a possession claim to prevent someone continually breaching orders and being sent to prison.

The other issue, and again it's dealt with fairly extensively in the notes, is where you have a very vulnerable defendant and the central issue in terms of the whole possession claim, never mind the injunction, is whether or not they require a litigation friend. Obviously we know that no one should take any steps in the proceedings if there is that requirement, and if it's raised as an issue nothing really should happen in the case until the court's dealt with it.

I had a recent case where the joint expert in the case came back and said this person lacks capacity, very definitely can't understand the nature of these proceedings, not able to balance the evidence. In that case the landlord's representative disputed that and they got in touch with the psychiatrist who had treated the individual for some ten years - everyone agreed that he suffered from schizophrenia, but it was the extent of that condition - and the consultant psychiatrist formed a completely different view. He said, well actually, no, he's got capacity. He understands the proceedings, and he can make decisions in the proceedings. Now in those circumstances what has to happen is that you have to get it listed before the court, and it would normally be as a preliminary issue, to have a hearing for an assessment as to capacity, and the person who assesses that is the judge at the hearing. The final issue as to capacity rests with the judge, they're bound to take into account the medical evidence and be guided by it, but they don't necessarily have to follow all the findings of a particular medical report. There are a number of decisions on it: *Masterman-Lister v Brutton* and *Evesham and Pershaw Housing Association v Timothy Werrett*.

I think what people sometimes think is that if they get a certificate of capacity that's it. Very often the claimants might say, well that's fine. We'll agree to papers going before the court and to a litigation friend being appointed. But they are entitled to say, well we don't, and to request or require such a hearing. Again I've pointed out in the notes that in relation to the case of *Croydon v Moody*, quite an old case, but worth reflecting on, where it was held that psychiatric evidence is relevant if there is a prospect of the defendant being treated so his behaviour improves so that the antisocial behaviour ceases subject to timescales involved. In such cases consideration has to be given as to whether or not further support could be put in place, so that perhaps through support from the community and psychiatric services that can address ongoing behavioural issues.

Obviously if you do get a litigation friend involved, and the official solicitor in particular, in some cases where the psychiatric evidence is all one way and the ongoing nuisance is all one way, you will get a report saying that this client is not fit for independent living and they shouldn't be in the property and there is no floating support that can rectify or remedy the situation. In those circumstances the litigation friend, and particularly the official solicitor, may form the view that first of all it's not going to be productive to put your client through a trial, put the client in the witness box, and may also form the view that you're not in a position to challenge the claimant's case. In terms of what happens then, you can have a bit of a battle, if it's a housing association, between the housing association saying we need to get possession and it's much better to get a short order of 14 days because social services and community mental health won't do anything - they haven't done anything for two years - until we obtain an order. What Lord Neuberger says, in *Pinnock*, is obviously applicable to Article 8 - which if we're talking about discretionary cases is weaved into it.

In terms of such tricky situations what sometimes you can do is get an order which is built into a provision that allows you to put pressure on adult social services and community mental health to ensure that within a timeframe they carry out the necessary assessments to seek out and identify alternative accommodation. We know that in terms of Article 8 you can come back to the court after the possession stage, *Ministry of Justice v J*, if the circumstance are such to make an application. So you could have an application to stay the execution of the warrant and perhaps you could even have a witness summons requiring someone from community mental health team to come to court. In one case I was involved in we had to get a psychiatrist from the community mental health team to come to court to actually address and consider the issue of alternative accommodation. Up to that point they were simply saying: well why doesn't the court make some kind of an order requiring him to take his medication, and were not recognising the situation.

Andy Lane: I think J v Ministry of Defence is a good authority to cite, but I think it also needs to be remembered that if you've dealt with proportionality at the substantive hearing, unless there's been a chance of circumstances it's not there to be raised again to justify a suspension of warrant for example in a discretionary ground case. If it's never been dealt with at the substantive ground, fair enough, but if you've deal with it, unless you can show a change of circumstances, a landlord would be able to resist such a challenge on the basis that we dealt with that at the possession hearing. The fact that we are now just simply four or five weeks on doesn't make any difference and doesn't allow you to revisit that issue. If you don't like what the judge said, appeal.

Ed Fitzpatrick: I clearly agree with that. What I'm contemplating is the situation where the possession might be resisted, you're trying to get a long stop on the order taking effect but then there's a change in circumstance in terms of what is contemplated as a managed move from the property just doesn't happen for whatever reason. So I think if you haven't already argued the point you are entitled to go back, and some judges are quite flexible on that and some claimants who have had difficulties for years will be quite amenable to such fairly creative orders and reserving the case to a particular judge and saying: well we don't want this to happen but if it does we'll come back.

I know the main focus has been absolute grounds, but in relation to your old discretionary grounds for possession very often what the courts are all burdened with is the citing of myriad authorities going back many years. Nowadays quite helpfully a lot of the cases are summarised in the headnotes of the housing law reports and where it wasn't enough to have the many authorities, often it's well worth looking behind the authorise that are cited. The one that's probably cited most is *Lambeth v Howard*, 33 HLR 58 where Lord Justice Sedley talks about an outright order being required where the effect on the neighbours cannot be undone, the shadow of the past. That was a case that involved the defendant stalking his neighbour's daughter for a period of time, and that's often cited in situations where you have problems with music being played every other Saturday night. So I think it is important to look fairly closely at the facts.

The two authorities that really summarise all the other authorities are *Manchester City Council v Higgins*. In that case the court says that when you're considering the question of making a possession order, at the same time looking at generally the same factors, you can consider the whole question of whether to make a suspended order, and the court talks about you looking to the future and there must be a sound basis for hope that the anti-social behaviour will cease. And then there was a case of *Sandwell v Hemsley* where the court ran with that and talked about a situation where if you got convictions the more serious the offence the more serious the breach, conviction, several offences, more serious. But it still it concluded that there must be cogent evidence to support a sound basis for hope that the anti-social behaviour will cease. In that case Lady Justice Arden does comment that if you have this sort of criminality, and in *Sandwell* it was a case where he was innocuously growing his own cannabis and was convicted on a number of occasions, she says it will only be in exceptional cases that the court will make other than an outright order. That at times has been elevated as a principle. If there's any conviction the court will only in exceptional cases make an outright order.

The most recent Court of Appeal case that goes through and picks these decisions is *Birmingham City Council v Ashton* and again it contains a very good summary of the cases that previously applied. That was a case where the court made a suspended possession order and that was overturned by the Court of Appeal, but if one looks at the facts there are some fairly seriously behaviours, such as the defendant, who did have mental health problems, brandishing a baseball bat in an aggressive manner outside the flat; threatening abuse at a neighbour; smashing a concrete block; and waving a samurai sword above his head. So again one has to look at the seriousness of the offending there. But in that case Lord Justice Tracy approves of the approach in *Higgins* and says the onus is on the defendant and

accordingly there must always be a sound basis for hope that the anti-social behaviour will cease. That is set out very clearly at para 30, but then, later in the judgment, it shifts a bit and he says that you have to provide cogent evidence to show that what can generally be categorised as anti-social behaviour will not recur or will be unlikely to do so. So on the face of it that's ratcheting it up a bit. That's harder for the defendant to demonstrate than the approach in *Higgins*, so obviously I would advocate relying on the earlier part of the judgment and referring back to what was a full review of anti-social behaviour discretion in the case of *Higgins*.

The other case I mentioned in the notes is *Greenwich v Tuitt*. That was a typical case of anti-social behaviour where it seems to have been all the behaviour of the defendant's son and I think the arguments were to say that he's not misbehaving any more, and I will kick him out if he does anything. But that was soundly rejected by the Court of Appeal and there is reference to the pusillanimous contents of the defendant's witness statement, which is probably a little unkind, and says that the defendant was effectively in denial and that was something that the judge rightly placed considerable reliance on both in relation to reasonableness and suspension. To reiterate the point, in terms of suspended orders it is important from the start that one is realistic in terms of what one denies and what one admits, and in terms of the way the case is going, or else from the very start it would be said that you're not remorseful in relation to the behaviour and you're not constructive in terms of looking to the future and a suspended order is all about looking to the future.

In the notes I've dealt with the fact that at possession hearings it's often said, based on various cases including *Shrewsbury v Evans*: Well, in terms of what's going to happen to this defendant, they'll make a homelessness application, they've got kids, you shouldn't speculate about what's going to happen. In another case, *Lewisham v Akinsola*, which is a very odd case if anyone reads it, Lord Justice Sedley refers to the fact that if it's manifestly obvious that a homelessness application will fail or succeed then that is something that could be taken into account. In terms of the operation of s191 it's remarkable how positive people acting for the claimants are about the chances of your client, who's had five years of anti-social behaviour, breaches every order, turned up drunk at court, threw things round the court, say that they've got a good chance, they're vulnerable, who knows what will happen. So I think that's something that I think is worthy of a challenge to say that if it's an open and shut case it's a factor. Obviously it won't be too big a factor, but it should be a factor and looked at in terms of all the circumstances.

I will leave hearsay, but again the notes set out the very important point that all too often these days we have a situation where we get anonymised witness statements and we don't have live evidence. We've got an anti-social behaviour officer with a statement with exhibits with second hand hearsay in it. It is important, and what it comes down to is people say: well there's no point because we know that under the Civil Evidence Act s2 it is admissible and therefore even if they haven't served hearsay notices it doesn't make much of a difference. The point in *Moat Housing* is that in considering the evidence and considering weight to be attached one does look at s4(2) and very often there's no justification for not obtaining proper witness statements and not having full and proper records before the court. Obviously there will be serious cases where there have been actual threats and violence and you will never win an argument to say you should be able to call someone who has provided an anonymised witness statement to cross examine them. It's also a bit pointless if you've got nine witness statements detailing beautiful diary record sheets as to anti-social behaviour then to say: we want to bring the two witnesses who haven't come forward to court and cross examine them. In other cases certainly claimants should be required to provide proper hearsay notices and then you can make a request in the right case to ask for them to come to court, and if non-attendance and not producing

a witness statement is not justified then obviously that should go to the weight the court attaches to it ultimately.

Finally, remember that we have the Pre-Action Protocol for Possession Claims by Social Landlords. I was going to say that I was looking at it to see whether there is any great public law protocol defence in relation to absolute orders, but sadly under s2.13(b) it says that in cases other than those brought solely on mandatory grounds the court can adjourn, strike out, dismiss claims, but not in cases brought on mandatory grounds. And then after that there's the section we have which says what they should do in relation to cases brought on mandatory grounds.

Chair: Thank you very much to both of our speakers. I would now like to invite questions.

Lou Crisfield, Miles and Partners: I just wanted to know how successful people have been in getting clauses in suspended possession orders that require some sort of scrutiny by the court if there is an alleged breach and the landlord wants to evict. I have had quite a few cases recently where the suspended possession order has been made and I've not been involved and then it's at warrant stage and the allegations are very trivial and the defendant had no opportunity whatsoever to rebut them or to have that scrutinised at all.

Ed Fitzpatrick: If this is a case where they attended the possession hearing and made admissions I think you're in difficulty. If you've had a hearing and obviously the court has had to consider and make findings, there would be a number of findings made in order to justify the court saying the grounds for possession are made out and it is reasonable to make the possession order. So the issue is whether or not you've breached it, so you're limited to the question of whether or not there has been a breach. Obviously you can challenge that factually if there hasn't been a breach. In terms of going back and saying, well actually we've got other arguments, I think if you don't attend the hearing you ought to apply to appeal if it's manifestly wrong, but the difficulty is it might be that you don't like the terms of the order, as too restrictive. You can apply to vary it under the Housing Acts 1985 and 1988 so if there's something in it that's not quite right you could have an opportunity to vary it, but you will not change it. You could wait a year or so and then go back and say well some of the clauses are not necessary.

It's very common to have a clause - especially with vulnerable defendants - to say that before a warrant for possession is applied for the defendant will be notified seven days in advance. There are some orders that I have heard - realistically I don't think you'd get one now - that have a requirement that they come back to court and prove the breach.

Andy Lane: Well you do still get postponed orders, which was obviously the rather panicked effect to tolerate a trespasser nonsense. Most courts don't bother with that. There are still a few courts outside London that have not followed the debate and still do postponed orders which, of course, would allow the matter to come back. I have certainly agreed suspended orders which make a provision for not going back to court until we've alerted the solicitors of any alleged breach, but we would only ever do that - and I would certainly only ever advise my clients to even think about that - where the defendant was vulnerable, and it was quite obvious that it was a sensible thing to do. We had to make the possession order, because unfortunately the neighbours were suffering, but there were genuine issues which hopefully would be addressed and that seems to me a very sensible thing to put in. You could either do that at the time or, as Ed says, you can apply to vary the order and say: we're not particularly concerned about the length of time or the terms, save that we wouldn't mind a term saying that you will let us know first and that, in many cases, I would have thought acceptable if the tenant is vulnerable.

Ed Fitzpatrick: One of the difficulties you always have is that you close the file, unless you're prepared to babysit the file for a couple of years.

Julian Becker, Hansen Palomares Solicitors: I have a question about the timeframes for reviews involving local authority secure tenants as well as housing associations that have a reviews procedure. The timeframe seems very short to actually consider and gather evidence. I know that when I do homelessness reviews I always insist on a response to my subject access request and time to consider the full file before I make final representations. It doesn't seem as though five days is enough days for them to respond to the subject access request, much less for representatives to consider and gather evidence in response.

Andy Lane: I think that's a very good point and I think failure to get the full details may be one of the reasons why the local authority or the housing association would be well advised to allow longer if they can't, for any reason, give you the housing files as required. Although, remember we're talking about absolute ground of possession so, in other words, although, of course in some cases there may be a history much wider than the serious offence or the s1 breach, or the closure order at fact, in many cases there's not, or not a great deal more. Therefore what you will want to know is first of all obviously the validity of the notice, although that may be later a defence to any possession claim, but you're will want to know about whether the condition is satisfied - if it's a serious offence when were they convicted, and what of? - and you can check that out from Schedule 2 of the Housing Act 1985 and that will be a yes or no answer so that should not take long. In terms of whether it's appropriate then for the landlord to go through the absolute ground procedure, it seems to me that first of all you will want to have their policy, because that seems to be absolutely crucial in this area. And, yes you're right, there may be cases where what the landlord is saying: Whereas in other cases we may have let this slide or we may have gone through a discretionary ground, in this case because of the history of problems we've had with this person we decided enough's enough, and in those circumstances you're right.

Obviously what you're not meant to be doing is having some kind of three day trial at a review process, but it does depend on how the landlord puts its case which is why I say that if I was acting for tenants I would want to look very closely at the notice, not for whether it's in the prescribed form so much, but what reasons the landlord is giving for using the absolute ground. Not just because you satisfy condition 1 - well that's almost a given - but why are you using the absolute ground. As I say, it may sometimes be very straightforward. Just to give you one example, the difficulty in a recent case involved someone who had a serious offence, didn't deny they had a serious offence, issues of disability were quite properly raised but he accepted that he was an alcoholic and actually he said that since he'd been to prison he was now OK. There was really no defence put forward that would have justified an adjournment and using 55.8 sub para 2 the Judge had to make an order. But that's in a sense quite an easy case because it was purely based on the serious offence, and therefore we didn't have to go back over the history - and he had, incidentally, gone through a review as well and West Kent Housing Association had done a very good and clear review process, and had - and this is what I always say to housing associations and local authorities - whatever you do, a bit like an ASB claim normally, front load the case. Do a witness statement with your claim exhibiting the policy and making it quite clear why you feel it's appropriate to adopt the absolute ground, and obviously that may be informed by the policy. It just seems to me that helps a lot because obviously it narrows the issues as to what the potential debate is about.

I used to do duty advice desk before coming to the bar in Oxford and Banbury - and it's the kind of thing you'd just raise. We didn't have the Equality Act then but you just raise anything to get the adjournment. So I do think for the landlord, and I appreciate that most of you are going to be acting

for the tenant, but for the landlord it's sensible to frontload their claim and have a good witness statement - doesn't have to be more than two or three pages - setting out exactly why they've decided on the absolute ground. If they haven't got that you may well have the opportunity to say, well, we accept that the condition's satisfied - it's a matter of fact - but maybe there is a public law defence as to why have they decided, in this particular case, go through the process, or my client tells me they knew nothing about a review process, they were never advised of anything, or they asked their officer whether they could have a review of it and although they didn't put it in writing they did ask and therefore is that really a fair process given that it was quite clear to the landlord. Whatever it is, but it's certainly enough to get your adjournment. But I do take your point in some cases it may be the landlord is well advised to extend the time - and as I say, if it has to go past the time provided in the notice I don't think that'd be a problem for the landlord ultimately and it would be incredibly unfair if that was taken against them if it was done for the purposes of allowing proper information to go to the tenant and their advisers.

Nik Nicol, 1 Pump Court Chambers: Just on the last point you were saying about your clients front loading their claims for possession. Can you please stop them having particulars of claim which say: See the witness statement. Another is: We rely on all 157 allegations, all of which are identical. Can you please get them to bring out a few sample allegations so we can actually get moving. What I more wanted to say was that this is a quintessential area where you've got to decide on a strategy to start with. You've been talking about litigation and often what happens at trial - you're barristers, of course you do - but if I end up in an ASB trial I think I've failed, because the risks at an ASB trial, apart from having to put your client through it, are not worth it. If you are faced with 157 allegations, take a realistic view of it. You've got to tell your client that you can't deny it all and say it's all lies. I have had a couple of cases where there's just one complainant and you can defend it on the basis that this never happened, or it's been exaggerated, but most ASB cases you can't do that. If you know at the end of the day your best result is a suspended order you've got to aim for that from the very start.

There will be cases where you'll want to go through the full procedure because that will give your client time to show they're a good tenant, but apart from that you've got to say to yourself: How am I going to get a suspended order out of this? What medical evidence am I going to need to demonstrate not only what difficulties they've got but how they're going to be managed in the future, why they weren't in the past, why they're going to be managed in the future, and everything's got to be aimed at that strategy. And if you hit your strategy right you'll be able to persuade the landlord to concede a suspended order, you won't need to get it from the court. You can get that in good time and settle your client's nerves and get them into a good place. A lot of the problem with many of these clients is they're so wound up about what's happening that just makes it worse. If you can calm them by getting them in a good place that's going to be better.

Just a couple of things running on from what you said. Hearsay, yes, that's a big bugbear. I had a case where the statement said: She came into my home, sat on my sofa, I lifted her up physically and threw her out. The housing officer then says: This person was much too frightened to come to court to talk to her. It just doesn't follow. I have actually had one case on a mandatory ground which I do remember the broad details where the client was convicted of having child pornography and bothering a young girl on a bus. So they took proceedings on the basis he had been convicted of a serious offence. The fact was that he lived next to sheltered accommodation, there weren't any kids within a mile and therefore there wasn't really a basis for it. We put this argument to the panel and they conceded.

Andy Lane: Just on that last point Nik - obviously I brushed over it by saying there are locality provisions, but in broad terms the locality provisions are that it has to be a matter that happens in the

locality, but also it can be involving people who do live in the locality so if you have a go at your neighbour in a shopping centre, even though that's three miles away from your home, that could still be caught. But you're absolutely right in the case you give.

I would say that I don't draft things and say: Please see attached witness statement, but I may well draft things that say: Please see appendices and I'm actually a big fan of including the allegations in there, so it may be seventy odd allegations, but the sensible thing is actually, in directions, to say that the claimant will select 15 and it will be 15 upon which findings are made. And, as you rightly say, a lot of them are fairly repetitive. I did one on Friday where it's the same allegation every time. The guy keeps swearing over the phone and he wasn't having a go at the neighbours, but the neighbours could hear this and: Oh, for God's sake Mr So and So, could you just quieten it down. He made no admissions in his defence apart from having a go at the girlfriend, he made no admissions in his witness statement and suddenly, it's one of those cases where you say to him: Mr So and So, you accept it's causing a problem for your neighbours don't you? Yes I do. You accept it's been happening even last week? Yes that's right. And you turn to your opponent thinking: Did he tell you this?

You're absolutely right. It seems to me, and obviously, as I say I don't really do this work any more for tenants and I appreciate there may be legal aid issues of course about this, but you really need to see the person who's going to be conducting the case prior to the defence because if you can get a good defence, and you do see some excellent defences where it says: Yes, there have been problems, yes it's inevitable, we accept - although it's got to be the court decision - that it's a suspended order, but there are good reasons why it should be suspended and not outright. That's what the issue really is. Let's get to the meat of the matter. It's not fair on the neighbours to have to live next door to somebody who's doing that and is the judge satisfied when he says to me: I'm going to have to deal with my anger aren't I? Yes, you are Mr X, but what are you dealing with? What are you doing about it? And we get to the cogent evidence in the *Birmingham v Ashton* and so on. So I think it is about - and I know you were saying earlier about people coming to you early enough - a lot of people don't come early enough, and I totally agree that the moment has passed. But if you can get them early, get them to be realistic. If they have done it, please get them to admit it. If they haven't done it, fair enough. The court will often give you a chance.

Last thing I would say is on drug cases, and I say this generally, because as I say I do primarily work for housing associations, particularly some of the ones in East London around Poplar, I will often say to them this is an SPO at the first hearing. You know, I've got some rubbishy defence here, but it's an SPO and actually those are quite useful because, let's be honest, unless you're really stupid you're not going to be growing cannabis again in your flat for a good long while, so you're probably not going to have too much difficulty complying with it. For example, I did one recently and it was the boyfriend that was the problem - we accept you're probably not too involved in growing 60 odd plants, even though you say you didn't notice it was happening, and you were sleeping in the living room and a lot of lighting in the room. But it's the boyfriend so we'll exclude him so he's not allowed to be at the property and that's fine, we'll do an SPO for a year and let's hope it's turned the corner. The landlord's just as keen in those kind of cases as tenants are to retain the property. They don't want the property back on their lists. Where they have difficulty is, I think, is those where they have tried often over many years to try to deal with the matter and it just hasn't stopped and those are the ones where they're saying: well, what do you want us to do? And it may be the tenant is able to show that they have finally had an epiphany and realised that it can't go on like this. Again, it may be that you accept that, but my advice to housing associations is to be realistic and in probably half of the cases I would suggest SPOs. And if they breach it you save a lot of money.

David Foster, Foster & Foster Solicitors: We do many defence cases on anti-social behaviour. Can we talk about the other appellants in these cases, the legal aid agency funding? First of all, do colleagues have cases where the legal aid agency asks for another member of the family who is not the tenant, but living at the property, to make a contribution towards the costs and do they have an interest in those services? And next question would be committal proceedings - obviously that now has to be done under a criminal contract rather than a housing contract in fact. Are colleagues trying to get a criminal contract, or referring cases to criminal solicitors? And finally on the review cases, obviously there's no court proceedings at that stage, are colleagues doing these cases under legal help?

Ed Fitzpatrick: I think I can deal with some of those points. If you're trying to get a solicitor to come along to speak you're lucky. In terms of the committals, you have to get exceptional criminal funding.

Chair: You can run the case if you have a criminal contract, but if not you can do it under civil contract but you have to apply by individual case

Ed Fitzpatrick: You have to apply per individual case - I think it's referred to as exceptional funding but there's a discretion to run it and I've certainly done a couple of cases with solicitors where the rates are even lower than EA rates, where there's an injunction on a committal, but it has gone through.

Chair: There has been a Freedom of Information Act request about how many of these cases are being won so we're having some correspondence with the Legal Aid Agency about figures and how many of these individual case contracts are being granted and we will bring that back to HLPA.

Ed Fitzpatrick: I think, from talking to judges, that there has been a big increase in people being represented at committal hearings which is persuasive as a result.

Andy Lane: I should say there has certainly been a big increase in delays and adjournments, so from the landlord's point of view it's being adjourned time and time again because the courts have very specific requirements, not just about public funding and advising people about their rights and seeking public funding, but also in terms of, for example, publicising the fact of the hearing and, for example, I've had cases in London where they've had to adjourn it because it hadn't been publicised, and it was meant to be publicised on the board. We had four or five different hearings for the same person, on the odd occasion when he was allowed out he'd breach again, so from a landlord point of view it's not satisfactory either because it actually is leading to more hearings, although it has to be said that my experience of social landlords is that most of them aren't that interested in the hearing anyway insofar as they proceed with injunctions under s1 almost as a test pattern. If you can comply with the injunction, great. If you can't then we'll get the possession. We're not interesting in imprisoning people. If they really can't behave with the threat of prison hanging over their head we might as well go for possession and say, come on folks, what is going to persuade you to behave. I think on your other questions, and obviously I'm not a legal aid practitioner, but I would have thought the answer in relation to the review is probably very similar to the Reg 8 hearings that no doubt a lot of people here do and I suspect it is under legal help. I can't imagine it's anything other than that to be honest with you, but again I'm not probably the right person to ask. Can you remind me of the other part of your question?

David Foster, Foster & Foster Solicitors: The example would be where the tenant was a sole tenant.

Andy Lane: I think if there's a conflict of interests - let's say for example the adult son is maybe one of the perpetrators of the alleged incidents. I don't think they really ought to be a litigation friend to

be honest with you and I think that there really is a factor. I have had a couple of cases recently where I've wanted to query the litigation friend as to whether they're actually acting in the interests of the defendant because often it is a household member who's the problem more than the actual tenant. Maybe the tenant can genuinely not control the partner or lodger or whatever, but I can't imagine that one of the perpetrators of some of the acts should be a litigation friend, let alone have to make a contribution. I think it's a very good point about the conflict of interest.

Sarah Pearce, Southwark Law Centre: Is there any way we can raise this issue of other people in the property having to make contributions to the legal aid agency? You have to be very specific about how much this client is going to have to pay themselves but then you say when you've got an adult son or daughter who's working I'm afraid I can't give you an idea what they may be asked to pay.

Vincent Davis, Springfield Advice and Law Centre: It has only happened to me very recently that I've had a client whose father was asked to pay a contribution towards the legal aid. He was asked to pay a capped contribution of about £2,500, but my understanding from looking at the guidance is that the applicant for legal aid cannot have their legal aid certificate revoked if another person living in the house does not pay a contribution. What the final effect is when you come to claim the bill from the legal aid agency I'm not quite sure. Presumably they don't pay the whole of your bill, but fortunately in my client's case she got a costs order against the landlord anyway so it wasn't an issue for her.

Contributor: Has anybody else come across the issue of getting a costs order against the other side where they are saying that they don't have to pay if your certificate has been revoked. Not revoked from the start, but on the means reassessment that the Legal Aid Agency dreamed up towards the end of the case, the client didn't give the information they requested because the case was virtually over and there was a costs order. The certificate was then revoked and the council are now saying that they don't have to pay the costs because the certificate was revoked.

Andy Lane: They're wrong. I can't give you chapter and verse but I've had a case involving a private landlord where an order had been made by default in proceedings and they had to pay the costs of the proceedings and the four final hearings less some damages and the certificate was revoked because of a change in means and failure to cooperate. But we fought to enforce the costs order against the private landlord so the fact that it's been revoked makes no difference.

Chair: A quick legal aid update. The legal aid group are meeting with the Legal Aid Agency to discuss the future of housing law legal aid contracts tomorrow so we'll feed back if they share any information of interest to us. And, as I've already said, please do report legal aid issues to me. If I don't have issues to raise, I can't raise them on your behalf, and in particular the Legal Aid Agency's position at this moment is that CCLS is working wonderfully so if that's not your experience please do give me examples because, again, when we just say members have complained generally they don't listen whereas giving cases does help me.

Thank you again to our speakers and thank everyone for coming. Just to let you know the next meeting is on 20 July on the topic of Judicial Review and Housing.