

ANTI-SOCIAL BEHAVIOUR ORDERS AND POSSESSION CLAIMS

Key points:

- When considering the reasonableness of making a possession order a court should not consider the availability of other remedies
- Where an injunction has been obtained that is something which a court should weigh in the balance in deciding whether to suspend any possession order
- Landlords should be clear as to the purpose they believe obtaining an injunction will serve
- The fact that an ASBO has been made does not preclude the making of an outright possession order

With the rise in Anti-Social behaviour orders (ASBOs) they increasingly feature in possession claims.

How are they considered?

Available injunctions not relevant in making an order

When deciding whether to make a possession order on a fault based ground courts are given a wide discretion - only making a possession order if persuaded that it is reasonable and then deciding whether it should be outright or not. In considering reasonableness the courts consider all the circumstances of the case. However, this broad discretion does not entitle courts to consider the availability of other remedies (such as injunctions). This was confirmed in NEWCASTLE CITY COUNCIL v MORRISON (2000) 32 HLR 891 when it was held that a recorder was wrong to see the question of reasonableness as turning on the notion that there was an alternative and, as he thought, more appropriate remedy available. May LJ found that the comments of Ralph Gibson LJ in SHEFFIELD CITY COUNCIL v JEPSON (1993) 25 HLR 299 applied to cases of anti-social behaviour:

"although the authority could have obtained an injunction rather than seeking possession [there is] no reason why a council should be required or expected to take that course. It is in the public interest

that necessary and reasonable conditions in tenancy agreements of occupiers or public housing should be enforced fairly and effectively".

Injunctions should be considered when considering reasonableness

However, it is right to consider the fact of an injunction when the court exercises its discretion as to whether to suspend a possession order. Kay LJ commented in CANTERBURY CC v LOWE (2001) 33 HLR 583 at 590, "*The issue of whether to suspend must be very much a question of the future. There is no point suspending an order if the inevitable outcome is a breach. Any factor which is relevant as to whether there will be future breaches must, in my judgment, be relevant to the question of suspension. This would include the fact that following an injunction things had considerably improved or that a person is likely to observe an injunction if one was granted at the same time*".

ASBOs

What then of ASBOs? In the County Court decision of DEVON AND CORNWALL HOUSING ASSOCIATION LIMITED v MORGAN 2002 3 CL 418 a District Judge declined to make a possession order on the basis that an ASBO was in place and that breach of such an order could lead to arrest and punishment. This decision was appealed successfully. The Circuit Judge found not only that the existence of an ASBO was not a sufficient reason for declining to make a possession order but that such an ASBO was an indicator of those cases where a possession order was reasonable and necessary.

In LONDON AND QUADRANT v ROOT AND ANOTHER [2005]EWCA Civ 43 the Court of Appeal did not go that far. Ms Root ("R") (the sole tenant) resided at the property with her three children under an assured tenancy. Contrary to denials R's partner "B" (the father of her youngest child) also resided at the property. It was alleged that shortly after R moved into the property B began to operate a car scrapping business at and from the property, carried out works to cars at anti-social hours and was abusive and threatening to neighbours. The threats included threats to kill those that co-operated with the landlord and threats and intimidation towards the housing officer responsible for the location. Further, the exterior of the property was in the words of the Trial Judge "a tip". After

numerous letters to R and home visits, possession proceedings were commenced on the basis of nuisance and/or breach of the tenancy. Shortly before the original trial date it was alleged that B had assaulted his neighbour because of the assistance that he had given the landlord in bringing the case. The landlord sought and obtained an ASBO primarily excluding B from an area surrounding the property. The ASBO was sought not because it was felt it would solve the problems of the tenancy or would avoid the need to obtain a possession order, but to try to provide some protection for those that had assisted in the bringing of the proceedings – only two individuals had been willing to make other than anonymous complaints and there was a climate of fear on the estate. The ASBO continued until the date of the trial. At that hearing His Honour Judge Yelton made no finding in relation to the alleged assault (a criminal prosecution was pending) but still felt able on the evidence to make an outright possession order and continue the ASBO. He continued the ASBO because he found that it would (1) provide some safeguard in the period before the warrant would be executed (2) provide some protection from retaliation (3) lessen the possibility of B being re-housed in the vicinity of the property.

On appeal it was argued that had the trial judge properly considered the ASBO then he could not reasonably have made an outright order as (it was argued) the ASBO had largely resolved the problem behaviour that had led to possession being sought. The landlord did not accept that the ASBO had (or could have) been effective in the way suggested and maintained that the trial judge had made the correct order. The Appeal was dismissed - the trial judge had weighed all the appropriate factors, there had been no error in the decision below and further this was a case in which the "shadow of the past" fell to heavily on the present for an outright order to be inappropriate.

Conclusion

In conclusion, when a landlord seeks an ASBO they should be clear what mischief they believe that it will address. In so far as a landlord still wishes to urge that an outright possession order be made then the presence of an ASBO is something that the court will consider. Whilst the mere presence of an ASBO does not mean that an outright possession order should not be made a landlord must be clear as to why such an outright order is necessary.