

Banned behaviour

Anti-social behaviour orders under the Crime and Disorder Act 1998: **Paul Tapsell** examines legal issues raised by recent cases

MORE AND MORE local authorities and police forces are involved in applications for anti-social behaviour orders (ASBOs) under s 1 of the Crime and Disorder Act 1998 (the Act), particularly in respect of juveniles. The higher courts have now had several opportunities to consider this area of law.

Procedure

A relevant authority – defined as “the council for the local government area or any chief officer of police [for] that area” – may make an application if it appears that any person over the age of 10 years:

“(a) has acted [since 1 April 1999] in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself, and (b) that such an order is necessary to protect persons living in the local government area in which the harassment, alarm or distress was caused or was likely to be caused from further anti-social acts by him” (s 1(1)).

The application is made by complaint to the magistrates’ court covering the location(s) where the harassment [etc] was caused, and the court may make an order “which prohibits the defendant from doing anything described in the order” if it is proved that the conditions from s 1(1)(a) and (b) above are met. Any prohibition must be necessary to protect local residents from “further anti-social acts by the defendant”. When determining whether an order should be made the court must “disregard any act of the defendant which he shows was reasonable”.

An authority making an application is required to consult, but not necessarily secure the agreement of, every other relevant authority for the area to be covered by the order.

An order must run for at least two years but either party can apply for the order to be varied or discharged (although, if both parties consent, an order may be discharged before the end of two years).

Breach of an order without reasonable excuse constitutes an either-way offence with a maximum penalty of five years imprisonment, but the sentencing court cannot impose a conditional discharge.

Evidence

ASBOs and the procedure outlined above were considered in *R v Crown Court at*

Manchester, ex p McCann [2001] 1 WLR 1084 (CA), para 31. Lord Bingham CJ held that the applications were civil rather than criminal in nature, so the civil rules of evidence applied but, adopting and quoting dicta from *R v Chief Constable of Avon and Somerset* [2001] 1 WLR 340 (QBD) at 354:

“[a] magistrates’ court should apply a civil standard of proof which will for all practical purposes be indistinguishable from the criminal standard”.

The admissibility of hearsay evidence in applications for ASBOs was considered in *R v Marylebone Magistrates’ Court, ex p C* (2000) 165 JP 322 (QBD) where:

“what was sought to be adduced by the policemen in the witness box was evidence of complaints made by third parties to the police.... If it had been merely intended to prove that complaints had been made then ... this would not be hearsay.... However ... the local authority were seeking to prove that C had acted in an anti-social manner ... if the policeman could only say that he had been told by such persons that C had behaved in an anti-social manner that would be hearsay evidence of the behaviour” (Schiemann LJ at para 15).

However the evidence was still admissible, notwithstanding any failures to comply with the various statutory provisions concerning notice requirements where a party intends to rely upon hearsay evidence (s 2(1) of the 1995 Act and the Magistrates’ Courts (Hearsay in Civil Proceedings) Rules 1998), because of the contents of s 2(4) of the Civil Evidence Act 1995:

“a failure to comply with [the said provisions] does not affect the admissibility of the evidence but may be taken into account by the court — (a) in considering the exercise of its powers with respect to the course of proceedings and costs, and (b) as a matter adversely affecting the weight to be given to the evidence in accordance with s 4”.

Time limits

Because the ASBO application is made by complaint, the provisions of s 127 of the Magistrates’ Courts Act 1980 apply, so there is a maximum period of six months between the date of any incident relied upon and the laying



of the complaint. This can become an issue, either

- where criminal proceedings arising from the same incident are going through the courts and the Crown Prosecution Service is unwilling to prejudice the criminal proceedings by allowing the ASBO application to rely on ‘their’ evidence before the conclusion of the criminal matter; or
- where an individual behaves himself either voluntarily (following the advice set out by Paul Tain, *Anti-social behaviour orders* (2001) 145 sj 36, 19 January 2001) or as a result of bail conditions.

Usually there would have to be several incidents within the six month period to justify an ASBO (a one-off event would not normally satisfy the “necessary to protect ... from further anti-social behaviour” requirement). Often relevant authorities wait, like a gambler or angler, for one more ‘big one’ and so lose the opportunity to rely on the string of allegations six-plus months before which caused their interest to be focused on the individual.

Publicity and confidentiality

As the proceedings are civil the hearing will be in open court and the name, etc of the defendant can be reported regardless of his/her age. There is often a great deal of press interest in any applications for an ASBO, particularly where the defendant is a youth. However the court has the power under s 39 of the Children and Young Persons Act 1933 to order reporting restrictions preventing the identification of any child or young person involved in proceedings. This matter was aired (in a criminal context but equally applicable to ASBOs) in *R v CCC, ex p W, B and C* [2001] 1 Cr App R 7 (QBD) which details the matters to be taken

In brief

Anti-social behaviour order applications are civil proceedings but usually involve proof to the criminal standard.

Proceedings must be begun within six months of the incident relied upon.

There is a 'strong public interest' argument for identifying individuals subject to ASBOs, regardless of their age.

The Home Office guidance document provides useful background information: www.homeoffice.gov.uk/cdact/asbo.htm

into account when determining an application for the imposition of reporting restrictions;

"namely, that prior to conviction there was no public interest and consequently no justification for not making an order under s 39 but, following conviction, the public interest and the interests of the applicants had to be weighed, and the welfare of the applicants had to be considered with great care and circumspection. The judge identified the fact that publicity might affect the welfare of the applicants and their families and that importance was to be attached to the effect of publicity on the applicants . . .

The judge rightly identified the public interest in open justice and deterrence, not in the form of naming or shaming, or as an additional punishment, or because of public disquiet. But the judge was right to identify the strong public interest in open justice and in the public knowing as much as possible about what had openly happened in court. Deterrence, of less weight than welfare, was a factor to be taken into account . . ." (Rose LJ at para 39).

When dealing with an ASBO there is no question of a criminal conviction, so, arguably, any stigma attaching to the naming of the defendant is significantly reduced. Furthermore, if the order is to be enforceable in practice, members of the defendant's local community and to an extent the wider public must be aware that he (or she) is subject to the various prohibitions in the order. Note also:

"the court has a complete discretion to hear anybody in support of, or in opposition to, an application under s 39; *R v CCC, ex p Crook* [1995] 2 Cr App R 212 (QBD) (where the judge heard representations on behalf of the press and the relevant children)" (*Archbold* 2002 at 4-27).

The number of applications for ASBOs will continue to rise and criminal lawyers may well find that many of their 'regular' clients, particularly persistent young offenders, are targeted in these civil proceedings ■

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