

Public Law Newsletter

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Telephone

020 7242 2523

Email

enquiries@hardwicke.co.uk

Practice Director

Amanda Illing

Senior Practice Manager

Daniel Kemp

Practice Manager

Elizabeth Boucher

Assistant Practice Manager

Jack Wheeler

In this edition Brendan Mullee discusses the government's latest attempts to use preventative orders to control anti-social behaviour, in this case, gang-related behaviour and Andy Lane brings us up to date on human rights issues in possession cases.

Hardwicke is delighted to announce that Boyd Morwood has joined chambers. Boyd has developed an exceptional practice focusing on professional discipline, Judicial Review and inquests. He is also known for his personal injury expertise. For more information on Boyd's practice please contact Senior Practice Manager, Daniel Kemp.

Mostly this month we have been . . .

- **John McKendrick** has been in the Upper Tribunal arguing about the appropriate test to grant a stay of the lower tribunal's decision.
- **Barbara Hewson** is busy defending complex cases before the Nursing and Midwifery Council, with a hearing this month lasting 15 days.
- **Clive Rawlings** appeared in the Administrative Court in one of the first cases on the new education duties to released prisoners.
- **Kerry Bretherton** and **Andy Lane** spoke at a social housing seminar on the 16th of September discussing hearsay evidence in possession claims.
- **Barbara Hewson** is chairing the opening session at the Public Law Project annual seminar on 18 October.

Farewell to the ASBO and hello to the GANGBO

Brendan Mullee regularly appears in anti-social behaviour cases. Here, he comments on the likely trends of policy in this area.

"It's time to move beyond the ASBO, we need a complete change in emphasis, with communities working with the police and other agencies to stop bad behaviour escalating that far."

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So said the Home Secretary, Theresa May in her recent speech delivered at the Coin Street Community Centre on 28 July of this year, confirming the coalition's intention to 'bin' the **ASBO** regime. Her speech was pre-faced with the sentiment, "*There is nowhere, not any single government policy, where we need strong, local community action more than in tackling anti-social behaviour ... We must turn the system on its head. For 13 years, politicians told us that the government had the answer; that the ASBO was the silver bullet that would cure all society's ills. It wasn't. Life is more complex than that.*"

Listing the perceived failures of the old regime, Mrs May alleged that sanctions were not followed through, ineffective orders were issued, then breached, and fines issued but not enforced. She concluded with "*People got away with it and the victims knew it.*" Whether or not such a determination is based upon sound analysis is plainly a matter of conjecture. However it would appear that the much maligned **ASBO** is a dead duck. So what is next in the toolbox?

Enter the **Gang Related Violence Injunction** or **GANGBO** as it will inevitably become known. The relevant provisions, referred to below, were enacted in April of this year. The **GANGBO** originally applied to those gang members aged over 18 but by **section 34 of the Crime and Security Act 2010** ("the 2010 Act") its scope has now been extended to those aged 14 and over. Given Mrs. May's criticism of the **ASBO** as being '*too complex and bureaucratic, too time consuming and expensive and they too often criminalised young people unnecessarily, acting as a conveyor belt to serious crime and prison*' it may be illuminating to consider, or be it briefly, some of the statutory requirements for obtaining a **GANGBO** and subsequent enforcement.

By **section 34(1) to Part 4 of the Police and Crime Act 2009** ("the 2009 Act") a court may grant an injunction if two conditions are met. The first condition is that the court must be satisfied, to the civil standard, that the offender has engaged in, or has encouraged or assisted in, gang-related violence. The second condition being whether the court thinks it is necessary to grant the injunction to prevent gang-related violence and/or to protect victims from gang-related violence.

By **34(5) of the 2009 Act** 'gang-related violence' means violence or a threat of violence which occurs in the course of, or is otherwise related to, the activities of a group that (a) consists of at least three people, (b) uses a name, emblem, colour or has any other characteristic that enables its members to be identified by others as a group, and (c) is associated with a particular area. Practitioners in this field will no doubt envisage considerable evidential difficulties arising.

Section 35(2) of the 2009 Act provides that an injunction may prohibit the offender from: being in a particular place; being with particular persons in a particular place; ever being in charge of a particular species of animal in a particular place (presumably in an attempt to address the prevalent menace of the '*weapon dogs*'); wearing particular clothing in a particular

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place or even using the internet to facilitate or encourage violence. Breach of a **GANGBO** could, inter alia, require the offender to report to the police regularly, obey a curfew enforced by an electronic tag or attend anger management courses.

Additionally, offenders may be required to notify their address to particular people, be at a particular place between particular times, present themselves to a particular person at a set place and time and even participate in particular activities. Specifically addressing the sanctions available against offenders aged under 18, **by virtue of section 46A of the 2010 Act** it is provided that where the court is satisfied, to the criminal standard, that the offender is in breach of any provision of the injunction, the court may make a supervision order or a detention order.

There are some limits to how far orders can go. **Section 46A(4)** provides that a person cannot be ordered to stay in the same place for more than eight hours in any day. **Section 46A(5)** stipulates that the prohibitions and requirements included in the injunction must, so far as practicable, avoid any conflict with the offender's religious beliefs, work or education.

So there we have it then, a new statutory tool already in force, arguably replacing the principle elements of **ASBO**. Frankly, in my view, it is difficult to envisage a more complex, bureaucratic, time consuming and expensive process of achieving restraint of antisocial behaviour perpetrated by the young and not so young alike. Admittedly deficiencies and difficulties abounded in the operation of the **ASBO** framework, but notwithstanding such, those of us specialising in this area may soon look back with some affection at its relative simplicity and effectiveness. Given the prohibitions and conditions particular to the **GANGBO**, one may ponder as to whether the new provisions may be described as rehabilitating and restorative, as envisaged by Mrs. May, rather than criminalising and coercive.

Kay-sera sera

Andy Lane discussed human rights challenges to possession claims in our last edition. Here he covers the next instalment in the saga – the ECtHR decision in Kay.

The European Court of Human Rights handed down judgment in **Kay and others-v-The United Kingdom** on the 21st September 2010 and found that the occupiers' **Article 8** rights had been violated in the article's procedural aspect only.

In August 2000 the London Borough of Lambeth brought summary possession proceedings against six people occupying properties which Lambeth had earlier leased to London & Quadrant Housing Trust. The occupiers' primary defence to the possession claim, aside from an argument about their status in law, was that their **Article 8** rights would be breached should a possession order be made. Their defences were struck out in December 2003 and the case thereafter progressed to the House

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of Lords where the original order was upheld and the appeal dismissed. Possession orders were then made by the County Court in April 2006.

The occupiers complained to the ECtHR under **Article 8** that they had been prevented from challenging the possession orders on the ground that, having regard to their personal circumstances, the local authority's exercise of its power to seek a possession order was not compatible with the rights set out in the **Article 8**. The parties agreed that **Article 8** was engaged by the decision to seek possession and that the eventual possession orders constituted an "interference" with the occupiers' right to respect for their homes. The ECtHR considered that the central question for it to determine was "whether the interference was proportionate to the aim pursued and thus 'necessary in a democratic society'".

The ECtHR made a number of findings including:

- An interference will be considered "necessary in a democratic society" for a legitimate aim for **Article 8(2)** purposes if it answers a pressing social need and is proportionate to the legitimate aim pursued (para 65).
- Whilst it is for the landlord to make the initial assessment of whether the proceedings are "necessary in a democratic society", the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with requirements of the Convention (para 65).
- An acknowledgment of a "welcome" development in the domestic courts' "increasing tendency" to develop and expand conventional judicial review grounds in the light of **Article 8** (para 73).
- The situation faced by the applicants in **Kay** has moved on since then because of Lord Hope's exposition of the gateway (b) test in **Doherty-v-Birmingham City Council**, and particularly the ability now to allow "for personal circumstances to be relevant to the county court's assessment of the reasonableness of a decision to seek a possession order" (para 73).

"**Inside Housing**" reported this case under the headline "Tenants handed Human Rights boost". My analysis is somewhat different. The judgment gives an interesting analysis of the law and runs through the post-**Kay** developments in the law (not least on the role of proportionality). It may be argued that it supports a reversal of the existing approach of the courts by requiring them to initiate an examination of the proportionality of the proposed eviction (paras 61, 67). However it seems to me that this decision is very much of its time and, to a significant degree at least, the procedural defect identified has been overcome by reason of the developing jurisprudence in this area.

Of much greater significance will be the Supreme Court's forthcoming decisions on the operation of gateway (a) and gateway (b), which we will report as and when they are published.

George Pulman QC	1971 (1989)
John Friel	1974
Charles Calvert	1975
Barbara Hewson	1985
Karl King	1985
Deborah Hay	1991
Kerry Bretherton	1992
Arthur Moore	1992
Margaret Bloom	1994
Clive Rawlings	1994
Brendan Mullee	1996
Boyd Morwood	1996
Fiona Scolding	1996
Alison Meacher	1998
Alastair Redpath-Stevens	1998
Andrew Lane	1999
Sarah Malik	1999
John McKendrick	1999
David Lawson	2000
Shazia Akhtar	2001
Dean Underwood	2002
Sarah Venn	2002
Diane McBrinn	2002
Ajmal Azam	2006
Morayo Fagborun-Bennett	2004
Robin Jacobs	2006
Laura Tweedy	2007
Amelia Walker	2007

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Hardwicke Building, New Square,
Lincoln's Inn, London WC2A 3SB
Telephone 020 7242 2523
Facsimile 020 7691 1234
DX LDE 393
Email: enquiries@hardwicke.co.uk
Website: www.hardwicke.co.uk