NEIGHBOURS, EVERYBODY NEEDS GOOD NEIGHBOURS: CLOSURE ORDERS UNDER THE ANTI-SOCIAL BEHAVIOUR, CRIME AND POLICING ACT 2014

Introduction

1. In the immortal words of the theme tune to the long running Aussie soap, "Everybody needs, good neighbours". But what effective legal remedies are available when neighbours go bad? As every housing practitioner will be aware, possession proceedings based on anti-social behaviour and nuisance are a notoriously long-winded affair.
2. If you can persuade your witnesses to run the course that is likely to involve a lengthy delay until trial, suspended and/or postponed possession orders, further trials to prove alleged breaches of the same and then applications to suspend warrants, you may eventually get a result. But it takes time, money, and a lot of emotional investment.
3. This webinar will consider an alternative, and often less used remedy: namely applications for a closure order for premises associated with serious nuisance and/or disorder under sections 76-80 of the Anti-Social Behaviour, Crime and Policing Act 2014 ("the 2014 Act").

Context

4. Thanks to the Covid-19 pandemic, we find ourselves living in interesting times, with significant in-roads being made into our personal freedoms and human rights. Few would have imagined just over 12 months ago that under legislation designed to deal with a public health emergency, it would be facto illegal and risk a fixed penalty notice to sit on a bench in a public park or to meet indoors.
5. This week the House of Commons passed the Policing, Crime, Sentencing and Courts Bill 2021 (although the committee stage is now stalled) which amongst other things seeks to give police forces greater powers to intervene in protests, including those that cause "serious annoyance, serious inconvenience and serious loss of amenity", attracting a potential sentence of up to 10 years. Even the suffragettes would likely to find themselves in more hot water than they did if such provisions were in force when Emily Pankhurst was fighting for the right to votes for women.

6. Have our legislators suddenly gone all right wing and draconian on us without us realizing when it comes to property and anti-social behaviour or is it something inherently English about the "English man's home is his castle"?
7. An examination of the steps taken over the past couple of decades in relation to Anti-Social behaviour shows that potentially draconian legal remedies have existed for some time.
8. Under the Crime and Disorder Act 1998, the notorious ASBO reigned supreme for many years and many were handed out (over 110,000 by 2010). They have now been replaced with Criminal Behaviour Order. Whether it was a badge of honour or not, certainly in the early days it was possible to get orders which spanned the whole of England and Wales, until further order, in relation to a whole host of behaviours including loitering in groups of more than 2 persons, or being in a car with certain people, or drinking in public, aggressively begging in public or "behaving in a manner likely to harassment, alarm or distress". Breach of such conditions would result in imprisonment. Overtime, caselaw intervened to mitigate some of the more extreme orders and to balance them against individual freedoms.
9. However, closure orders under the 2014 Act are another arguably equally draconian legal remedy in relation to property rights and anti-social behaviour.
10. In summary, upon service of a closure notice, the premises will be closed to all except normally the lawful occupiers. Upon application for a closure order only 48 hours later in the magistrates' court, the premises can be closed for up to six months (3 months with the power to extend to 6 months) to all including the lawful occupiers. Further, a closure order is made for more than 48 hours of a residential tenanted premises, it can found a mandatory/absolute possession ground pursuant to s 84A of the Housing Act 1985.

Anti-social behaviour

11. Notwithstanding the above and the need for balance between competing rights, anti-social behaviour is an important issue for people who live with it and for those who have to tackle it.

12. What are we talking about when we talk about anti-social behaviour? As referenced above, it can include a whole host of behaviours – as a rule of thumb, if you have to ask whether something amounts to anti-social behaviour, it probably does not!
13. Such behaviours range from playing loud music at anti-social hours, repeatedly banging doors, barking dogs, blocking corridors, revving engines/racing cars/bikes, defacing property, tampering with meters, shouting, swearing, fighting, parking illegally, threatening, harassing, loitering, and possessing/taking/supplying illegal drugs.
14. It can have a real and long lasting impact upon those who are unlucky enough to live with it. I am sure all practitioners will have a case in mind where they saw the real effects of living with what to some people is fairly low level bad behaviour.
15. This is recognised by the Home Office and perhaps explains why the available remedies can be so draconian. The 2014 Home Office Anti-social Behaviour Guidance[1] emphasises the need to put victims of such behaviour first:

    "The legal tests that govern the use of the anti-social behaviour powers are focused on the impact that the behaviour is having, or is likely to have, on victims and communities. When considering the response to a complaint of anti-social behaviour, agencies must consider the effect that the behaviour in question is having on the lives of those subject to it recognising. For example agencies should recognise/consider the debilitating impact that persistent or repeated anti-social behaviour can have on its victims, and the cumulative impact if that behaviour persists over a period of time."

16. The guidance repeatedly stresses that that the victim must be keep informed and in the loop.
17. Prior to the use of closure powers, an Anti-Social Behaviour case review will be convened to consider the use of appropriate remedies under the 2014 Act. Such a conference consists of partnership working between:
    (i) the district council, unitary authority or relevant London borough council for the area;

[1] Anti-Social Behaviour, Crime and Policing Act 2014: Anti-Social Behaviour Powers – statutory guidance for frontline professionals, revised January 2021.

(ii) the police force covering the area;

(iii) the relevant clinical commissioning group in England or local health board in Wales; and;

(iv) local providers of social housing who are co-opted into the local arrangements.

18. An ABC case review will be triggered where there has been "persistent anti-social behaviour". One might imagine that "persistent" would be a high threshold to meet but the guidance provides that "persistent" means just three qualifying complaints of anti-social behaviour within a six month period. A qualifying complaint will be a complaint that is reported within one month of the behaviour taking place. Once the case review is triggered, the assortment of powers under the 2014 Act are considered, including injunctions, and CBOs.

19. In terms of applications for closure orders, the guidance describes the purpose of such applications as:

" The closure power is a fast, flexible power that can be used to protect victims and communities by quickly closing premises that are causing nuisance or disorder."

Application for closure orders

20. As mentioned above, it is a two stage process: closure notice followed by an application for a closure order. The relevant applicants are the Police and Local Authorities.

21. Applications are made in relation to "Premises" (see s 76 of the 2014 Act") and has therefore a wide application. The guidance clarifies that "premises" include licensed premises, those occupied or open, business premises as well as residential premises. The definition of "premises" also includes any outbuildings associated with the premises.

<u>Stage one: Closure Notice- nuisance or disorder</u>

22. The pre-conditions for service of a closure notice are to be found in section 76 of the 2014 Act:

(1) A police officer of at least the rank of inspector, or the local authority, may issue a closure notice if satisfied on reasonable grounds—"

(a) that the use of particular premises has resulted, or (if the notice is not issued) is likely soon to result, in nuisance to members of the public, or

(b) that there has been, or (if the notice is not issued) is likely soon to be, disorder near those premises associated with the use of those premises,

and that the notice is necessary to prevent the nuisance or disorder from continuing, recurring or occurring.

23. It will be noted that the service of a closure notice can be preventative rather than reactive of nuisance or disorder if the closure notice is not served. Such powers are normally used where intelligence has been received in relation to licensed premises, such as pub and clubs, where there is credible evidence of planned trouble associated with a particular event, rather than housing cases. However, this simply brings the power in line with the Police's existing closure powers for licensed premises under sections 160 and 161 of the Licensing Act 2003 for noise nuisance and disorder so it must clearly have been intended to have a wider impact, although it is difficult to imagine the circumstances where it would be used in a residential context.
24. It is also noteworthy that at the service of a closure notice stage, there is no requirement that the nuisance or disorder is serious or persistent (other than it will have been deemed to be persistent for the ABC case review to take place).
25. Prior to the service of a closure notice, the Police must take reasonable steps to inform those who live on the premises, whether habitually or not. So would include people who would be staying at the premises whether as welcome guests or otherwise.
26. However, the obligation to inform about service of a closure notice does not include the obligation to consult the same: see *R (on the application of Qin) v Commissioner of Police for the Metropolis [2017] EWHC 2750.* On the facts of that case, 6 massage parlours in Soho were closed by service of a closure notice under s 76 on the basis that they were suspected of operating as brothels as part of intelligence led police operation. The rationale being that section 76(6) talks about reasonable efforts to inform affected persons that the closure notice is going to be served. By that point in time, the officer should already have consulted under section 76(7) and have the reasonable grounds that the nuisance and/or disorder is made out and that the decision has been made that a closure notice is required. Further the decision held

that when considering an application for a closure order the magistrates should not generally be considering the validity of the closure notice.

27. There is a specific obligation to consult contained in section 76(7). That obligation is to consult any body or individual the officer or authority thinks appropriate has been consulted. The Guidance gives further detail that this should include:

"This should include the victim but could also include other members of the public that may be affected positively or negatively by the closure, community representatives, other organisations and bodies, the police or local council (where not the issuing organisation) or others that regularly use the premises. There may also be people who use the premises as access to other premises that are not subject to the closure notice but may be impacted on by the closure. The method of consultation will depend on the situation and urgency. The police or council will want to consider how to keep a record of those consulted in case challenged at a later date."

28. Pursuant to section 75(5), the closure notice must contain the following:

(a) identify the premises;

(b) explain the effect of the notice;

(c) state that failure to comply with the notice is an offence;

(d) state that an application will be made under section 80 for a closure order;

(e) specify when and where the application will be heard;

(f) explain the effect of a closure order;

(g) give information about the names of, and means of contacting, persons and organisations in the area that provide advice about housing and legal matters.

29. The notice needs to be served by fixing it in a prominent place on the premises and the means of access(section 79). A copy should be provided to the person appearing to be control of or the responsibility for the premises and people who live in the premises or occupy the same. Because of the speed of the process, absentee landlords or mortgagees may not find out about until it is too late.

30. Closure notices operate so as to exclude all but named persons from the Premises for up to 48 hours, which would normally be the occupier. After the service of the notice,

it is a criminal offence for a person to remain in the premises without excuse unless they are a named person.

31. The notice can be cancelled in whole or in part during that time (see section 78 of the 2014 Act).

32. The Court can adjourn and continue the closure notice if it is satisfied that the statutory grounds are made out but can only adjourn for 14 days: section 81(3) of the 2014 Act.

Stage two: Application for a Closure order

33. Careful thought needs to be given to the timing of the service of the closure notice as the application for a closure order to the Court needs to be made within 48 hours. This means that as a matter of practice that a tenant even a vulnerable one may find themselves with only 48 hours to prepare a defence and also to deal with the prospect of being excluded from their home.

34. Further as a matter of practicalities it is a good idea for the Applicant to contact the Court in advance of serving the closure notice to give them advance warning that an application for a closure order is to be made.

35. The legal test to be applied is to be found in section 80 of the 2014 Act:

5) The court may make a closure order if it is satisfied—

(a) that a person has engaged, or (if the order is not made) is likely to engage, in disorderly, offensive or criminal behaviour on the premises, or

(b) that the use of the premises has resulted, or (if the order is not made) is likely to result, in serious nuisance to members of the public, or

(c) that there has been, or (if the order is not made) is likely to be, disorder near those premises associated with the use of those premises,

and that the order is necessary to prevent the behaviour, nuisance or disorder from continuing, recurring or occurring.

36. It will be immediately noticed that the closure order grounds are wider than the closure notice grounds. They include a closure order for disorderly, offensive or criminal behaviour on the premises. "Offensive" behaviour is defined by section 92

of the 2014 Act and it's the much loved anti-social behaviour definition: *"behaviour by a person that causes or is likely to cause harassment, alarm or distress to one or more other persons not of the same household as that person".*

37. Further, unlike its predecessor in title there is no requirement that the nuisance relied upon be persistent only that it be serious and in terms of disorder, the provisions only require that be disorder near the premises associated with the premises rather than it be serious disorder. Similar provisions under the Anti-Social Behaviour Act 2003 required evidence of "persistent serious nuisance" and "significant and persistent disorder" (s 11B of the Anti-Social Behaviour Act 2003 now repealed) to obtain a closure order.

38. In applying for closure orders, what sort of evidence will applicants need to be persuade the magistrates's court that nuisance is serious and disorder such that an order should be made?

39. "Serious" is of course an objective test but it is arguable that it means something that is not merely trivial. The time limits for application are strict and short so applicants will have little time to get their house in order after the service of the closure notice, so it is advisable that preparatory work is carried out in advance of the notice where possible. Applicants will be relying upon at least the 3 trigger incidents that led to the ABC case review plus any other supporting evidence, whether it is criminal intelligence or historic complaints.

40. Applicants will also need to demonstrate the detrimental community impact of the behaviour which is likely to be achieved by the obtaining of impact statements from local residents subject to the behaviour complained of.

41. The obvious difficulty for Applicants is that where there is serious nuisance, local residents are unlikely to want to be identified. A good example of where closure orders are effective remedies are where the premises are being used for drug dealing, this may result in serious nuisance to neighbours from anti-social behaviour in and around the premises, drug paraphernalia and noise nuisance at all hours. However, many local residents may not want to come forward or to be identified out of fear of being targeted.

42. In those circumstances, hearsay evidence or anonymous evidence can be adduced. Closure orders are civil orders and therefore hearsay can be admitted under the Civil Evidence Act 1995. although this will affect the weight given to such evidence, if any: see R (on the application of Cleary v Highbury Corner Magistrates Court [2007] 1 WLR 1272. Although there will be arguments as to weight of such evidence, depending on the circumstances, it can be compelling, particularly in relation to demonstrating the detrimental impact on the community and the necessity for an order to prevent the nuisance/disorder continuing.

43. Further, Applicants need to be in a position to present evidence to the Court as to the circumstances of the occupiers/owners of the premises. In the example where premises are being used to drug dealing, it may be the case that the tenant themselves are vulnerable and have been "cuckooed" and their flat taken over. In those circumstances, the Court will need to be shown what steps have been taken and will be taken to protect the vulnerable tenant.

44. A good example of these problems is the recent case of Taylor v Solihull MBC [2020] EWHC 412 (Admin). On the facts of that case, local authority applied for a closure order following a closure notice under section 76(4). rIt sought to rely on the fact that the appellant had been arrested for a drugs offence and what he had said in interview, and that the police had searched his flat and found drugs and what they said was drug-dealing paraphernalia. The appellant gave evidence claiming that the cannabis found at the flat was for his personal use and that he had been coerced into dealing. A police officer and the local authority gave evidence, and the court admitted anonymous statements from neighbours. The magistrates acknowledged that much of the evidence was hearsay and untested but decided that it was clear that substantial drugs and drug-dealing items had been found at the flat for which the appellant could not give a plausible explanation, and that known drug-dealers had frequented the flat, and therefore the criteria under s.80(5)(a) and (b) were met.

45. On appeal by way of case stated, the High Court (Mr Justice Chamberlain) dismissed the appeal and held that the Magistrates had been entitled to find the case made out. There was no requirement that the Respondent be the person engaging in the offensive or criminal behaviour. As these were civil proceedings, the Magistrates had

been entitled to admit the hearsay evidence and the evidence of the outstanding criminal investigation.

46. In terms of the interesting arguments on the proportionality of excluding the tenant from his home, in an analysis of the proportionality of a closure order, it was not necessary to show that there were no other less intrusive measures that could have been adopted to prevent the nuisance occurring. Such a suggestion had rightly been rejected in *R. (on the application of Leary) v Chief Constable of the West Midlands [2012] EWHC 639 (Admin); [2012] A.C.D. 67*. Magistrates, when considering proportionality in relation to a person's rights under art.8, should consider carefully both the duration of an order and whether it should extend to prohibiting him from accessing his own home. However, they were not obliged to consider and analyse all the possible consequences of exercising every alternative power before making a closure order. Appellate courts hearing appeals on a point of law should not interfere with proportionality analyses of this kind unless an error of law or logic or approach could be identified: *Granada UK Rental and Retail Ltd v Pensions Regulator [2019] EWCA Civ 1032; [2019] B.P.I.R. 1121*. *T*here was no such error in the instant case.

47. In terms of the position of the Respondent to an application, they are unlikely to have had much if any time to present a defence and would be well advised to apply to adjourn (as mentioned the Court only has the power to adjourn for 14 days). As mentioned above, there are obvious difficulties for a Respondent in challenging applications for closure orders that rely heavily upon hearsay or anonymous evidence but submissions should plainly be made as limited weight to be provided to the same.

48. It is fair to say that Respondents may find themselves facing an uphill battle, particularly depending on the Court they appear in front of. Purely based on anecdotal experience, justices seem less minded to find against Police or Local authorities than district judges so the best option may be to appeal.

49. However, the silver lining for Respondents is that closure orders made under the 2014 Act is that they are more flexible than previously made under the Anti-Social Behaviour Act 2003.

50. It is not mandatory under section 80(7) that the occupier is excluded and that power given to the Court is flexible:

"*A closure order may prohibit access—*

(a) by all persons, or by all persons except those specified, or by all persons except those of a specified description;

(b) at all times, or at all times except those specified;

(c) in all circumstances, or in all circumstances except those specified.

51. Therefore it should be strongly argued on behalf of the Respondents that the mischief will be remedied by the exclusion of the rest of the world and that it is not necessary to prevent further nuisance/disorder for the occupier to be excluded.

52. If a closure order is made, it is made for a maximum of 3 months (s 80(6)) and can be extended for a further six months. It is a criminal offence for anyone to remain on the premises who is not an excluded person without reasonable excuse. If you live in building with the affected premises and need access to the affected premises to get your premises, can apply under s 87 for access if impeded by the closure order. Breach of the closure order is punishable by imprisonment up to 51 weeks and/or an unlimited fine (s 86).

53. If the premises closed are licensed premises, the licensing authority must be informed of the closure order. As previously mentioned, if the premises are residential and a closure order is made for more than 24 hours, it can lead to a possession order.

Summary

53. Closure orders under the 2014 Act are a draconian but effective remedy to tackle anti-social behaviour, nuisance and disorder in the community. Although such a behaviour has a detrimental impact upon the community and those who live with it, Applicants would be well advised not to overuse such remedies because of the adverse effects on occupiers and should always consider whether there are more proportionate steps that can be taken.

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20th March 2021