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

These form the second section of the notes relating to the webinar presented by Gillian Crew and Amy Stroud on 24 March 2021.

Challenging a closure order

1. Upon hearing the application for a closure order, the court will not grant the order if an occupier of the premises, anyone who has control of or responsibility for the premises or anyone else who has an interest in the premises can satisfy the court either that one or more grounds for seeking the closure order does not apply or that it is not necessary as a means to prevent the disorder or nuisance.
2. Under s.81(3), *Anti-social Behaviour: Crime and Policing Act 2014* (*ASBCPA 2014),* the court has the power to adjourn the application to permit the respondent to show why the closure order should not be made. If adjourning, the court may order that the closure notice continues in force until the end of the period of adjournment. S.81(3) permits the court to adjourn the application for a period of not more than 14 days.
3. No adjournment can continue beyond 14 days. However, the impact of s. 54 of the *Magistrates' Courts Act 1980* has introduced a further basis for extension in the event of exceptional circumstances.
4. In Commissioner of the Police of the Metropolis v Hooper [2005] 1 WLR 1995, Mitting J. held that statutory time limit – what was then s.2(6) of the *Anti-social Behaviour Act 2003* – did not exclude the operation of s.54 *MCA 1980* so that in exceptional circumstances there would be power to adjourn over and above the 14 day limit. However, the power in s.54 should be not be used to frustrate the statutory purpose and should only be used when there was no other way to avoid a breach of a person's rights under the European Convention of Human Rights.
5. In Turner v Highbury Magistrates Court [2005] EWHC 2568 (Admin) we see an example of the magistrates' exercise of the extended adjournment by reason of exceptional circumstances. In that case the police sought a closure order for the tenant (T)'s flat which was being used as a crackhouse. Solicitors for T notified the magistrates that

he intended to contest the application under the 2003 Act and the proceedings were adjourned for 14 days. At the adjourned hearing T did not attend but was represented by his brother as a MacKenzie friend who told the court that his brother had a psychiatric condition and needed to find new solicitors. Some 12 days later at the adjourned proceedings a further adjournment sought by T on the basis that his new solicitors had only received 100 pages of evidence that morning was refused and a closure order was granted (which was later stayed that same afternoon).

6. On application by way of judicial review of the magistrates' decision to dismiss T's latest application to adjourn, the High Court rejected T's argument that the application for a closure order was time-barred pursuant to Hooper because lack of representation could not constitute exceptional circumstances. Poole J., sitting with Keene L.J. said:

> *Although exceptional circumstances will often be rare ones, the primary meaning of exceptional is not 'rare' or 'infrequent', and I have no doubt that Mitting's phrase 'exceptional circumstances' encompasses, and should be taken to encompass, circumstances, whether frequent or infrequent, that are so compelling as to make them a clear exception to the general section 2(6) rule, that is, literally, to take them outside its ambit* (para 35).

7. Poole J. considered that, in light of T's mental problems and lack of representation, the magistrate was indeed faced with circumstances sufficiently compelling as to be exceptional. That the magistrate was not directed to section 54 MCA 1980 and that he misdirected himself as to the meaning of s.2(6) did not diminish this.
8. Of course the key objective of a closure order is to stop or prevent anti-social behaviour rapidly so the issue of engagement of a respondent's Convention rights and/or exceptionality of circumstances, as well as the reasons for any primary adjournment under s.81(3) *ASBCPA 2014*, will invariably face a substantial hurdle. However, the stringent nature of many orders sought under this legislation, for example, the eviction of an occupier from his property, will inevitably engage rights protected by Article 8 of the ECHR.

Appealing a closure order

9. Two categories of party can appeal to the Crown Court against the making or extension of a closure order (s.84, *ASBCPA 2014*): (1) a person on whom a closure notice is served, (2) a person who has an interest in the closed premises but was not served with a closure notice.
10. Any challenge to a closure notice must be by way of judicial review. It cannot be appealed.
11. The police can appeal a decision not to make or extend a closure order where the application was made by the police. Similarly, a local authority can appeal a corresponding decision where the application was made by the local authority. Where either issued a closure notice and the court decides not to continue that notice, the police/local authority can appeal that too.
12. Any appeal must be made within 21 days of the date that the closure order or other decision is made.
13. In Crocker v Devon & Cornwall Police [2020] EWHC 2838 (Admin), the appellant succeeded in her appeal against the Crown Court's decision that it did not have the jurisdiction to extend the 21-day time limit in respect of her appeal against a closure order. She had lodged her notice of appeal with the Court within the 21 days but service of her notice of that appeal on the police had taken place after the expiry of the time limit. The Crown Court held that, since her appeal had not been served on the police within the 21 days, it had not been 'made' in time.
14. On appeal, the High Court held that the provisions in relation to appeal necessitated both the filing of an appeal and service of notice of appeal on the respondents (Mucelli v Albania [2009] 1 WLR 276) within the stated period (ie. 21 days). However, unlike cases under the 2003 Act where Parliament had made provision for both the time limit and appeal procedure such that the general power contained in r.7(5) of the *Crown*

Court Rules 1982 did not apply[1], the 2014 Act did engage r.7(5), such that the 21 day period could be extended. Furthermore, in exceptional circumstances and where the matter of the appellant's civil rights were in contention, the court might be bound by Article 6 of the ECHR to ensure that the essence of the right to appeal was not negated. Strict time limits with no possibility of extension infringed the very essence of that right to appeal: Pomiechowski v Poland [2012] UKSC 20.

Extending a Closure Order

15. An applicant, be it a police or local authority, can apply for an extension of a closure order, provided the closure order has not yet expired. The applicant must satisfy the court that an extension of the closure order is necessary on reasonable grounds to prevent any of the following occurring, recurring or continuing:

    a. Disorderly, offensive or criminal behaviour on the premises;
    b. Serious nuisance to members of the public resulting from use of the premises; or
    c. Disorder near those premises associated with the use of those premises

16. The applicant must also demonstrate that it has consulted about the application to extend the closure order. Local authorities applying to extend the closure order must consult the police and *vice versa*.
17. If the application for the original closure order was made by a constable, the police officer making the application for an extension must be at least of the rank of an inspector (s.82(2)(a)).
18. An extension of a closure order can be made for no more than three months. And a closure order (including any extensions) cannot be in place for more than six months.

[1] Hampshire Police Authority v Smith [2010] 1 WLR 40

19. An application for a second extension can be made where the closure order in place has already been extended but the total extensions cannot exceed the six-month maximum period.

Discharging the closure order

20. There are four categories of party who can apply for a closure order to be discharged:

    a. The local authority (provided it was that same local authority which applied for the closure order in the first place);
    b. A constable – where the closure order was made on the application of a constable;
    c. Any person served with a closure notice pursuant to s.79;
    d. Anyone else who has an interest in the premises but on whom the closure notice was not served.

21. The magistrates' court hearing the application for discharge may discharge the closure order if it is satisfied that it is no longer necessary to prevent any of the following continuing, occurring or recurring:

    a. Disorderly, offensive or criminal behaviour on the premises;
    b. Serious nuisance to members of the public resulting from the use of the premises;
    c. Disorder near those premises associated with the use of those premises.

Costs against the Applicant

22. There is a presumption that no order for costs will be made in the event of an unsuccessful application for a closure order by either the police or a local authority. This is to guard against any disincentive it would create for public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made

in the public interest when the circumstances require it. This principle follows that propounded by the Court of Appeal in R (Perinpanathan) v City of Westminster [2010] EWCA Civ 40 and before that the Divisional Court in Bradford Metropolitan District Council v Booth [2001] LLR 578.

23. In R (on the application of Qin) v Commissioner of Police of the Metropolis [2017] EWHC 2750, the police applied for closure orders in respect of six Soho massage parlours, which it was believed were being run as brothels using forced labour. The application was unsuccessful, the district judge finding that the s.80 test for making the order had not been met. The claimants who owned the massage parlour business sought both costs against the Police Commissioner and compensation for lost business. The district judge applied Perinpanathan in refusing the claimants their costs.
24. A further point - on appeal it was held that the district judge had been correct to find that any invalidity of the closure notices issued by the police were not relevant to a claim for costs but was rather a matter for judicial review. Magistrates did not have to consider validity of the closure notice when determining whether to make a closure order. The notice simply triggered their jurisdiction.

…..**and against the Owner or Occupier**

25. A local police body or local authority which incurs costs for clearing or securing or maintaining premises which are subject to a closure order may apply to the court for an order for reimbursement of those costs. The court has a wide discretion to award such reimbursement as it considers appropriate, to be payable by the owner or occupier of the premises in question.
26. However no liability will accrue if the application was not served on the owner or occupier.
27. The application must also be served on the police body if it was made by the local authority and *vice versa*.
28. Any such application must be made within a three-month period beginning with the day when the closure order ceases to have effect.

Compensation

29. Those financially affected by either the issue of a closure notice or the making of a closure order can apply for compensation. The application will be made to the magistrates' court unless either the order was either made or extended by the Crown Court on appeal, in which case the application must be made to the Crown Court.
30. Under s.90 *ASBCPA* 2014, the application must be made within three months of the later of the following dates:

    a. The day on which the closure notice was cancelled (s.78);
    b. The day the court decides not to make a closure order;
    c. The day the Crown Court dismisses an appeal against a decision not to make a closure order;
    d. The day the closure order ceases to have effect.

31. If all of the following criteria below are met, the court may award compensation:

    a. The claimant is not associated with the use of the property or the behaviour that occurred on the property which led to the issue of the closure notice or the closure order being made;
    b. If the claimant is the owner/occupier, the claimant took reasonable steps to prevent that use or behaviour;
    c. The claimant has suffered financial loss as a result of the closure notice or order; and
    d. It is appropriate having regard to all the circumstances to award compensation in respect of the loss.

32. Compensation awarded under s.90 *ASBCPA 2014* is payable from public funds, rather than the budget of the applicant for the closure notice or order, so it is not tantamount to costs against the applicant – see above in respect of public interest in not discouraging local authorities and police authorities from embarking on closure action.

33. In Qin (see above), the claimant-operators of the massage parlour business sought both costs against the Police Commissioner and compensation for lost business. Both applications were rejected on the basis that the police had acted reasonably and properly in making the application, the district judge applying the Perinpanathan principle in relation to the compensation application.
34. The claimants appealed the district judge's decision. Choudhury J. held that payment out of central funds meant that there was no financial prejudice to the police applicant and therefore no 'chilling effect' on it in its regulatory activities. There was no basis for saying, as the judge at first instance had held, that the starting point on compensation is that there should be no award.

Offences in relation to closure orders

35. Remaining or entering on premises in contravention of a closure order or a closure notice (including a notice which continues in force under s.81) without reasonable excuse is an offence under s.86 *ASBCP 2014.* Obstructing anyone serving a closure notice or enforcing a closure order under s.85, whether by entering or securing the premises, is equally an offence. All three offences can lead to an unlimited fine and/or imprisonment of up to 51 weeks in respect of breaching a closure order, or 3 months in respect of any of the other offences under s.86.

Exemption from liability

36. Section 89 *ASBCP 2014* exempts the applicant from liability in judicial review proceedings or an action in tort or misfeasance in public office arising out of anything done or not done in the exercise of a power under the closure order provisions.
37. Ss. 89(3)-(4) permit exceptions where an act or omission is shown to have been in bad faith or if it is unlawful by virtue of s.6(1) of the *Human Rights Act 1998.*

Consequences for those with an interest in the property

38. A closure order can have significant adverse consequences for those with an interest in the affected property.

39. The Act is silent about the effect of a closure order on an evicted tenant's rights and obligations under the tenancy agreement. However, the closure order does not terminate the tenancy so there is nothing to suggest that the tenant would not remain liable to pay rent or that the tenancy would not continue once the premises were unsealed; however, in practical terms, there may well be difficulties with evicted tenants refusing to pay rent and sourcing permanent alternative accommodation.
40. If the landlord complies with the conditions set out in s.90 *ASBCPA 2014*, the landlord can apply for statutory compensation.
41. However the landlord may become subject to an application by the local authority/police body for reimbursement of its costs.
42. The imposition of a closure order on a dwelling house for a period of more than 48 hours forms a mandatory ground for possession (Ground 7A) under s.84A of the *Housing Act 1985.* Regaining possession is not a given. Ground 7A is expressly made subject to a tenant's rights under the Convention. Should the tenant's conduct improve after the making of a closure order that might render possession disproportionate (see Southend-on-Sea Borough Council v Armour [2014] HLR 23). Local council landlords are also required to offer the tenant a statutory right of review. These criteria had not been followed in Goode v Paradigm Housing (October 2015, unreported).
43. The negative consequences of a closure order are numerous. A barricaded and shuttered property attracts an increased risk of vandalism and squatting. The means of sealing the property combined with the presence of closure notices and closure orders affixed to the property in prominent view will detract from the appearance and desirability of the property as the surrounding area.
44. At the application for the closure order, those with an interest in the property can request permission to access it for maintenance purposes. The order may specify right of access to authorised persons tasked with carrying out essential maintenance, but this is unlikely to be granted if the court orders a total sealing of the property.

Avoiding closure action

45. The possible consequences for landlords in the event of a closure order should make it all the more important that those responsible for managing premises are proactive in response to alerts from the local authority, police or neighbours, co-operating fully with police/local authority requests and taking the necessary action to resolve the nuisance or antisocial behaviour.
46. Pre-empting such problems is advisable, for example having good channels of communication with occupiers and managing agents. Also, ensuring their tenancy agreements adequately provide for a breach of the agreement in the event of, for example, service of a closure notice or anti-social behaviour.
47. Maintain appropriate security for empty and unattended buildings to reduce the risk of them being used for criminal or anti-social activity.
48. Seek advice and act quickly in the event of a closure notice being served.

AMY STROUD

42 Bedford Row

22 March 2021