

PUBLIC LAW IN PUBLIC SPACES

James Stark , Garden Court North Chambers

INTRODUCTION

1. Historically, remedies to control nuisance or what is described as anti-social behaviour were matters for the criminal law if the conduct constituted an offence. The oft-quoted approach of the common law is that everything is permitted unless it is expressly proscribed.
2. In relation, to what might be regarded as anti-social behaviour in modern terms there existed from 1361 the common law jurisdiction of breach of the peace. The modern definition is that a breach of the peace may occur where harm is done or is likely to be done to a person, or to their property in their presence, or they are in fear of being harmed through assault, affray, riot, or other disturbance (R v Howell [1982] QB 416, QBD).
3. This is a curious historical remedy. It is treated as civil in nature in domestic law but the conduct has to be proved to the criminal standard. There is the alternative of binding over to keep the peace (such conduct now being required to be specified) and breach proceedings may result in loss of a recognizance
4. The Attorney General also had the power to bring civil proceedings by means of a *relator* action to restrain a public nuisance. This is also a common law offence – traditionally described as a nuisance that materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. Local authorities were also enabled to bring proceedings to restrain a breach of the criminal law (in limited circumstances) and public nuisance by Section 222 Local Government Act 1972. Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754. This provision did not create substantive rights but merely enabled

the local authority to sue in its own name rather than requesting the AG to do so on its behalf.

5. In the last 20 years or so Parliament has provided a rash of purportedly civil remedies to address various types of nuisance or anti-social behaviour. This began with housing ASB injunctions under the Housing Act 1996 which were significantly extended by the Anti-Social Behaviour Act 2003, the ASBO of the Crime and Disorder Act 1998 which whilst originally a stand alone civil remedy became most used after sentencing from criminal offences that constituted such behaviour, to follow have been gang related violence (and now drug dealing) injunctions and there have been or are a number of others such as football banning orders.
6. One effect of this raft of statutory remedies not foreseen by local authorities was to circumscribe their ability to use injunctions to restrain public nuisance at common law. In general it is improper and impermissible to use S222 LGA 1972 relying either on allegations of public nuisance or breach of the criminal law to seek to control anti-social behaviour. This is because it is for Parliament to decide what is the appropriate remedy as it has made a number of statutory interventions and that is not to be undermined by "parallel judicial activity " per Hoffmann J in Chief Constable of Leicestershire-v-M [1989] 1 WLR 20 to extend the common law.
7. In Birmingham City Council-v-Shafi [2009] 1 WLR 1961 the Court of Appeal dismissed an appeal against the refusal to grant S222 injunctions to restrain breaches of the criminal law and public nuisance on the basis that Parliament had intervened in the form of the anti-social behaviour order to address the behaviour of which the local authority complained and therefore the court should decline to grant an injunction where the conduct complained of fell within the statutory definition of an anti-social behaviour order on the basis that to do so would be indulging in " parallel judicial activity " in extending the common law .
8. In Leeds City Council –v-Persons Unknown & Scott 2015 unreported . LCC obtained ex parte an injunction against " all persons " preventing them from begging in Leeds City Centre . Ostensibly , the purpose was to remove beggars from the streets in time for the Tour de France in summer 2014 . It relied on S222 for the purposes of the injunction .

9. An application was made to set the injunction aside on behalf of Mr Scott who found himself facing committal proceedings for breach of the injunction (it was disputed whether the injunction had been served on him but he had not been joined as a defendant to the original injunction although he had been identified as a beggar LCC wanted to remove
10. The injunction was attacked on a number of grounds:
 - That it sought to circumvent the statutory remedy of an ASBO
 - That its effect was to create a local criminal offence with a punishment of up to 2 years for begging when Section 3 Vagrancy Act 1824 only provides for a level 1 fine
 - That it was an abuse of process to seek an injunction against persons unknown alone when specific individuals who would be targeted had been identified
 - That injunctions *contra mundum* should only be granted in cases to protect life and limb or an irreversible interference with Convention rights
 - That it was an exercise in judicial legislation subverting the statutory method of the creation of local byelaws under Section 235-238 Local Government Act 1972
11. Leeds conceded the application and paid Mr Scott's costs
12. It will be seen that generally the earlier statutory remedies for anti-social behaviour were targeted against individuals rather than groups (an injunction to restrain gang related violence is directed to an individual member of a gang not to the public or even a specified gang). There were some exceptions to this before the Anti-Social Behaviour, Crime and Policing Act 2014 in the form of dispersal orders under Section 30-36 Anti-Social Behaviour Act 2003 and Section 27 Violent Crime Reduction Act 2006

ASPCA 2014

13. The ASBPCA 2014 is a measure that brings together a number of remedies to address anti-social behaviour under one Act. Part I deals with anti-social behaviour injunctions encompassing (a) injunctions to restrain harassment, alarm and distress – which mimic the old ASBO and (b) two types of housing related injunction. Part II introduces criminal behaviour orders to be made on conviction for an offence modelled on the old criminal ASBO and Chapter III codifies the various types of closure order.
14. Part III codifies new and wider dispersal powers and Part IV introduces two new concepts the community protection notice and the public spaces protection order.

COMMUNITY PROTECTION NOTICES – Section 43 ASBPCA 2014

15. These are notices that may be served by an authorised person to an individual aged 16 or over, or a body, if satisfied upon reasonable grounds that
 - (a) *the conduct of the individual or body is having a detrimental effect , of a persistent or continuing nature , on the quality of life of those in the locality and*
 - (b) *the conduct is unreasonable*
16. There are four obvious things to note . Firstly , there is a great deal of similarity between the conduct required for a community protection notice and the tort of public nuisance albeit that the latter is a tort directed primarily at property and the use of it .Secondly, the drafting of the section borrows heavily from Part III Environmental Protection Act 1990 and the provisions in respect of statutory nuisances . Thirdly , it is very widely drawn and could include all manner of conduct that subjectively a

person may find very annoying and fourthly, the requirement is that its effects are detrimental to quality of life, persistent and continuing . There is no level of seriousness specified by the section but the reference to quality of life must import some seriousness of impact on everyday life rather than mild annoyance or disapproval .

17. Section 43(3) states that the notice is a notice (shocking drafting) that imposes any of the following requirements on the individual or body issued with it
 - (a) requirement to stop doing specified things
 - (b) a requirement to do specified things
 - (c) a requirement to take reasonable steps to achieve reasonable results .

18. Section 43(4) limits the requirements that may be imposed to those that are reasonable to impose in order
 - (a) to prevent the detrimental effect referred to in Section 43(1) from recurring or (b) to reduce the detrimental effects or to reduce the risk of its continuance or recurrence .

19. Section 43(5) makes a pre-condition to the issuing of such a notice that a person or body (a) has been given a written warning that the notice will be issued unless their conduct ceases to have the detrimental effect and that the person serving the notice is satisfied that the individual or body has had sufficient time to comply . Hence , this is a subjective decision .

20. Section 43(6) requires the authorised person to inform any body or individual that person thinks appropriate . Note a subjective obligation to inform not consult . This is very odd drafting to make mandatory a subjective requirement . Section 53 sets out that the authorised persons include a constable , the relevant local authority(for the area where the conduct or offence has taken place) and a person designated by the relevant local authority. As local authorities are given much of the

responsibilities for enforcing these notices it is difficult to see how a constable could decide not to inform the local authority . Local authorities are allowed to designate social landlords and PCSOs as authorised persons

21. Section 43(7) requires the notice to identify the detrimental conduct and explain the effect of sections 46 to 51 (appeals S46 , action in default by local authority S47 , offences S48, remedial orders S49 , s50 forfeiture of item used in commission of an offence & s51 seizure of item used in the commission of an offence . S52 provides that a fixed penalty notice may be issued rather than criminal proceedings .
22. Section 56 provides that the Secretary of State may issue guidance under the section .
23. The Guidance suggests that the primary targets of these provisions are those that were covered by various notices they replaced – graffiti, noise and rubbish . Concerns were raised during the passage of the Act that its provisions were so wide they would overlap with as well as being modelled on the statutory nuisance powers of a local authority under Environmental Protection Act 1990 . The Guidance is clear that generally if the conduct constitutes a statutory nuisance it is that power that should be used .
24. It is extremely unlikely that Parliament intended such notices to be used on a homeless man living in a tent as reportedly happened in Doncaster. They appear to be directed to environmental nuisances of various types . This example is an illustration of the dangers of making a power so general .
25. Appeals may be lodged to a magistrate’s court within 21 days of service of the notice on a number of specified grounds and an appeal suspends any mandatory requirements of the notice . The grounds of appeal do not expressly include that the notice is invalid on public law grounds . Section

46(1) does include that there is a material defect or error in , or in connection with , the notice, which would seem to be wide enough to cover an error of law .

26. The width of the power has apparently been used recently to clear a garden , to disruptive drivers, cab drivers parking illegally and for street drinking . More concerning is the apparent use of a community protection notice in Glastonbury to act as an exclusion order . This strikes me as ultra vires . Section 2(1) (a) ASBCPA 2014 injunctions should be used. Dog mess , an equestrian centre for setting off bonfires , beggars , street drinkers .
27. It is very doubtful that it is proper to use community protection notices on beggars or homeless persons . They are not referred to at all in the Guidance as being the object of this section . It is also very difficult to see that either type of conduct is such as to affect the “quality of life” of people in the locality . Aggressive begging may be different but that conduct is likely to be more appropriately covered by Part 1 of the Act .
28. Although Section 46(1) is silent upon it clearly any community protection notice must comply with the Human Rights Act 1998 being an act of a public authority that is likely to constitute an interference under Article 8 ECHR . Section 43(4) states that the only requirements that may be imposed are those that are reasonable to impose in order to achieve the statutory objectives but they must also be proportionate to the legitimate aim .
29. What is of particular concern about public authorities misusing these notices to achieve the results that an injunction under Part 1 is designed to achieve is that (a) the notice is effective unless there is an appeal . The appeal process shifts the burden of having the legality of a notice examined to the person served with the notice and (b) the fact that Legal Aid, Sentencing and Punishment of Offenders Act 2012(LASPO)

provides that legal aid is available for injunctions and indeed for closure orders .

30. Thus it would seem that for conduct which properly should be dealt with under those sections it is wrong for the community protection order power which is directed at persistent but low level nuisance to be used – let alone for the words of Section 43(3) to be used to justify exclusion without an order of the court.

PUBLIC SPACE PROTECTION ORDERS

31. Sections 59-75 ASBCPA govern the making of public space protection orders . The Guidance issued under S73 states that the purpose of the legislation is as follows

Public space protection orders are intended to deal with a particular nuisance or problem in a particular area that is detrimental to the local community's quality of life by imposing conditions on the use of the area that apply to everyone . They are designed to ensure the law-abiding majority can use and enjoy public spaces , safe from anti-social behaviour .

32. In short , they are a form of local law . Unlike bye-laws, which require the approval of the Secretary of State, local authorities can make them without any such approval after consultation in accordance with Section 72 . It is notable that any byelaw covering the same conduct is suspended whilst a PSPO is in effect see Section 70
33. There has been significant criticism of PSPOs notably from Liberty . Their attack on the orders has been focused on two points (a) that they are being used to criminalise the poorest and most vulnerable in society such as the homeless and people begging and (b) that they are being used to stifle freedom of expression and association . Two Convention rights that

councils are enjoined to have specific regard to when making the orders under Section 72 .

Liberty stated

We opposed their introduction – because they are too widely drawn, with vague definitions of what can be criminalised, and carry disproportionately punitive sanctions.

34. The statutory grounds are very similar to those upon which a community protection notice may be served upon an individual
- (1) **A local authority may make a public spaces protection order if satisfied on reasonable grounds that two conditions are met.**
 - (2) **The first condition is that—**
 - (a) **activities carried on in a public place within the authority’s area have had a detrimental effect on the quality of life of those in the locality, or**
 - (b) **it is likely that activities will be carried on in a public place within that area and that they will have such an effect.**
 - (3) **The second condition is that the effect, or likely effect, of the activities—**
 - (a) **is, or is likely to be, of a persistent or continuing nature,**
 - (b) **is, or is likely to be, such as to make the activities unreasonable, and**
 - (c) **justifies the restrictions imposed by the notice.**
 - (4) **A public spaces protection order is an order that identifies the public place referred to in subsection (2) (“the restricted area”) and—**
 - (a) **specified things being done in the restricted area,**

- (b) requires specified things to be done by persons carrying on specified activities in that area, or
 - (c) does both of those things.
- (5) The only prohibitions or requirements that may be imposed are ones that are reasonable to impose in order—
- (a) to prevent the detrimental effect referred to in subsection (2) from continuing, occurring or recurring, or
 - (b) to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence.
- (6) A prohibition or requirement may be framed—
- (a) so as to apply to all persons, or only to persons in specified categories, or to all persons except those in specified categories;
 - (b) so as to apply at all times, or only at specified times, or at all times except those specified;
 - (c) so as to apply in all circumstances, or only in specified circumstances, or in all circumstances except those specified.
- (7) A public spaces protection order must—
- (a) identify the activities referred to in subsection (2);
 - (b) explain the effect of section 63 (where it applies) and section 67;
 - (c) specify the period for which the order has effect.
- (8) A public spaces protection order must be published in accordance with regulations made by the Secretary of State.

35. The Guidance admits that the power is intended to be broad. It does note, however, as many councils appear to have failed to do that a blanket ban may simply displace that activity elsewhere. Some authorities appear to

have responded to that by pre-emptive strikes of making a PSPO that covers their whole borough.

36. It is difficult to see how such a prohibition can be justified unless the behaviour concerned has been taking place across the whole borough or there is good evidence that it will be displaced (which would fall within Section 59(2)(b)). It is also very likely to be disproportionate e.g. a zone in which alcohol consumption is prohibited because there have been fights between drunk youths in a shopping precinct cannot justify an alcohol ban across the whole borough affecting an elderly couple having a glass of wine or beer with their picnic in a quiet park see Section 59(5).
37. The first requirement is that the activities have had or are likely to have, a detrimental effect on the quality of life of those in the locality.
38. The reference to quality of life implies despite no express reference to the seriousness of the detrimental effect that this is a similar test to that of public nuisance and goes beyond mere annoyance. It must be or be likely to be persistent or continuing in nature, is or is likely to be, unreasonable and justifies the restrictions imposed.
39. This underlines the importance of a PSPO being drawn as narrowly as possible e.g. one instance of a group of youths being drunk in a park cannot justify the making of such an order. There should be close focus on the extent of the problem and the locality in which it is occurring.
40. Also the behaviour specified needs to be very carefully considered. Rightly there has been considerable disquiet at orders that have included rough sleeping or begging without any element of aggression, abuse or demanding money menacingly. As to the former it is difficult to see how this can satisfy the first condition. Passers by may find it distressing but in the absence of for example an established or long term camp, which has caused nuisance it, is unlikely to be regarded as having a detrimental

effect on quality of life. The position might be different if rough sleepers were sleeping in doorways to residential premises.

41. The strongest objection to such a provision that could be taken is that it is difficult to see how potential criminalisation can be justified. It is not open to a local authority even on the broad drafting of Section 59 to produce a shopping list of conduct that its local inhabitants might not like. It must be evidence based and justified.
42. The reference to justification, which of course is a concept known to our common law, also imports the recognition of the concept in ECHR law. It is an essential part of considering whether a step is proportionate is whether it is justified. That includes considering whether there is a rational connection with the interference proposed with the legitimate aim, that the least intrusive means should be employed without compromising the objective and the importance of balancing the rights of those against whom the measure may be employed and the wider community.
43. With regard to rough sleepers and beggars in particular, in the absence of evidence, that the local authority has considered or is actively engaging in measures to help those vulnerable groups it may be difficult to justify the use of a PSPO against that group of persons even where there is evidence of a detrimental effect on the quality of life.
44. Section 59(5) ASBPCA also ought to direct the local authority to the requirement that the prohibitions should be no wider than is necessary as only those prohibitions or requirements that are reasonable to impose to prevent the detrimental
45. The examples that Rhiannon Jones will deal with do illustrate a tendency to adopt the shopping list approach. Consider for example a proposed ban on “ chuggers” in Newcastle. It is unlikely that this can be justified to ban collecting for charity even on a commercial basis. Such behaviour does

not of its nature have a detrimental effect on quality of life. The reason why local authorities are likely to adopt a blanket approach may be in the difficulty of drafting a proposition that covers the conduct that is objectionable namely repeatedly asking for or seeking to persuade a person to contribute after they have stated that they are not interested in or do not wish to do so.

46. Even so, is it justifiable to turn such conduct into the criminal, which by virtue of Section 67 it becomes if the PSPO is breached?
47. The consultation and publication requirements are set out in Section 72. It is necessary for these provisions to be complied with as otherwise the order is subject to challenge in the High Court under Section 66.
48. I have not been able to ascertain whether there have been any challenges under Section 66 ASBCPA 2014. The grounds for a challenge are
 - That the authority did not have power to make the order or variation or to include particular prohibitions or requirements imposed by the order
 - That a requirement under this Chapter was not complied with in relation to this order or variation
49. The application must be made within 6 weeks of the order or variation being made. There is no power to extend the time. The procedure appears to be modelled on that for statutory review of various planning matters in particular S288 Town and Country Planning Act 1990.
50. To have standing to make such an application one must be an interested person namely who lives in or regularly visits or works in that area.
51. There a no other proceedings rule in Section 66(7) that would appear to seek to exclude judicial review. It is clear that in most cases any judicial

review application would fail on the basis of the S66 alternative remedy but the courts do not like attempts to oust their jurisdiction and it is unlikely this would be operative consider for example if an interested person could not have known about the order within the 6 weeks because the authority had failed to comply with its Section 72 publication duty.

52. It is important to note that such an application is likely to be in scope. LASPO Sch1 Para 19 as judicial review is defined as including (b) Any procedure in which a court, tribunal or other person mentioned in Part 3 of this Schedule is required by an enactment to make a decision applying the principles that are applied by the court on an application for judicial review.
53. The CPR appears to be silent on how such an application should be made. I suspect that the proper course is to make a Part 8 application and to seek that it is heard in the Admin Court by analogy with a planning claim.
53. It is also important to note that the invalidity of a PSPO is a defence to any criminal proceedings.

CONCLUSIONS

54. Challenges to CPN's are difficult in particular due to the lack of legal aid. The best approach may well be to seek to make a Freedom of Information request and try and establish what policies are being adopted by authorities as to the use of CPNs and to establish whether that is lawful. That may then be open to challenge if it is clear that the policies go beyond the statutory purpose or ignore or conflict with the Guidance.
55. There is, however, under Section 66 significant scope to challenge PSPOs and it seems that they are in scope. The difficulty may well be in finding an applicant as the interested person rule seems to be designed to try and prevent organisations like Liberty challenging a PSPO. It is clearly much more restrictive than the standing rules for judicial review.

56. It is encouraging to see strong local campaigns against the misuse of these orders. The campaign against the proposal in Hackney to penalise the homeless was clearly effective and others also seem to have been so. It is important that these wide local laws with criminal effect are closely scrutinised and fully justified .

14th July 2016

James Stark
Garden Court North
3rd Floor Blackfriars House
Parsonage
Manchester M3 2JW
DX: 715637 Manchester 2