Housing Team Legal Bulletin

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GARDEN COURT NORTH CHAMBERS of IAN MACDONALD QC

Good Question? Some thoughts on expert evidence within injunction proceedings

This bulletin focuses on the topic of injunctions and, largely, the issue of the mental capacity of Defendants within those proceedings. It is aimed at practitioners working in the fields of housing, anti-social behaviour and gang-related injunctions who might need to question an expert when defending an application for injunction or when applying to discharge one.

The recent ASBO case of *Pender v Director of Public Prosecutions* [2013] All ER (D) 173 (Jan) is a reminder of the role and value of expert medical evidence, usually from a psychiatrist, in relation to the perennial problems of a Defendant's understanding of and complying with an injunction. This is not intended to be an exhaustive summary of the topic but I shall look at some key cases which might underpin and set the parameters for any set of questions to an expert.

Basic principles

It is worth briefly considering the leading case in relation to injunctions and mental incapacity. In *Wookey v Wookey* [1991] 3 All ER 365 a non-molestation order with power of arrest had been sought and ordered against a 70-year-old husband who suffered from dementia and had become jealous of his 72-year-old wife. First, it is useful to note what the Court in *Wookey* [at 370f] called "well-established general propositions" about injunctions:

- The Court will not act in vain by granting an injunction which is idle and ineffectual and therefore an injunction should not be granted to impose an obligation to do something which is impossible or cannot be enforced;
- The injunction must serve a useful purpose for the person seeking relief and there must be a real possibility that the order, if made, will be enforceable against the Defendant;
- The Court expects and assumes that its orders will be obeyed and the Court will not normally refuse an injunction because of the Defendant's likely disobedience to the order.

These are very useful principles just to bear in mind when instructing an expert, since they set some useful boundaries for thinking about the relief: effective/ineffectual; enforceable/unenforceable; obedience/disobedience.

In *Wookey* it was held that where the Defendant (against whom the injunction was sought) was incapable of understanding what he was doing or that it was wrong then an injunction should not be granted. This was because: the Defendant would not be capable of complying with it; the injunction would not have a deterrent effect nor operate on the mind so as to regulate conduct; any breach by the Defendant would not be subject to effective enforcement proceedings since the Defendant would have a clear defence to any application for committal to prison for contempt of court.

So, questions to the expert about the Defendant's mental capacity to understand what he or she is doing and/or understand whether such activity is right/socially acceptable or wrong/socially unacceptable are plainly going to be key questions. In particular the expert will need to answer these questions with reference to the pleadings and allegations in the case and should be referred to copies of the documents. They lead into the question of whether or not the Defendant has the capacity to understand an injunction order. Flowing from that is the question of whether or not the Defendant has mental capacity to comply with the requirements of the injunction order. The Defendant's medical notes should be available to the expert so that a diagnosis or prognosis can ascertained as necessary.

Just how far, and about what, does the Defendant's understanding have to extend?

In *P v P (Contempt of Court: Mental Capacity)* [1999] 2 FLR following a divorce, an injunction with power of arrest was made which prohibited the husband from returning to the matrimonial home. The husband

suffered from Usher's Syndrome, was described as deaf and dumb, had little more than tunnel vision and an average IQ. It was alleged that there had been 29 breaches of the injunction.

The judge at first instance heard the wife's application to commit the husband and the husband's application to discharge the injunction. In dealing with the applications the judge found that although the husband did not understand the legal system and the civil jurisdiction to commit he did know that he should not go to the matrimonial home and knew that he would be liable to go to prison if he did so. The judge extended the injunction for six months with a power of arrest. The husband appealed.

The Court of Appeal dismissed his appeal. The judge's reasoning was correct. They husband did not need to understand the nature and extent of the jurisdiction of the court to deal with the disobedience of its order. A potential contemnor needs only to understand that an order has been made, that it forbids certain acts and that if such an act were to be carried out then the potential contemnor would be punished.

The case sets out the relevant matters for the Defendant to understand. Evidence should therefore be sought as to the Defendant's understanding: that an injunction order has been or will be made; as to whether the Defendant understands each and all of the prohibitions; of the consequences of breach of such an order. The expert will therefore need to be briefly informed about the courts powers to imprison or, less usually in these cases to fine or to sequestrate assets so that the issue of punishment can be investigated with the Defendant.

Is the likelihood of a breach of an order a reason not to make one?

In *R (on the application of Jamie Cooke) v Director of Public Prosecutions* [2008] EWHC 2703 (Admin) the court looked at the issue of mental incapacity in the context of an ASBO on conviction. It is an ASBO case but, even though it is a statutory creation, an ASBO has similarities with an injunction and so the case is applicable in the context of civil injunctions.

The Defendant had relied upon the evidence of a psychiatric nurse (although the court indicated that in matters of mental incapacity evidence should normally be given by a psychiatrist and not by a psychologist or a psychiatric nurse) who gave evidence that the Defendant had a diagnosis of a borderline personality disorder and post traumatic stress disorder and that his behaviour was "consequential to his mental health problems".

In particular, it was the Defendant's case that because of his impulsiveness, said by the psychiatric nurse to be a feature of his borderline personality disorder, he was not capable of complying with an ASBO.

The magistrates made the ASBO and the Defendant appealed by case stated. It was contended on the Defendant's behalf that the magistrates had erred in law by making the ASBO because the Defendant was not capable of complying with it and therefore if it was impossible for a person to obey an ASBO then there was no point in making it. The CPS contended, inter alia, that the evidence before the magistrates did not require a finding that the Defendant would inevitably breach the conditions of the ASBO.

It was held that the magistrates were entitled to reach the conclusion on the evidence that the Defendant was not bound to breach the ASBO. He had the mental capacity to understand the ASBO and to know what behaviour would constitute a breach of it. The fact that the Defendant would be likely to breach an order because he suffered from a personality disorder was not, of itself, a good reason for not making the ASBO.

So if considering the issue of future compliance with any order, the questions to the expert should be posed to clarify the degree of free choice or not of the Defendant and the inevitability or not of breach. The extent to which a diagnosed condition is contributory to, or directly causing, the prohibited behaviour will be a crucial point of evidence. If the expert can comment on factors which might worsen or improve compliance with the injunction order then that evidence could be usefully requested. For example these could be environmental factors (such as particular neighbours or associates or crisis situations) or substance misuse or compliance or non-compliance with medication or treatment.

Value of evidence about addiction?

In *Pender v Director of Public Prosecutions* [2013] All ER (D) 173 (Jan) an ASBO on conviction was made which prohibited the Defendant from begging in a particular way within a certain location. The Defendant appealed to the Crown Court on the basis that he had

no capacity to understand the prohibition or to comply with it. It is a very recent case and shows how the points raised above are perennial ones in this area of work.

Medical evidence was given, and perhaps crucially was not challenged, which stated that the Defendant suffered from learning difficulties, schizophrenia and a severe addiction to nicotine. Medical evidence concluded that the begging behaviour arose directly as a result of the nicotine addiction. Further, it was concluded that the Defendant lacked capacity to understand the ASBO prohibition and the consequences of any breach. Finally, the Defendant was incapable of complying with the prohibition on begging because he was compelled to seek nicotine by the only means available to him, in effect, begging.

The judge in the Crown Court dismissed the appeal, finding first that the Defendant understood the nature of the ASBO (based on a finding that the Defendant had tried to hide from police officers and so knew that he should not beg) and second that the Defendant understood the consequences of ignoring the ASBO (however, no reasons were given for reaching that conclusion).

On appeal to the Divisional Court, by way of case stated, the Defendant contended that even if he had understood the ASBO then he had no capacity to comply with it. The prosecution's contention was that although the evidence showed that it was extremely likely that the Defendant would not comply with the ASBO that was not a reason for not making the ASBO: the Defendant had a choice whether or not to comply.

It was held, in an extempore judgment, that the prosecution was correct in contending that it was no reason for the Court not to make the ASBO where the evidence merely showed that it was extremely likely that the Defendant would not comply with it.

However in this case there was no basis for the Crown Court judge to disagree with the medical evidence, which had been carefully reasoned, that the Defendant had not been capable of complying with the ASBO. The impact of the addiction upon the Defendant's behaviour meant he was incapable of complying with the ASBO which went further than the notion of extreme likelihood of breach. The Divisional Court allowed the appeal and quashed the ASBO.

Pender clearly revisits earlier themes and types of questions which can be usefully put to experts on the issues of mental capacity. However, it appears to be a rare case where the addiction of the Defendant meant that the specific prohibition sought was not compliable with. It should act as a prompt to practitioners to send to the expert a copy of any proposed prohibitions together with questions focussing upon the particular behaviour.

The framing of a winning compliance argument based upon an addiction is going to be, I suggest, rare. Here there had been a clear conclusion from the expert that the begging behaviour arose directly as a result of the nicotine addiction. In this case, it might have been that if the medical evidence had been challenged then another conclusion could have been reached. However, practitioners should at least be alive to the possibility of this type of argument and, in appropriate circumstances, could question an expert accordingly on the relationship between addiction and future breach.

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Informal Advice

Please bear in mind that barristers at GCN are always available to give informal advice on any housing matters. In the first instance please contact the clerks (Sarah Wright, Annmarie Nightingale or Nicola Carroll) on 0161 236 1840.

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