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Legal Briefings

Anti-Social Behaviour

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The **Housing (Miscellaneous Provisions) Act 1997** (HA 1997) introduced the concept of 'anti-social behaviour' into local authority housing law.¹ This involves any behaviour that may cause significant or persistent danger, injury, damage, loss or fear to any person near the house provided by the housing authority and includes 'violence, threats, intimidation, coercion, harassment or serious obstruction of any person'. The manufacture, production, preparation, importation, exportation, sale, supply, possession for the purposes of sale or supply, or distribution of a controlled drug is also included.

The **Criminal Justice Act 2006** expands on the definition of anti-social behaviour to include behaviour where damage or defacement of property by a person causes or is likely to cause harassment, significant or persistent alarm, distress, fear or intimidation, or impairment of another's use or enjoyment of his/her home.²

Section 9(1) of the **Housing (Miscellaneous Provisions) Act 1992** (HA 1992) requires local authorities to develop a statement of policy on housing management, and the Department of the Environment and Local Government has stated that the measures to reduce crime and vandalism and increase security in local authority rented accommodation should be afforded particular attention in these statements.

■ ANTI-SOCIAL BEHAVIOUR

Under the HA 1997, a tenant may him/herself apply for an exclusion order against a member of his/her household who is engaging in anti-social behaviour. Alternatively, the local authority can apply to the District Court for an excluding order against any member of a household who is engaging in anti-social behaviour. The order may exclude that person from a specific house or from an entire estate and it may forbid intimidation or other interference with a tenant or anyone else. Approved housing bodies can also use these provisions. The housing authority must consult the tenant and the local Health Service Executive and be satisfied that the order would prevent violence, threat or fear by the tenant; or that it is in the interests of good estate management.³ An excluding order made by the court lapses after three years.

The State may also refuse to house where that person fails to provide information requested by the housing authority relating to a person living with him/her, and which the authority believes is necessary in connection with a letting application.

Where the court is satisfied that there are reasonable grounds for believing that the respondent is or has been engaged in anti-social behaviour, it may order the respondent to leave the house if he/she lives there, or if he/she does not live there, prevent that person from entering or being in the vicinity of the house or housing estate for the length of the order.⁴

The housing authority or tenant may obtain an interim (temporary) excluding order between the making of an application and its determination by the court, and may order the respondent to leave the house. Proceedings under the HA 1997 can be heard in private, i.e. members of the public are not permitted into the hearing.

Section 14 of the HA 1997 exempts the State from the obligation to house a person where it considers that the person is or has been engaged in anti-social behaviour, or where it feels that letting a house to that person would not be in the interests of good estate management. This section is viewed as relieving local authorities from their obligations to certain persons.⁵

Where people occupy housing authority property illegally and are or have been engaged in anti-social behaviour, the Gardaí can direct them to leave the property immediately, if this is necessary in the interests of good estate management. Failure to comply can lead to a fine of €1,905 or imprisonment for 12 months or both.

Section 3 of the **Residential Tenancies Act 2004** (RTA 2004) allows purchasers of local authority housing and their successors to apply for an excluding order. The Act also extends similar tenancy obligations regarding anti-social behaviour to the private rented sector. S.14 of the RTA 2004 gives a local authority the power to refuse to sell a house under the Tenant Purchase Scheme to a person it has reason to believe is or has been engaged in anti-social behaviour or where a sale would not be in the interests of good estate management.⁶ The Health Service Executive may refuse or withdraw rent supplement for a private rented dwelling where the person in question was evicted, excluded or removed from local authority housing on the grounds of anti-social behaviour.

The **Housing (Miscellaneous Provisions) Act 2009** (HA 2009) contains a number of new legislative provisions in relation to anti-social behaviour.⁷ The HA 2009 updates the definition of anti-social behaviour contained in the HA 1997 to include damage to property, defacement by graffiti and significant impairment of the use or enjoyment of a person's home.⁸ In addition, it provides for the inclusion in local authority tenancy agreements of conditions specifically prohibiting anti-social behaviour.⁹

Housing authorities will be required to adopt: anti-social behaviour strategies, providing for cooperation with other relevant bodies, particularly the Gardaí and the Health Service Executive; procedures for the making of complaints; and initiatives for the prevention and reduction of anti-social behaviour.¹⁰ The Act also extends the existing anti-social behaviour powers of housing authorities to cover a broader range of accommodation, including accommodation provided through rental or leasing arrangements.¹¹

A recent report conducted in the UK highlighted some policy considerations in relation to anti-social behaviour orders granted there.¹² In conducting a study of many anti-social behaviour orders the research found that such interventions had a disproportionate impact on women-headed households (over half). The findings showed that a majority of these cases involved single-parent mothers. Half of these women were subject to domestic violence, not only from their partners, but also from mother-son domestic violence. Two-thirds of those accused of anti-social behaviour were themselves victims of anti-social behaviour and victimisation. In some Court of Appeal cases examined, the judges, while recognising the presence of domestic violence and victimisation of neighbours, nonetheless stated that such did not excuse the behaviour of these mothers' children.¹³ The research on these cases showed that unless the women concerned demonstrated to the court that they accepted responsibility (predominantly for their children) and wished to change, they would lose their homes.¹⁴

Case Law

There are few reported cases which are based on the HA 1997, and authorities have used S. 62 of the HA 1966 to seek evictions in relation to anti-social behaviour. The S. 62 process does not require that reasons for eviction be given in order for the court to grant an order for possession. However, in the recent cases of *Donegan v Dublin City Council*¹⁵ and *Dublin City Council v Gallagher*¹⁶ this S. 62 process has been held to be incompatible with the provisions of the ECHR Act 2003.

In *McConnell v Dublin City Council*,¹⁷ the applicant was served with notice to quit due to the anti-social behaviour of his son under S.62 of the Housing Act 1966. During the course of three meetings with the applicant, the Council explained that if his son's anti-social behaviour continued, the Council would terminate his tenancy, which ultimately it did. The applicant did not dispute the anti-social behaviour, but argued that the decision to use S.62 as opposed to an exclusion order against his son by the Council was outside the Council's powers.

In *Leonard v Dublin City Council*,¹⁸ the applicant was served notice to quit due to the breach by her of the terms of her tenancy agreement, i.e. the presence of her partner who was prohibited from entering or remaining on the property. While the applicant had previously been a tenant of the Council in a different dwelling, there had been a complaint about her partner being in her premises, and illegal substances were found there after a Garda search. The applicant claimed that she had no opportunity of being heard and therefore unable to show what steps she had taken to cease any alleged anti-social behaviour, she was unable to point out that her partner had never been convicted of drug dealing and other relevant matters.

The court refused to find a breach of Article 6 ECHR (right to fair procedures). The court stated that S.62 could not be looked at in isolation from the process that led to the application for an issue of a warrant for possession. Before the decision to terminate the tenancy was made, the applicant was written to many times and attended meetings with Council officials. She had every opportunity to put her case to the Council as to why her tenancy should not be terminated. Dunne J held that arts. 6 and 8 requirements were satisfied by the opportunity for judicial review.

In *Donegan v Dublin City Council*,¹⁹ the plaintiff lived in local authority housing with his son. The Gardaí carried out a search of Mr Donegan's house under the Misuse of Drugs Act and found some 'drugs paraphernalia' in his son's bedroom. The Council sought the report by the Gardaí as it is entitled to under the HA 1997. On foot of this report, it began an investigation into alleged anti-social behaviour, and subsequently served the applicant with a notice to quit.

As an alternative to terminating his tenancy, the Council gave the applicant the option of taking out an exclusion order against his son, which he declined. The applicant claimed that the Council could have then sought an exclusion order against his son under S.3 HA 1997 instead of taking the more draconian step of terminating his tenancy by S.62 proceedings.

The court held that S.62 was incompatible with art. 8 ECHR as it allowed the District Court to grant a warrant for possession where there was a factual dispute between the tenant and local authority, without having an independent review of the dispute.

The court held that it is the outcome of S.62 HA 1966, and not the termination of the tenancy, which gives rise to an interference with the tenant's art. 8 rights. Judicial review was held not to be a real procedural safeguard, as the plaintiff would have had no prospect of success where there was a factual dispute with real procedural safeguard.

The court stated that the interference with the plaintiff's art. 8 ECHR rights had a legitimate aim of ensuring good estate management and preventing anti-social behaviour. However, the decision-making process which led to the measure was not fair, did not afford due respect to art. 8, and was not proportionate to housing management requirements. Drawing on the recent ECtHR case of *McCann v UK*²⁰ the court issued a Declaration of Incompatibility under S.5 of the ECHR Act 2003, stating that S.62 was incompatible with art. 8 of ECHR.²¹

In *Pullen v Dublin City Council (No.1)* the local authority served a notice to quit and a demand for possession, and subsequently instituted S.62 proceedings against the plaintiffs.²² The plaintiffs admitted having difficulties with neighbours but strongly denied anti-social behaviour. They argued that they should be entitled to an independent hearing, wherein the finding of anti-social behaviour by the defendants – which was the stated reason for the termination under S.62 – could be challenged at some point before the warrant for possession was enforced.

The court stated that the process here denied the plaintiffs the opportunity of a fair hearing by an independent tribunal on their supposed wrongdoing and that judicial review was a wholly ineffective remedy here, as the facts were hotly disputed.

The court also found that the plaintiffs' art. 8 rights were breached, as the local authority had chosen to use S.62 HA 1966 instead of S.14 of the Conveyancing Act 1881, which allowed a hearing. It stated that it is not enough to show that S.62 is a useful tool for dealing with anti-social behaviour and that, while the defendant's aim of

swiftly recovering possession of houses from those engaged in anti-social behaviour was laudable, the measures taken here were not proportionate. As only 10-12 local authority tenants were evicted using S.62 every year, the court stated that the section could not be seen as a vital procedure.

The court rejected the defendant's argument that it might be difficult to get witnesses to give evidence in court if the District Court eviction process was dealt with on the merits, and that the local authorities would lose control over their estates as a result. It noted that the plaintiffs' neighbour gave evidence voluntarily here.

The court concluded that the plaintiffs belonged to one of the most vulnerable sections of society and their rights were seriously altered to their detriment, namely they were deemed voluntarily homeless due to eviction for anti-social behaviour. It held that it was not at all clear how even model tenants could prove that the problem that had caused them to become homeless (anti-social behaviour) had been resolved. The court stated that the defendants therefore did not perform their functions in a way that was compatible with the State's obligations under the ECHR.

In *Byrne v Dublin City Council*,²³ the applicant, a mother of ten children, sought an interlocutory injunction (a temporary order until the permanent order is made) to stop the Council from evicting her from her residence. She claimed that, as she was given no opportunity to confront her accusers, a violation of the ECHR had occurred.

In granting the interlocutory injunction, the court held that the main reason for terminating the tenancy was now absent. The great majority of the complaints of anti-social behaviour related to the applicant's sons, one of whom had moved into alternative accommodation, and the applicant had obtained orders against the other two, barring them from the family home. The respondent's statutory duties in respect of estate management did not seem to justify an eviction; therefore there was a 'serious question to be tried' at the full hearing. The court mentioned that it may be doubted whether S.62 can justify an eviction which is otherwise unwarranted, as it is merely a procedural provision, but left the ultimate decision of such to the full hearing.

The court held that while the applicant did not dispute the anti-social behaviour, she did deny the veracity of some of the complaints. This was known, or should have been known by the respondent, prior to serving the notice to quit, through investigations that it should have undertaken. If evicted, the applicant would be homeless, with no prospect of alternative accommodation, as she would not be entitled to be re-housed.

The court also noted that the loss of the applicant's social welfare, if evicted, might infringe the right to respect for family life under the ECHR. In contrast, there did not seem to be any loss to the respondent in the exercise of its estate management functions, especially as most of the anti-social behaviour problems were now absent.

However, despite the decision in *Pullen v Dublin City Council [No. 1]*, a later decision in the High Court in *Pullen v Dublin City Council [No. 2]* ruled that this incompatibility with the ECHR could not prevent the S. 62 order for possession from being enforced.²⁴

The court refused to grant an injunction preventing the Council from enforcing the S.62 eviction process. It stated that the European Convention of Human Rights Act 2003 clearly included the remedy of damages but not an injunction to prevent such eviction, as the court would be encroaching on the role of the legislature if it granted such an order.

Conclusion

The HA 1997 gives housing authorities many options to deal with anti-social behaviour, which will be enhanced with the introduction of the new HA 2009. The Courts have taken a strict view of authorities utilising the S. 62 procedure to evict tenants for anti-social behaviour, when such behaviour is disputed, and in any case this procedure has now been held to be incompatible with local authorities obligations under the ECHR Act. The preference for S. 62 procedures by authorities on grounds of possible witness intimidation, or the need for expeditious method of eviction, has been found to be unnecessary or unlawful in a number of existing cases.

It should be noted, however, that many cases of anti-social behaviour involve wider issues, such as levels of support for heads of households, disability and wider estate management policies.

Notes

- 1 See Jacinta Cunneen, *Working Paper Series No 1 – Tackling Anti-Social Behaviour: International Problems, Indigenous Solutions* (Centre for Housing Research, April 2008); CHR, *Preventing and Combating Anti-Social Behaviour* (Centre for Housing Research, December 2003). For a close analysis of the introduction of this concept, what countries influenced our legislation on the matter, and the controversy surrounding anti-social behaviour orders, see Paul Michael Garrett, 'Learning from the "Trojan Horse"? The Arrival of "Anti-Social Behaviour Orders" in Ireland' (2007) 10(4) *European Journal of Social Welfare* 497.
- 2 *Tackling Anti-Social Behaviour*, *ibid*, at 4.
- 3 Padraic Kenna, *Housing Law and Policy in Ireland* (Clarus Press, 2006), at 94.
- 4 *Ibid*.
- 5 Siobhán Stack, 'Anti-Social Behaviour of Local Authority Tenants: When will the Authority be Liable?' (1999) 4(1) *Conveyancing and Property Law Journal* 2, at 5. She also states that the existence of the section means that a court might be persuaded to impose a duty of care on the local authority where the facts were such that it should have exercised its discretion under it. She continues: *A court would probably be reluctant to second-guess an authority, but they might do so, for example, where the offender had previously been the subject of an exclusion order. A local authority who undertakes to re-house such a person does so at the risk of a liability in negligence to neighbouring residents.*
- 6 *Housing Law and Policy in Ireland*, *op cit*, note 5, at 95.
- 7 See Housing (Miscellaneous Provisions) Act 2009, available at <http://www.environ.ie/en/DevelopmentandHousing/RHLegislation/FileDownload,21568,en.pdf>
- 8 See Item 1 (a) of Part 5 of Schedule 2 of HA 2009.
- 9 See Part I (i) and (ii) of Schedule 3 of HA 2009. <http://www.environ.ie/en/DevelopmentandHousing/Housing/RHLegislation/FileDownload,21568,en.pdf>
- 10 See Section 35 of Chapter 5 of Part 2 of HA 2009.
- 11 See Item 1 (b) of Part 5 of Schedule 2 of HA 2009.
- 12 Judy Nixon and Caroline Hunter, 'Disciplining Women: Anti-Social Behaviour and the Governance of Conduct' in A. Millie (ed), *Securing Respect: Behavioural expectations and anti-social behaviour in the UK* (Policy Press, 2009).
- 13 *Manchester CC v Higgins* [2006] HLR 14; *Knowsley HT v McMullen* [2006] HLR 43; *London and Quadrant HT v Root* [2005] HLR 28.
- 14 *Castle Vale HAT v Gallagher* [2001] 33 HLR 810.
- 15 [2008] IEHC 288.
- 16 [2008] IEHC 354.
- 17 Unreported, High Court, 18 January 2005, Smyth J.
- 18 Unreported, High Court, 31 March 2008, Dunne J.
- 19 Unreported, High Court, 8 May 2008, Laffoy J. For a more detailed summary on the case, see 'Donegan v DCC and the Attorney General: Summary of Judgment by Ms Justice Mary Laffoy' (April-June 2008) 18(2) *Flac News* 4.
- 20 (2008) 47 EHRR 913.

■ ANTI-SOCIAL BEHAVIOUR

21 The decision is being appealed to the Supreme Court.

22 Unreported, High Court, 13 December 2008, Irvine J.

23 IEHC 122.

24 Unreported, High Court, 28 May 2009, Irvine J.

The views expressed in this paper are those of the authors and do not necessarily reflect those of the Centre for Housing Research Board of Management or funding organisations. This document is not intended to be a legal interpretation of any existing legislation or to be a legal instruction in relation to procedure.

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