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When will two or more procedures apply in cases of pre-empting violence?

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Crime analysis: Does the civil standard of proof applied to conduct of criminal nature need to be given more thought? Ryan Mowat, partner at Kingsley Napley thinks so and comments on the Court of Appeal's ruling.

Original news

Birmingham City Council v James (Secretary of State for the Home Department intervening) [2013] EWCA Civ 552, [2013] All ER (D) 218 (May)

The Court of Appeal, Civil Division, held that a judge had been entitled to grant an injunction pursuant to the Policing and Crime Act 2009, s 34 restraining the appellant, a member of an urban street gang, from entering a prescribed area of the city of Birmingham. The judge had been entitled to find that the appellant had been part of a gang who had demonstrated a deliberate and provocative act towards a rival gang. Further, the judge had been entitled to grant the injunction even though an anti-social behaviour order could have been granted, because, as long as the provisions of the Act had been met, there was power to grant the injunction notwithstanding the alternative remedy.

What key issues did this case raise?

Birmingham City Council applied and obtained an injunction to restrain gang-related violence under the Policing and Crime Act 2009, s 34 (PCA 2009) after Mr James (the defendant) attended an event in rival gang territory with 30 other gang members in what was considered by the court to be 'deliberately provocative' and a statement that the gang were 'ready and looking for a fight'.

The injunction prohibited the defendant from associating with 19 named persons or gathering with them in any public place within the city and required him to engage (and remain engaged) with The Centre for Conflict Transformation. The defendant appealed the decision arguing:

- o there was no evidence that he had been engaged in gang-related violence
- o an alternative remedy was available in the form of an anti-social behaviour order
- o the terms of the order breached his right to respect for private and family life under art 8 of the European Convention on Human Rights

The Court of Appeal dismissed the appeal addressing each point in turn and holding that:

- o it was clearly evident that the defendant was 'actively and deliberately engaged in gang-related violence' and was not acting in a passive capacity
- o there was no 'closest fit' principle in deciding between the various pre-emptive orders available to control violence--if the statutory conditions are satisfied it is at the judge's discretion whether to grant an injunction to restrain gang-related violence
- o there were no grounds for criticising the terms of the order, which were fair and proportionate

What is the court's discretion in relation to the PCA 2009, s 34?

Under the PCA 2009, s 34 a court may grant an injunction if it is satisfied, on the balance of probabilities, that the respondent has been involved in gang-related violence and that it is necessary to prevent the respondent from being involved in gang-related violence and/or to protect them from gang-related violence.

Did the judgment clarify the law in this area, and are there any remaining grey areas?

Lord Justice Jackson's judgment detailed the three different procedures for pre-empting violent or other unacceptable conduct as follows:

- o an application for an anti-social behaviour injunction
- o an application for an anti-social behaviour order
- o an application for an injunction to restrain gang-related violence

As demonstrated in this case, there will be situations where two or more procedures could apply, and in this instance it will fall to the discretion of the judge to determine the most suitable given the circumstance. Whilst arguably, this leaves further scope for clarification, each order is aimed at a 'particular kind of mischief' which is likely to be apparent on the facts.

In this case, the judge highlighted that there can be no doubt that Part 4 represents Parliament's 'considered response to the particular problem of gang-related violence'. It is, however, likely that further thought will need to be given in relation to the civil standard of proof being applied to conduct of a criminal nature.

Is there a trend emerging in this area? Will we see exclusions from certain areas more often?

The provisions in the PCA 2009 in relation to gang-related violence were introduced following the Court of Appeal's decision in *Birmingham City Council v Shafi and another* [2009] 3 All ER 127 that, save in exceptional circumstances, a court should not grant an injunction under the Local Government Act 1972, s 222, in circumstances where an anti-social behavioural order would be appropriate.

The government's explanatory notes cite the purpose of the provisions under Part 4 to be:

- o preventing serious violence from occurring
- o breaking down gang culture and preventing younger gang members' behaviour from escalating
- o providing an opportunity for local agencies to engage with gang-members and develop effective strategies for them to exit the gang

Each order is tailored to the specific facts of the case.

Judges will be familiar with the pervasiveness of gang related violence in their area and the ways in which they operate leaving them best placed to identify whether an injunction will have the required effect. It is well reported that street gangs are more prevalent in certain inner city [areas] where gangs mark their 'territory' geographically by postcode or area. Precluding gang members from entering another gang's territory may provide a useful tool in meeting the government's objectives.

Interviewed by Nicola Laver.

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