

6. Injunctions and committals

6.1 Introduction

This work is an important part of the daily diet of the family judge. Human Rights Act considerations can never be overlooked and there are a number of interesting challenges, particularly where parties are unrepresented. Perhaps more surprisingly there are some quite significant points of law on which there is a sharp division of judicial opinion. Local practices also vary widely, for example over *ex parte* applications, and part time judges would be wise to make enquiries when arriving at a new court. However, tempting as it may be simply to fall in with local practice, this should never be a substitute for the proper exercise of judicial discretion on the facts of each individual case.

Injunctions will most commonly be sought under Part IV of the Family Law Act 1996 ('the 1996 Act'), but other applications may be made, e.g. under section 37 of the Matrimonial Causes Act 1973 to restrain the disposal of family assets. Since these injunctions are made under a specific statutory provision they are not covered by the jurisdiction restrictions which apply to *Mareva* injunctions made under the inherent jurisdiction, and family judges at all levels may therefore grant relief under section 37.

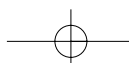
The changes which will be introduced by the Domestic Violence Crime and Victims Act 2004 ('the 2004 Act') are potentially far reaching and only time will tell if they actually achieve their stated objective. Only a few of the relevant provisions of the 2004 Act are in force and there is at present no firm date for implementation. The JSB intends to publish an occasional paper at the appropriate time. Both Acts are entirely gender neutral, but in order to avoid repetition of his/hers, etc it will be assumed that applicants are female and respondents male, as is generally the case in practice.

6.2 Part IV of the 1996 Act, as amended by the 2004 Act

The 1996 Act introduced a comprehensive code of injunctive relief dealing both with property rights (ss. 31 to 41) and molestation (ss. 42 to 49). This covers a wide range of family members now including cousins, which is based on the concept of 'associated persons' as defined in section 62(3). Those who fall outside the definition may still be entitled to similar protection from molestation under the Protection from Harassment Act 1997, but without the added protection of a power of arrest.

The governing rules are FPR 3.8, 3.9, 3.9A, 3.10, 4.24, 8.1A and 9.2. Note that rule 9.2A does not apply to applications under the 1996 Act and consequently applicants who are under 18 must have a next friend. This can cause real problems when teenage children have been effectively cast off by their parents and the only solution may be to have recourse to the saving provisions of CCR Ord 37 r 6.

Most orders will be made on application but the court does have power to make orders of its own motion:



- if it is seized of an application under the Children Act 1989, usually for a section 8 order of some kind, or
- on any application under the 1996 Act.

This chapter is not intended as a guide to the Act itself, which contains a number of detailed and complex provisions and makes extensive use of defined terms, some of which are set out in sections 62 and 63 and others in individual sections. The aim is rather to point up some of the practical problems which may be encountered in dealings with cases under the Act, and offer some guidance to judges who may be unfamiliar with this area of law

6.3 Jurisdiction of the judge

The Family Proceedings (Allocation to Judiciary) Directions 1997 permit any judge with a family ticket to hear proceedings under the Act. However, deputy district judges are not authorised to deal with enforcement either by committal or by dealing with those arrested under a power of arrest. They do, however, have jurisdiction, since the 1997 Directions are directory and not mandatory, but this should only be exercised in cases of real emergency.

6.4 Matrimonial Home Rights.

A spouse, but not a cohabitant, who does not have any legal or equitable right to occupy a matrimonial home has a statutory right of occupation of that home. These are called 'matrimonial home rights' (sections 30-32 and Schedule 4).

6.5 Occupation orders

Sections 33-38 give the court a wide range of powers to make occupation orders. Different sections apply depending on the relationship to each other of the persons concerned and the nature of their existing occupation rights. In disputed cases it will be necessary for the judge to make clear findings of fact in order to establish the relevant section under which relief may be granted. The nature of the relief may be entirely permissive (under ss. 33, 37 and 38) or a combination of mandatory (sections 35(3) and (4) and 36(3) and (4)) and permissive. Although confusing variations of wording are used in sections 35 to 38, orders under these sections are effectively limited to dwellings which either are, were, or were intended to be the matrimonial home of the applicant and respondent.

However, no such limitation appears in section 33 which is the section most commonly encountered in practice. The preconditions for jurisdiction are set out in section 33 (1)(a) and (b) and appear to be wide enough to cover a home, never the matrimonial home, of which the applicant is the owner or tenant, provided that another associated person, e.g. a child of the applicant, lives there too. This view is not shared by the editors of the Family Court Practice who consider that the home must also be, have been, or intended to be the home of the respondent. It is true that a number of possible orders under section 33(3) make no sense unless this is in fact the case, but orders under section 33(3)(g) may offer significant protection

to a former spouse or cohabitant who has re-established herself in a new home with a child and finds that the respondent is continuing to harass by attending at that property.

The point has up to now been rather academic since identical relief is available by a suitably worded order under section 42, but is likely to become more important once the different sanctions for breach under the 2004 Act become effective.

6.6 Exclusion orders

The most common form of relief under these sections is an exclusion order removing one party from the matrimonial home. The Court of Appeal has repeatedly said that these are draconian orders and therefore not lightly to be granted. Note that the court also has power to make exclusion orders in public law proceedings when making an interim care order or an emergency protection order (see ss. 38A and 44A of the Children Act 1989, introduced by the 1996 Act, s.52 and Schedule 6).

Section 39-41 contain supplementary provisions allowing the court to make orders as to furniture outgoings and maintenance but since there are no sanctions for breach these powers are of very limited practical value.

6.6 Non-molestation Orders

Section 42 provides that non molestation orders may be made either in general or specific terms, but in the light of HRA Article 5 and the remarks of Chadwick and Mummery LJ in *Manchester City Council v Lee* [2004] HLR 177, there must now be real doubt whether orders in general terms are lawful. Clear and specific wording should be the hallmark of a properly drafted order.

6.7 Ex parte applications

Ex parte applications are specifically authorised by section 45 and in the context of domestic violence the tests set out in section 45(2) are very commonly met. FPR r 3.8(4) requires the application to be supported by a sworn statement. This may cause serious practical problems for unrepresented applicants but it is a fundamental requirement of justice that a person against whom an order has been made is able to see the evidence which has been given to the court. Do not allow the sworn statement to be supplemented by further evidence dressed up as submissions by advocates, and if necessary adjourn to allow a further manuscript statement to be prepared and sworn. Do also insist on strict compliance with FPR r 3.8(5) so that the sworn statement sets out clearly why the application is being made ex parte.

Many judges insist on fixing a return date when making an ex parte order but section 45(3) simply refers to the respondent being given 'an opportunity to make representations'. Careful drafting is required, but the practice of making an order for an appropriate period leaving the respondent to request that a date be fixed for reconsideration of the order was approved by the Court of Appeal in *Re F* [2005] EWCA 499. The actual wording of the order approved in *Re F* was as follows:

'A. This order will be reconsidered at a further hearing on a date to be fixed by the proper officer on request by the Respondent.

B. Respondent must file and serve any affidavit evidence in support of his case not less than 48 hours before the review hearing.

IMPORTANT NOTICE TO RESPONDENT: This order has been made without any notice of the proceedings being given to you and on the basis of the affidavit evidence of the applicant, a copy of which has been served with this order. If you think the order should be set aside or varied you will have the opportunity to apply for this at a full hearing which will take place as soon as just and convenient. At that hearing the court will hear evidence from both parties and decide whether to confirm, or vary, or set aside the order. The court will fix a date for that hearing as soon as you come to the court office, or telephone or write to the court to ask for the date to be fixed. The hearing will normally take place within seven days of your request and both you and the applicant will receive at least 48 hours notice of the hearing date. You must file any affidavit evidence on which you intend to rely at the court office and serve copies on the applicant if possible not less than 48 hours before the hearing.'

6.8 Transfer of tenancy orders

Section 53 and Schedule 7 contain provisions allowing the court to transfer certain tenancies. Unlike sections 33-38 and section 42, these are effectively final orders. Notice must be given to the landlord (see FPR 3.8(12)- (15)).

6.9 Undertakings

Undertakings may be accepted in lieu of occupation or non-molestation orders, subject to the restrictions set out in section 46. However, no power of arrest can be added to an undertaking so they are only appropriate where an order without a power of arrest will adequately protect the applicant. The views of the applicant may be powerful evidence but if there are serious allegations of violence it may be necessary for these to be tried before deciding whether an undertaking can properly be accepted.

6.10 Powers of arrest

A power of arrest may be attached to an occupation order made under sections 33 -38 and must be attached where violence has been used or threatened to the applicant or a relevant child, unless the court is satisfied that the applicant will be adequately protected without one (s 47(2)). The duration of the power of arrest must be clearly specified in the order. The power can be expressed to run for the duration of the order or for a shorter period but, save in exceptional circumstances, should be expressed to expire on a fixed date.

Any person who is arrested under a power of arrest must be brought before the court within 24 hours, excluding Sundays, Good Friday and Christmas Day (s 47(7)(a)). The Act does not actually impose similar requirements for those arrested under a warrant issued under section 47(9), but Article 5 of the ECHR probably requires section 47 to be read as including an arrest under either provision.

Any arrested person has important human rights which must be respected.

- If he is not brought before a judge within 24 hours of arrest, he must be released and the applicant left to pursue her remedies by applying for committal in the normal way.
- He must be given notice in writing of the alleged breach or breaches which has led to his being arrested (*Newman v Modern Bookbinders* [2000] 2 All ER 814).
- If there is a real possibility of an immediate custodial sentence for the breach he must be offered the opportunity to be legally represented (*King v Read and Slack* [1999] 1 FLR 425).

The requirement that the allegations be reduced into writing may pose serious practical problems, particularly where the applicant is not present or is unrepresented. Since this procedure is a form of summary committal the primary responsibility for preparing the statement rests with the applicant, assisted if necessary by the arresting officer. Ultimately, the only practical solution may be for the judge to settle the form of notice working from the police records so that it can be typed and sealed by the court office before being served on the arrested person.

6.11 Penal notices

Orders made under section 42 will carry a penal notice. Orders made under sections 33-38 may carry a penal notice if the court so directs and such notices should be limited to the paragraphs of the order which contain mandatory or prohibitory provisions.

6.12 Durations of orders

Orders made under sections 33 or 42 may be expressed to last until a specified date or specified event, e.g. until the conclusion of any ancillary relief application or until further order. The Court of Appeal has regularly emphasized that relief under these sections should be regarded as temporary protection and not as a substitute for the proceedings which will permanently resolve matrimonial disputes. The court has power to extend the duration of orders so on a first application orders lasting for more than 12 months are unusual. Note also that the duration of orders under sections 35-38 is specifically limited by the terms of each section.

6.13 Dealing with arrested persons

The first duty of the judge before whom an arrested person is brought is to enquire into the lawfulness of his arrest. Unlawful arrests do occur for a number of different reasons and if the arrest is unlawful the arrested person must be released immediately. An arrest will be lawful if the arrest has taken place following the issue of a warrant issued by the court under section 47(8) or, if the arrest is under a power of arrest, and the arresting officer has reasonable grounds for believing:

- that the injunction has actually been served, and

- that the arrested person has broken a term of the order to which a power of arrest is attached.

The lawfulness of the arrest may be admitted by the Respondent or proved by evidence. The President's Direction of 9 December 1999 [2000] 1 All ER 544 states that the attendance of the arresting officer will not be necessary unless the arrest itself is in issue. If the arresting officer is present, he will give evidence and may be cross examined. If he is not present it may be possible to prove the lawfulness of the arrest by admitting hearsay evidence in the form of the officer's notes provided that the notes clearly specify that the arrest was for breach of a term of the order to which a power of arrest has been attached. Such particularity is not always to be found in the arresting officer's IRB.

The affidavit of service of the order should always be checked. If there is no evidence that the respondent has been properly served then unless he admits service he should be released, that is unless the court is able to make a formal order dispensing with personal service. This should only be done where there is clear evidence that the respondent was present in court when the order was made or otherwise aware of the terms of the order made (*Davy International v Tazzyman* [1997] 3 All ER 183) .

Once the lawfulness of the arrest is established, the court has the option to proceed with a summary hearing or to adjourn. Rule 3.9A (4)(b)(i) appears to contemplate that the hearing will be concluded within 14 days. There is no authority on the question whether the court loses its power to deal summarily with the respondent once the 14 day period has expired or whether the absence of the word 'must' in rule 3.9A(4)(b)(i) implies that the court's general power to adjourn is capable of keeping the court's jurisdiction alive after the 14 day period has expired. Support for the latter view may be derived from the statutory power to remand for medical reports for longer than 14 days (see ?? 19 below). Some judges take the view that the 14 day period only applies where the Respondent is remanded as opposed to the proceedings being adjourned.

A respondent may be remanded on bail, but since there are no sanctions for breach of bail conditions the power is of little practical value. The better course is simply to adjourn the hearing with a warning to the respondent that the court will proceed in his absence if he fails to attend. If the hearing is simply adjourned a formal order releasing the respondent from arrest must be made. Some private security firms insist on the order being personally signed by the judge before actually releasing the arrested person.

Remands in custody may be made for the following periods:

- Police custody - three clear days (Schedule 5, para 2(6)).
- Custody in prison- eight clear days (Schedule 5, para 2(5)).

- Remand for medical examination and report under section 48(1) for up to three weeks at a time (section 48(3)).

If the respondent admits the breach he must be given the opportunity to apologise and present any mitigation before sentence. If the applicant is present she must be given the opportunity to go first and make submissions before mitigation and sentence.

6.14 Sentence

The court has a limited range of powers to deal with breaches admitted or found proved, essentially by fine or imprisonment. There is certainly no absolute rule that an offender should not be sentenced to immediate custody for a first breach but it may be necessary to bear in mind that the person you are thinking of sending to prison is also the children's father and the family breadwinner. The maximum sentence is two years imprisonment. Consecutive sentences are permitted provided that the total does not exceed two years. Early release is now covered by section 258 of the Criminal Justice Act 2003. The contemnor is now entitled to be released unconditionally after serving half of the period imposed. Credit will only be given for any time spent in custody on remand if that is specified in the order and the order must state the actual number of days to be credited.

When imposing a short custodial sentence be aware also of the prison practice not to release on Saturday or Sunday so that those eligible for release on those days will be released on the Friday immediately before the weekend. The effect is that a person sentenced to seven days on Wednesday or Thursday will be released early on the Friday morning. Sentences of less than 14 days are best avoided.

Any person sentenced to imprisonment may apply to the judge to purge his contempt. Best practice dictates that such an application should be heard by the sentencing judge but if he is not available you may have to hear the application. Applications to purge should be made on notice to the applicant so that she has the opportunity to make representations. On the application the judge may order immediate release, or shorten the term originally imposed or dismiss the application. There is sadly no power to order immediate release with the balance of the term being suspended (*Harris v Harris* [2002] 1 FLR 248).

Sentences of imprisonment may however be suspended from the outset and such a sentence which leaves a threat hanging over the head of the respondent may be the most effective way of securing future compliance with the order. The term of the suspension must be fixed with a maximum of two years and may be subject to conditions, e.g. continued compliance with the terms of the order which has been breached. If the order is coming towards its end it is often advisable to extend the term for a further period. The effect of any suspended sentence should be explained clearly to the respondent. Great care should be exercised before declining to activate a suspended sentence on a subsequent breach. The normal rule is that the sentence should be activated and any sentence for the second breach be made consecutive. The other alternatives are a fine, adjournment of sentence for a fixed period which again may be subject

to conditions, or if the breach is simply technical or trivial the court may impose no penalty at all. The totality principle will however apply.

The record of hearing must be completed in all cases and approved by the judge. The form N79 is used and the judge must check and initial the draft completed by the court clerk. If the respondent is sentenced to immediate custody it is advisable for the judge personally to sign the warrant of commitments.

6.15 Committals

Much of the foregoing applies equally to committal proceedings for breach of 1996 Act injunctions or undertakings. The application will be in form N78 and must be personally served on the respondent with copies of any affidavits in support, as must notice of any adjourned hearing. The relevant rules are CCR O 29 rr 1 and 1A. If further breaches are alleged to have occurred after issue of the N78 it is permissible to allow a suitable amendment but care must be taken to ensure that the respondent has adequate notice of all the allegations against him and adequate time to prepare his defence. Although the 14 days notice period required by the CPR does not apply to family law committals, it provides a useful guide to their proper timetabling. Note that the respondent may be directed to file his evidence in reply but cannot effectively be debarred if he fails to do so.

The actual trial process follows that of a criminal trial although the civil rules of evidence apply. The burden of proof is on the applicant and each allegation must be proved to the criminal standard. It is vital to follow the proper procedural requirements (see *Nicholls v Nicholls* [1997] FLR 649).

In Children Act cases committals for breach of contact orders are really the last resort. There is a clear progression which should normally be carefully followed. The order must initially be expressed in mandatory terms and simple declaratory orders must be rewritten and reissued. A penal notice must then be endorsed and the order personally served. If committal proceedings then follow and the breach is proved the normal course is a suspended sentence and immediate custody only on a further breach and where really necessary (see *A v N (Committal: refusal of contact)* [1997] 1 FLR 533).

Since the unreasonable refusal of contact may cause emotional harm to a child the court should consider ordering a section 37 report at an appropriate stage of the proceedings. The alternative of an order under section 34 of the Family Law Act 1986 is always possible, but note the restrictions and bear in mind the effect on the child of the police being involved. Such orders are extremely rare.

If you are committing the parent with residence to prison, it may be worth considering making an interim residence order in favour of the applicant for the duration of the sentence so that the child is not only properly looked after but enjoys the contact which has been denied.