

# The new approach for ASB injunction breaches

What is the proper approach to sentencing for a breach of an anti-social behaviour injunction made under s.1 of the Anti-Social Behaviour, Crime and Policing Act 2014?

In this article I consider the Court of Appeal's recent judgment in the case of *Lovett v Wigan and others* which explains the systematic approach judges should take when imposing orders on committals for breach of an injunction.

In *Lovett* the Court of Appeal heard three appeals which were concerned with breaches of injunctions, sometimes known as "ASBIs", made pursuant to the Anti-Social Behaviour, Crime and Policing Act 2014. ASBIs have replaced the previous system of Anti-Social Behaviour Orders (ASBOs) and are made in the civil courts. Breaches of ASBIs are treated as a contempt of court.

## Legal framework

The power to make an ASBI is found in s.1 of the 2014 Act; a court can grant an injunction if two conditions are met:

1. The court being satisfied, on the balance of probabilities, that the respondent has engaged or threatens to engage in anti-social behaviour, and
2. That the court considers it just and convenient to grant an injunction for the purpose of preventing the respondent from engaging in anti-social behaviour.

Anti-social behaviour is defined in s.2 and the civil standard of proof applies.

The clauses in an injunction can include both prohibitions (a requirement to stop doing something) and positive requirements (where a person is required to take certain steps such as alcohol awareness or reparatory works).

CPR part 81 applies to breaches of orders made under s.1 and are treated as a contempt of court. Respondents to committal proceedings are entitled to non means-tested public funding. Any breach must be proved to the criminal standard and if proved the maximum penalty is two years' imprisonment by virtue of s.14 of the Contempt of Court Act 1981.

Injunctions can be made following a free-standing application in the county court or as part of the sentencing process in the criminal courts, the latter are called Criminal Behaviour Orders ("CBOs").

The civil court's powers on a contempt range from an immediate order for committal to prison, to a suspended order, an adjournment, a fine or making "no order".

The purpose of sentencing for a contempt of court differs from the purposes of sentencing in the criminal courts; with a contempt the court is concerned with future compliance with an order, punishment and rehabilitation (in that order).

## Traditional approach to breaches

Prior to the decision in *Lovett* the civil courts have had regard to the Sentencing Council's Guidelines for breaches of CBOs. That approach was approved in the case of *Amicus v Thorley* [2012] EWCA Civ 817 in relation to a previous set of sentencing guidelines. The principal difficulty with this approach is that the maximum sentence for a breach of a CBO is five years compared with a maximum of two years for a civil contempt. In its **July 2020 report** the Civil Justice Council observed that this approach was resulting in inconsistent sentences (the "Report").

## The Court of Appeal's decision in *Lovett*

The Court of Appeal looked at the approach used by judges imposing sentences in criminal cases and noted the relevance of concepts such as the "custody threshold" and "totality".

The Court of Appeal held that in future judges charged with dealing with breaches of injunctions should adopt the approach suggested by the CJC in its Report. This involves following a stepped approach of the type followed in sentencing criminal cases and would allow a systematic approach to sentencing whilst also recognising the "multifactorial exercise of judgment" that is required and the need for sentences to be just and proportionate.



Kuljit Bhogal is a barrister and a leading expert in anti-social behaviour law. She has been instructed in the all of the PSPO cases that have reached the courts and is able to advise and conduct advocacy in relation to all of the powers in the Anti-Social Behaviour, Crime and Policing Act 2014. She can also advise on the use of other powers such as s.222 of the Local Government Act 1972.

Kuljit sits as a Recorder in the Crown Court and is author of *Cornerstone on Anti-Social Behaviour, 2nd Ed*, May 2019.

The proper approach operates as follows:

## Step 1

The sentencing judge should determine the seriousness of the breach by deciding the level of “culpability” and “harm.”

### Step 1a: Culpability

There are three levels of culpability:

A High culpability; very serious breach or persistent serious breaches

B Deliberate breach falling between A and C

C Lower culpability; Minor breach/es

The CJC’s Report contains the following commentary:

*Examples of category A may include, but are not limited to:*

- *Violence or threat of serious violence*
- *Significant degree of premeditation*
- *Intention to engage in more serious behaviour than actually achieved (e.g. where the respondent was arrested or disturbed before able to complete intended behaviour)*

*Examples of category C may include, but are not limited to:*

- *No intention to cause harm or distress and no harm or distress reasonably foreseeable from the breach*
- *Breach is incidental to some other lawful activity (e.g. entering a prohibited area to use a shortcut)*
- *Lack of premeditation or inadvertent breach*

### Step 1b: Harm

The level of harm is determined by weighing up all the factors of the case to determine the harm that was caused or was at risk of being caused by the breach/es.

In assessing any risk of harm posed by the breach/es, consideration should be given to the facts or activity which led to the order being made.

Category 1 Breach causes very serious harm/distress

Category 2 Cases falling between categories 1 and 3

Category 3 Breach causes little or no harm/distress

The CJC’s Report contains the following commentary:

*Examples of category 1 may include, but are not limited to:*

- *Injury or threat of serious injury*
- *Significant damage to property*
- *Elderly or vulnerable person affected by breach/es*
- *Causes a resident to move home*

*Examples of category 3 may include, but are not limited to:*

- *No person(s) actually inconvenienced*
- *Breach comprises mere presence in unauthorised location other than in circumstances comprising greater harm*

### Step two

Having determined the categories at step one, the court should use the corresponding starting point to reach a preliminary penalty:

Having determined the appropriate level of harm and culpability, the table gives a range of sentences and a starting point. For example, for a Culpability A, Harm 3 case the category range is “adjourned consideration to 3 months” with a starting point of 1 month custody.

**See table below**

Harm	Culpability	Culpability	Culpability
	A	B	C
Category 1	Starting point: 6 months Category range: 8 weeks to 18 months	Starting point: 3 months Category range: Adjourned consideration to 6 months	Starting point: 1 month Category range: Adjourned consideration to 3 months
Category 2	Starting point: 3 months Category range: Adjourned consideration to 6 months	Starting point: 1 month Category range: Adjourned consideration to 3 months	Starting point: Adjourned consideration Category range: Adjourned consideration to 1 month
Category 3	Starting point: 1 month Category range: Adjourned consideration to 3 months	Starting point: Adjourned consideration Category range: Adjourned consideration to 1 month	Starting point: Adjourned consideration Category range: No order/fine to two weeks

Once the starting point has been established, the judge must look at whether there are any features which warrant an upwards or downwards adjustment. This reflects the procedure that is adopted in the criminal courts when sentencing for criminal offences. The CJC's report gives the following examples of factors which could warrant an adjustment:

Examples of factors increasing seriousness:

- history of disobedience of court orders
- breach committed shortly after the order was made
- targeting of a person the order was made to protect or a witness in the original proceedings
- victim, or protected subject of order breached, is particularly vulnerable due to age, disability, culture, religion, language, or other factors.

Examples of factors reducing seriousness or reflecting personal mitigation:

- breach committed after long period of compliance
- genuine remorse
- age and/or lack of maturity where it affects the responsibility of the respondent
- ill health, mental disorder or learning disability
- sole or primary carer for dependent relatives.

The CJC's report goes on to describe steps 3 – 8 which reflect the steps a criminal judge would take when sentencing for a criminal offence. The Court of Appeal's judgment does not expressly endorse those steps save for suggesting that totality is relevant at [43]. However, I suggest that those further steps are likely to be relevant in most cases and would be a helpful approach for the civil judge to adopt. Briefly, these steps are as follows:

### Step 3

The court should consider a reduction in the penalty to take account of any admissions that have been made and apply the Sentencing Council's *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (the "Guilty Plea Guidelines").

### Step 4

If penalties are being imposed for more than one breach, the court should look at whether the overall sentence is just and proportionate and apply the *Offences Taken Into Consideration and Totality: Definitive Guideline* (the "Totality Guidelines").

### Step 5

When imposing a sentence of imprisonment, the court should consider whether the sentence should be suspended and apply the *Imposition of Community and Custodial Sentences* (the "Imposition Guidelines"). A court should also consider whether the terms of the underlying injunction ought to be varied and whether the imposition of a positive requirement may be appropriate.

### Step 6

The judge should consider whether the term should be adjusted to reflect any time spent on remand or in custody.

### Step 7

The court should explain the reason for imposing the sentence using plain language.

### Step 8

The court should consider whether to list the case for a review to examine compliance with a positive requirement.

The judgment represents welcome guidance to those dealing with alleged breaches and to those advising respondents who are facing a committal application.

**If you would like to know more about sentencing in committal applications, or about any of the tools and powers found in the Anti-Social Behaviour, Crime and Policing Act 2014 please do get in touch using the contact details below.**