

DOMESTIC VIOLENCE

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Not really a topic which can be considered in isolation – issue commonly occurs in tandem with:

- Occupation orders
- Divorce proceedings, including ancillary relief
- Family/children matters

Non- Molestation Orders (s.42 Part IV Family Law Act 1996)

- Order can be made on application by the victim, or indeed, without application in any family proceedings.
- Can be made by court of its own motion in family proceedings.
- Where no family proceedings are pending, a free standing application can be issued in
 - ◊ Divorce county court
 - ◊ Family hearing centre or care centre
 - ◊ The Principal Registry of the Family Division
- Available to –cohabitants – former cohabitants – relevant children.
- Leave of the court required for applications by children under 16.
- Also available to “associated persons” (defined s.62(3))
 - a. married/have been married
 - b. cohabitants/former cohabitants
 - c. have lived in same household (not as lodgers etc)[*note same sex*]
 - d. relatives
 - e. agreed to marry each other

- f. relationship with a child
- g. parties to the same family proceedings

- 'Molestation' remains undefined – includes violence and threats of violence – physical, sexual or psychological or harassment (e.g repetitive telephone calls/texting).
- You *do not* always need physical assault

An Order containing either/both:

- prohibition on Respondent from molesting a person who is associated with the Respondent
- prohibition on R from molesting a 'relevant child'
- 'molesting' can refer to molestation in general, or to particular acts, or to both

Criteria:

- Court has regard to *all the circumstances* including the need to secure the **health, safety and well being** of
 - a. the applicant
 - b. any relevant child

- all these factors need to be addressed in the sworn statement of A - it is why you are asking for the protection of the court.

Protection from Harassment Act 1997

- Non 'associated persons'
- Remedy in both the civil and criminal courts.

Ex-Parte Non-Mol applications (s.45)

- Usually before a DJ in Chambers
- Risk of significant harm attributable to conduct of R *if the order is not made immediately*
- Will A be deterred/prevented from pursuing the application if the order is not made immediately?
- Is the respondent aware of the proceedings but is deliberately evading service?

Return Day

- Ex parte should be made to last for the full period of the likely 'on notice' order.
- MUST bring the application back for R to deal with it on notice.
- Must allow time for service and for R to seek legal advice.
- Must obtain proof of service.

Do You Need a Power of Arrest? (s.47 Arrest without warrant)

- Usually if there is violence/threats of violence
- President Family Division stated requirement to impose P of A is "almost mandatory" – not always in practice!
- P of A allows police to arrest Respondent without warrant if they have *reasonable cause for suspecting Respondent to be in breach of the order to which the P of A attaches*
- Ex Parte – *may* attach P of A
- On Notice – if Respondent used or threatened violence the court *shall* attach P of A unless satisfied in all the circumstances of the case that adequate protection without.

- Know your tribunal!

The Undertaking (s.46)

- Often considered for less serious cases
- Cannot attach P of A
- Court can only accept undertakings when satisfied the Applicant does not need P of A for her protection
- Also punishable by imprisonment – *remind your client!*
- Extremely useful bargaining tool – when acting for both sides.

When to *give* an undertaking/accept a non-molestation order

- Are there concurrent children applications eg. Contact?
- Do you want to avoid a finding of violence against you?
- Consider giving an undertaking on no admissions basis
- Sometimes caught between rock and a hard place

Duration

- Usually 6 or 12 months
- Can be *until further order*
- Duration can be useful bargaining tool
- Can make application to vary or discharge.

Breach

Breach of an order made by, or an undertaking made to the court is punishable as a Contempt of Court [Contempt of Court Act 1981]. This can be by fine, reprimand or committal to prison.

Party seeking to prove the contempt must prove:

- That the order was made and had a penal notice attached
- That the order was duly served upon the Respondent
- That the person is in breach
- That service of the application notice/notice to show cause has been made
- That the person has been validly arrested or otherwise brought before the court.

Arrest under s.47

- R must be brought before the court within 24 hours of arrest
- At court can admit breach and be dealt with
- Or deny breach – adjourn for statements
- If remands R– can (usually) only be for maximum of 8 days
- Be ready to make a Bail Application
- Bail – may attach conditions
- Must come back ASAP

Warrant of arrest s.47 (8)

Even when no P of A is attached, the Police can become involved: -

Apply to the county court for a warrant for arrest. Police are then under a *duty* to become involved. Contrast *power* of arrest under s.47.

What to do if breach is also a criminal offence and R is charged
e.g. Assault

- Family matter in county court does not wait until conclusion of criminal matter.
- At county court – you usually have police statements and little else
- Applicant not always there.
- Anomalies – Mags grant R bail/ CC want to remand him
- Be ready to make a 'bail app' in CC – what are his Mags bail conditions, how can you persuade Judge the Applicant is sufficiently protected now Non-Mol doesn't work?
- If remanded by CC – time limit is 8 days.

If no arrest

- N78 - 'Notice to Show Cause'
- Must be very precisely worded
- What has he done and why is this a breach?
- Ensure proof of service

Committal hearing

- Remember robes – R may be about to lose his liberty
- Burden of proof on A to the criminal standard
- Ordinary trial format

Penalties

Main objective of the courts is to punish the contemnor; the need to protect the victim comes second.

- Penalties limited to fine, imprisonment and suspended imprisonment.
- May be asked to say what A wants to happen.
- Consider effect on other proceedings:
- At this stage do you want to make admissions and secure your 'discount for guilty plea'?
- Max penalty Contempt of Court Act 1981 – 2 years imprisonment.
- Max penalty under Protection from Harassment Act – 5 years
- *Robinson v Murray* [2005] EWCA Civ 935 – where the case warrants a sentence near the top of the range, the appropriate course is probably to bring proceedings under PHA rather than FLA, so that the greater powers of punishment are available to the court.
- *R v Liddle; R v Hayes* [1999] 3 All ER 816 Typical sentences
- *H v O (Contempt of Court; Sentencing)* [2004] EWCA Civ 1691, [2005] 2 FLR 329
- *Lomas v Parle* [2002] EWCA Civ 1804 if there are parallel criminal proceedings arising out of the same incident it is not for the first court to sentence to anticipate or allow for a likely further sentence. Rather it is for the second court to reflect the prior sentence to ensure that the defendant is not punished twice for the same act.
- Cannot on any one occasion to impose consecutive sentences which cumulatively exceed the two year maximum.

- *Villiers v Villiers* [1994] 2 All Er 149 cannot on the same occasion both activate a suspended sentence and impose a new consecutive sentence which together exceed the two year maximum .
- *Delaney v Delaney*, *The Times*, November 2, 1995 a judge in CC has no power to detain the contemnor in custody pending consideration of the sentence to be imposed
- CC has power to suspend a committal order for contempt of court upon stated conditions, and to impose consecutive sentences for separate contempts.

Appeal

- Automatic right of appeal to CA – no need for leave.
- Usually exercised by contemnor who wishes to obtain reduced sentence.
- Also available to **victim** who wishes to appeal for a longer sentence. (*Linnet v Coles* [1987] QB 55)
- Only increased if sentence 'unduly lenient'.

Purging Contempt

- Only available in county court proceedings.
- Little known provision, not often used.
- If imprisoned, provision allows Respondent to 'purge' his contempt by demonstrating remorse and thereby securing his release.

- The notice of his application to discharge must be served on the committing party not less than one day before the application is to be heard.

The New Law

s.42A FLA 1996

- Introduced by The Domestic Violence, Crime and Victims Act 2004
- Breach of non-molestation order to be a **criminal offence**:
 - (1) A person who without reasonable excuse does anything that he is prohibited from doing by a non-molestation order is **guilty of an offence**.
 - (2) In the case of a non-molestation order made by virtue of s45(1), a person can be guilty of an offence under this section only in respect of conduct engaged in at a time when he was **aware of the existence** of the order.
 - (3) Where a person is convicted of an offence under this section in respect of any conduct, that conduct is **not punishable as a contempt of court**.
 - (4) A person cannot be convicted of an offence under this section in respect of any conduct which has been punished as a contempt of court.
 - (5) A person guilty of an offence under this section is liable (a) on conviction on indictment, to imprisonment for a term not exceeding **5 years**, or a fine or both (b) on summary conviction, to imprisonment for a term not exceeding **12 months**, or a fine not exceeding the statutory maximum or both.
- Billed as coming into force in April 2005, then July 2005
- Still not seen in practice – watch this space.

Impact

- No change to s.47 Power of Arrest – will remain in existence.
- Do not need a warrant for s.42A
- If R arrested under P of A s.47 Police will still have to comply with s.47(7) and produce the arrested person in the county court within 24 hours.
- If arrested for *the crime* of breaching the non-mol, it will not be necessary to come to the county court, instead, the normal criminal procedure will be followed -
- R will be taken to Magistrates' Court.
- Likely that once in force, s42A will be the most preferred route for the police wherever there is a choice.

Considerations

- Anomalies of arrest
- If convicted of breach – R will receive a criminal record
- Given domestic context – many applicants may be dissuaded from pursuing.
- CPS policy to pursue prosecution at all costs, regardless of complainant's willingness to attend court.
- Police will have to become more proactive in obtaining corroborative evidence from e.g third parties, Scenes of Crime.
- Potential outcomes – witness summons for complaint, treating her as a hostile witness.

- County court will still deal with persons brought before it pursuant to a warrant of arrest or under the 'notice to show cause' procedure.
- Highly likely that persons arrested by the police will be prosecuted rather than proceeded against for contempt of court.
- **Cannot do both.**

Sentence under s.42A

- Full range of criminal sanctions including community penalties.
- Max 5 years on indictment; 12 months on summary conviction.
- Ability to ask for pre-sentence reports.
- Disparity between civil and criminal court.
- Choice about severity of penalty effectively taken by Police when they decide upon which venue to take R after breach
- Should a new Contempt of Court Act be introduced to give the civil courts a comparative sentencing power?

A "better deal for victims"?

- Removes initiative from the victim
- What was a family affair becomes a state managed affair
- Regardless of victim's wishes.

Effect of conviction: -

- criminal record, loss of reputation affecting not only R but whole family, loss of livelihood and adverse publicity.
- Safety valve of undertakings removed.

- Ultimately could destroy domestic setting rather than cement it