

behaviour for those living on the estate), then the order should not (normally) prohibit driving whilst disqualified. It should prohibit, for example, the offender whilst on the estate from taking part in, or encouraging, racing or driving at excessive speed. It might also prevent the group from congregating with named others in a particular area of the estate. Such an order gives those responsible for enforcing order on the estate the opportunity to take action to prevent the anti-social conduct, it is to be hoped, before it takes place. Neighbours can alert the police who will not have to wait for the commission of a particular criminal offence. The ASBO will be breached not just by the offender driving but by his giving encouragement by being a passenger or a spectator. It matters not for the purposes of enforcing the ASBO whether he has or has not a driving licence entitling him to drive.

37 Not only must the court before imposing an order prohibiting the offender from doing something consider that such an order is necessary to protect persons from further anti-social acts by him; the terms of the order must be proportionate in the sense that they must be commensurate with the risk to be guarded against. This is particularly important where an order may interfere with an ECHR right protected by the Human Rights Act 1998, e.g Arts 8, 10 and 11.

38 We think that bail conditions provide a useful analogy. A defendant may be prohibited from contacting directly or indirectly a prosecution witness or entering a particular area near the alleged victim's home. The aim is to prevent the defendant trying to tamper with witnesses or committing a further offence. But the police do not have to wait until he has tampered or committed a further offence and thus committed a very serious offence. If he breaks the conditions even without intending to tamper, he is in breach of his bail conditions and liable to be remanded in custody. The victim has the comfort of knowing that if the defendant enters the prescribed area, the police can be called to take action. The victim does not have to wait for the offence to happen again.

39 We look at some examples of how the Divisional Court and this Court have approached ASBOs.

40 In *McGrath* [2005] EWCA Crim 353; [2005] 2 Cr.App.R.(S.) 85 (p.529) considered the terms of an ASBO made under s.1C in respect of an appellant, aged 25, with an appalling record who pleaded guilty to a count of theft which involved breaking into a car in a station car park and stealing various compact discs. The ASBO contained (amongst others) the following prohibitions:

- “2. Entering any other car park whether on payment or otherwise within the counties of Hertfordshire, Bedfordshire or Buckinghamshire.
3. Trespassing on any land belonging to any person whether legal or natural within those counties.
4. Having in his possession in any public place any window hammer, screwdriver, torch or any tool or implement which could be used for the purpose of breaking into motor vehicles.”

41 In respect of term 2, the Court of Appeal held that it was unjustifiably draconian and too wide; it would, for example, prevent the appellant from entering, even as a passenger, any car park in a supermarket. Similar considerations