

**SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY AT
HAMILTON**

[2024] SC HAM 54

HAM/B938-23

JUDGMENT OF SHERIFF J SPEIR

in the cause

SOUTH LANARKSHIRE COUNCIL

Pursuer

against

ANDREW CUNNINGHAM

Defender

**Pursuer: Mr Cox, solicitor; South Lanarkshire Council
Defender: Party**

Hamilton 5 November 2024

The sheriff, having resumed consideration of the cause:

Finds the following facts admitted or proved:

1. The pursuer is South Lanarkshire Council (“the Council”). It is a local authority constituted in terms of section 2 of the Local Government etc (Scotland) Act 1994. It has its principal offices at Council Offices, Almada Street, Hamilton.
2. The Council is the Housing Authority for the area of South Lanarkshire including the town of East Kilbride.
3. The defender is Andrew Cunningham who occupies a flat in Clyde Tower, East Kilbride (“Clyde Tower”). The Council owns the property occupied by the defender. It was let to the defender in terms of a Tenancy Agreement dated 9 November 2020.

4. Clyde Tower is a high-rise block of flats.
5. The Council has consulted with Police Scotland who support this application.
6. Records kept by Police Scotland in accordance with section 139 of the Antisocial Behaviour etc (Scotland) Act 2004 disclose that between 14 May and 19 September 2023 four complaints were made concerning conduct by the defender of which two related to conduct with which this application is concerned, namely:
 1. the telephone call on 7 September 2023 referred to in finding in fact 11; and
 2. a complaint dated 19 September 2023 at 1949 hours from one of the defender's neighbours at Clyde Tower reporting loud music, shouting and swearing coming from the defender's address which Police Scotland passed to the Council.
7. That from around August 2021 for a period of 2 years, the Council had from time to time received complaints from several other tenants in Clyde Tower in relation to the defender's behaviour. The complaints were of excessive noise from his property and generally antisocial and threatening behaviour from him or visitors to him. No action had been taken in response to these complaints.
8. That the Council have a policy of protecting the anonymity of complainers of antisocial behaviour within the properties managed by them.
9. That there was a meeting within Clyde Tower which took place on 21 August 2023. All of the tenants were invited. The defender did not attend. At that meeting the complaints referred to in the preceding finding in fact were ventilated publicly by other tenants in the presence of police and employees of the Council's housing department.
10. That in consequence of the complaints made prior to and at said meeting a Council housing officer, "M", issued the defender with a letter dated 6 September 2023 in terms of section 17(2) of the Housing (Scotland) Act 1987. Said letter intimated an intention to visit

him within his property for the purpose of inspecting his tenancy and discussing various tenancy related matters.

11. That in response to said letter the defender telephoned the Council's housing department on 7 September 2023. In the course of said telephone call he made several threats of violence towards M which caused her significant alarm and distress. Said telephone call was recorded and reported to the police and became the subject of separate criminal proceedings.

12. That by letter dated 19 September 2023 the Council's housing services manager, advised the defender that the behaviour evinced in said telephone call was unacceptable and due to a concern of re-occurrence a record of it was being retained until at least March 2024.

13. That following said letter dated 19 September 2023 a further complaint of antisocial behaviour on the part of the defender was received by the Council, being the complaint detailed in finding in fact 6(2).

14. That by letter dated 4 October 2023 M invited the defender to attend the Council's housing department office on 11 October 2023 to discuss matters further. The defender did not respond to that invitation nor attend at the appointed date and time.

15. That because of the complaints received and the lack of engagement by the defender the Council instructed KM, an officer within their antisocial behaviour team, to carry out an investigation and interview the complainers on the basis that their identities would not be disclosed to the defender.

16. That following such investigation and interview of the complainers concerned KM was able to obtain recent accounts of antisocial behaviour on the part of the defender including loud music, shouting, and banging emanating from the defender's property as well as alarming behaviour towards persons residing near him within Clyde Tower.

17. That such behaviour caused or would have been likely to cause alarm or distress to the complainers concerned.
18. That the defender did not accept KM's invitation to discuss the reports of complaints made.
19. That in all the circumstances and having regard to the available evidence the Council reasonably concluded that on the range of options available to it the appropriate course was to seek an antisocial behaviour order against the defender.
20. That an interim antisocial behaviour order was granted in favour of the Council against the defender on 6 December 2023 and remains in force at the present date.
21. That there have been no further reported incidents of anti-social behaviour since the beginning of October 2023.
22. That the defender successfully underwent detoxification treatment between October and December 2023 and continues to benefit therefrom and from the ongoing support he receives from appropriate agencies.

Finds in fact and in law as follows:

1. That between August 2021 and the beginning of October 2023 the defender engaged in antisocial behaviour towards relevant persons.
2. It is necessary to make an antisocial behaviour order for the purpose of protecting relevant persons from further antisocial behaviour by the defender.
3. That the appropriate period for such an order is 3 months

Therefore:

1. Recalls the interim antisocial behaviour order pronounced on 6 December 2023;

2. Grants an antisocial behaviour order against the defender in terms of section 4(1) of Part 2 of the Antisocial Behaviour etc (Scotland) Act 2004 prohibiting the defender from (i) shouting, swearing, banging, playing any amplified sounds (whether music, television or otherwise) or otherwise making noise within the subjects or in the vicinity of the (subjects occupied by the defender) at Clyde Tower, East Kilbride or any other dwellinghouse occupied by him as his principal home (hereinafter referred to as “the subjects”), at such a volume as to be audible outwith the subjects; (ii) assaulting, verbally abusing, threatening, intimidating or acting in a manner likely to cause fear and alarm or annoyance to others; all within the Sheriffdom of South Strathclyde, Dumfries and Galloway; for a period of 3 months from the date hereof;
3. Finds no expenses due to or by either party.

Sheriff John Speir

NOTE

Introduction

[1] The imposition of an antisocial behaviour order is a serious matter. Breach of it can have severe consequences in the form of a sentence of imprisonment or a fine or both. Applications for antisocial behaviour orders are made by way of summary application. This summary application is by South Lanarkshire Council (“the Council”). The Council seeks the grant of an antisocial behaviour order against the defender in terms of section 4(1) of the Antisocial Behaviour etc (Scotland) Act 2004 (“the 2004 Act”). The basis of the application is

the defender's alleged behaviour towards (a) his neighbours in the common stair at Clyde Tower, East Kilbride ("Clyde Tower") and (b) towards the Council's staff.

[2] The defender opposes the application. On 6 December 2023 at a hearing after service an interim antisocial behaviour order was made against the defender in the terms craved by the Council as follows:

"Ad interim Grants the Anti Social Behaviour Order, against the defender in terms of Section 4(1) of Part 2 of the Antisocial Behaviour Etc (Scotland) Act 2004 prohibiting the defender from (i) shouting, swearing, banging, fighting or otherwise making noise within the subjects or in the vicinity of the (subjects occupied by the defender) at Clyde Tower, East Kilbride or any other dwellinghouse occupied by him as his principal home (hereinafter referred to as 'the subjects'), at such a volume as to be audible outwith the subjects; (ii) damaging property belonging to another, including communal property, in or within the vicinity of the subjects; (iii) assaulting, verbally abusing, threatening, intimidating or otherwise putting into a state of fear, alarm or distress any persons in the South Lanarkshire Council area; (iv) entertaining more than three visitors at any one time at the subjects; and (v) permitting or encouraging any persons to engage in any of acts described in (i) to (iv) above; "

[3] There was no appearance by or on behalf of the defender at said hearing to oppose the making of the interim order.

[4] After sundry procedure the case called for proof. Mr Cox, solicitor, appeared on behalf of the Council. The defender represented himself. The only pleadings were those set out in the initial writ. The defender was content to proceed without written answers. The basis of his opposition was nonetheless clear from his questioning of the Council's witnesses, his own evidence and his brief written submissions as further referred to below.

The evidence

[5] The evidence in the case was of relatively short compass. The essential facts from the evidence heard are set out in my findings in fact. The Council led evidence from CL and KM. The defender gave evidence himself.

[6] CL is a housing services manager with the Council. She has responsibility for East Kilbride and Strathaven. Her duties involve oversight of all housing management functions, including: allocation, movements, rent arrears, homelessness provision and antisocial behaviour issues. In relation to antisocial behaviour she tended to be more reactive. It was something that required to be responded to rather than planned for. The defender was a council tenant of a property at Clyde Tower, East Kilbride. He had been a tenant there since 2020. Clyde Tower is a multi-storey property comprising a number of flats. Complaints about his behaviour from other tenants in Clyde Tower began around August 2021. Prior to the meeting in September 2023 there had been a total of six complaints of antisocial behaviour from different complainer's detailing load music, excessive noise, kicking of doors and the defender behaving in a threatening manner towards another resident. Generally complaints of antisocial behaviour were not necessarily acted upon straightaway. It depended on the nature of the complaints and the number of sources for it. The council recognised a need to try and find corroboration for complaints balanced against protecting the anonymity of complainers for fear of repercussions. There were usually different stages to go through before a decision was made to apply to the court for an antisocial behaviour order. Those included various forms of initial and then final written warnings. Stages could be skipped depending on the seriousness of the conduct involved. By 2023 there was a concern that the defender's behaviour was escalating. That concern was compounded when he made an abusive and threatening telephone call to the member of the local housing team ("M") who had been dealing with him. Shortly before that telephone call there had been a meeting of residents at Clyde Tower on 21 August 2023. CL had attended that meeting together with other members of the housing team and the local police. In the course of the meeting complaints were made that the Council were not doing anything

about the incidences of antisocial behaviour that been being reported. There was considerable frustration as to the lack of action in particular the continuation of excessive noise. The defender was specifically named as being the source of this behaviour. CL explained to the meeting the process for reporting and dealing with complaints and the need to seek corroborating evidence prior to significant action being taken. The defender had not been present at the public meeting. Following the meeting M sent a letter to the defender dated 6 September 2023 intimating an intention to carry out an inspection of his property and to discuss various tenancy related matters. The intention was to discuss the complaints that had been made against the defender and to deal with the issue robustly but also to clarify if the defender needed any support. The following day, 7 September 2023, and in response to that letter, the defender contacted the local housing team by telephone and made various threats against M. That call had been recorded. CL had listened to the recording. She had been very disturbed by what had been said by the defender in particular the nature and detail of the threats made. M had been extremely alarmed and threatened by the call. The issue was of particular concern because on occasions M could be required to work alone within Clyde Tower. The safety of council staff was of paramount importance and any risk to them was taken very seriously. As a result of the defender's call CL sent a letter to the defender dated 19 September 2023. The purpose of the letter to make it clear to the defender that his behaviour was unacceptable. Subsequent to the telephone call a further complaint of antisocial behaviour by the defender was received. By letter dated 4 October 2024 he was advised of the investigation of that complaint. He was invited to attend a meeting with M on 11 October 2023 or contact the office to arrange an alternative date if that was not suitable. He did not respond to that letter or attend the proposed meeting. In all the circumstances a decision was made to escalate the case to the Council's

antisocial behaviour team to carry out further investigations. On completion of those investigations all options going forward were reviewed ranging from sending out further warning letters to commencing eviction proceedings. A determination was made to seek an antisocial behaviour order. Had it not been for the telephone call to M less serious sanctions may have been considered in the first instance, including an invitation to enter into an antisocial behaviour contract. Separately the recording of that call had been passed to the police and criminal charges against the defender arising therefrom were pending. There had been no further complaints of antisocial behaviour order since the interim order had been made in December 2023. Prior to that there had been six different complaints from five different complainers.

[7] In cross-examination CL accepted that in fact there had been no further complaints since October 2023. She accepted the defender's assertion that this was because around that time he had been admitted to hospital in order to undergo detoxification treatment. She accepted that the names of the complainers had not been disclosed to the defender but that was consistent with the Council's policy not to disclose such identities having regard to both considerations of data protection and the possibility of recriminations. She was unable to speculate why there had been no police involvement prior to October 2023 nor indeed what steps any officers from environmental health had taken in relation to complaints made to them. The defender indicated that he was not intending to ask questions about the telephone call as this was currently the subject of an ongoing criminal complaint but suggested that he had complained about M's behaviour on several occasions and that her conduct towards him had been unreasonable. CL responded that she was fully satisfied that M had acted properly at all times in accordance with her role and responsibilities.

[8] KM is 55 years old. He is an antisocial behaviour investigation officer with the Council. He has responsibility for the East Kilbride area. He has been in post for 3 years. Prior to that he had been a detective constable with Police Scotland with 30 years' service. His role required him to deal with the more serious cases of antisocial behaviour. A housing officer or the housing services manager allocated him cases. He had been allocated the defender's case on 18 October 2023 and provided with background to the complaints made against the defender by five witnesses. Those complaints were of loud music, shouting, persons coming going at all hours of the day and night, the consumption of cannabis and alcohol in the lift and other common areas and threatening behaviour towards other residents. He carried out an investigation by initially contacting the complainers whose details were available. Ultimately he was able to speak to seven separate complainers within Clyde Tower. Their complaints against the defender stemmed from 2021 to the time of his investigation. He obtained detailed statements from them as to the nature and circumstances of the antisocial behaviour and how it had affected them. The principal complaints were: loud music and noise coming from the defender's flat; frequent and numerous visitors to him coming and going at all hours of the day and night; associated drinking and noise in common areas from those visitors who also urinated in the lift and exhibiting threatening behaviour towards other residents. He had been made aware of the threatening telephone call that the defender had made to M. He had listened to a recording of that conversation and had felt disgusted by it. On completion of his investigation and interviews with other residents of Clyde Tower he sent a letter to the defender dated 27 October 2023. Prior to sending that letter he had made numerous attempts to contact the defender without success. That letter details the outcome of his investigation and in particular of reports made of:

“loud music, shouting, and banging from (the defender’s) property as well as alarming behaviour towards persons both residing near (his) property and persons employed by the Council and placing them in a state of fear and alarm for their safety”.

The letter also advised that because of these reports the Council intended to seek an interim antisocial behaviour order against him. He invited the defender to contact him if he wished to discuss the matter further and in more detail. The following day the defender contacted him by telephone. The defender was not interested in listening to anything he had to say but rather wished to make it clear that he would only speak to him when he could be bothered to do so. He made no further contact. KM also obtained made a request for disclosure of antisocial behaviour information relative to the defender held by Police Scotland. A disclosure report dated 15 November 2023 detailed reported incidents from 13 and 14 May, and 7 and 19 September all 2023. KM was aware that there was a pending criminal case in relation to the telephone call made to M. KM’s recommendation to the housing services manager had been to seek an antisocial behaviour against the defender. Police Scotland supported that course of action in terms of their letter dated 16 November 2023.

[9] In a very brief cross-examination KM agreed with the proposition that the behaviour he had investigated and thereafter reported could amount to criminal offending. He was unable to comment why no criminal charges had been brought because of that offending but suggested that possibly the witnesses were too scared and intimidated to report it to the police. KM had reached his conclusion that the defender had been responsible for antisocial behaviour on the basis on the statements he had obtained from the defender’s neighbours in Clyde Tower.

[10] Giving evidence on his own behalf the defender asserted that there was no definitive evidence against him. He did not accept the accounts relied on by the Council. He suggested that other tenants were lying and making up stories against him. He further suggested that there was “more to it than meets the eye” but would not be drawn any further on what he meant by that. Since October 2023 he had successfully undergone detoxification treatment. He was still working with helpers and receiving support. He now abstained from alcohol. He thought there were at least a hundred people in the tower block and it would appear that only six of them had spoken against him. He believed that there was no point in an antisocial behaviour order being made against him. He had changed his lifestyle. He thought this process was a “complete waste of time”. He did not want any interference from the Council. He had suffered from PTSD which could make communication with others confrontational. He accepted he had made the telephone call to M had taken place but referred to there being were underlying circumstances which he did not elaborate on.

[11] In cross-examination he was prepared to accept that his behaviour in the past may have given a basis for some people to make complaints against him. He did not accept his behaviour was intimidating to others. He did accept he had been aggressive towards M. He did not accept that his behaviour towards her placed her in a state of fear and alarm. He suggested there was no evidence that he been aggressive towards anyone. He suggested that the seven witnesses who had given statements could have made up stories. Everything had been made up. He had not appeared at the hearing in December 2023 to oppose the making of the interim order as he was undergoing treatment for his drink problem at that time. Although not present at the public meeting he did not accept that it concerned him as the main issue was about dogs.

Credibility and reliability

[12] I accept the evidence of CL and KM as credible and reliable in all material respects.

The defender chose not to engage with all aspects of the evidence in particular the telephone call he made on 7 September 2023. He did however accept that he made that call but was not going to comment on it because it was the subject of pending criminal proceedings.

Having said that he then sought to explain it was because of “circumstances” prevailing at the time, from which I inferred his issues with alcohol.

[13] The defender refused to accept the veracity of the reports made initially to the Council’s housing department and then investigated by KM. He did not appear to challenge either that complaints had been made and then investigated but that rather what was involved was some sort of conspiracy against him by other tenants. I have little hesitation in rejecting that hypothesis. Had there been anything of that nature involved I have little doubt that KM as an experienced investigator would have detected it and reported it to the Council.

[14] In any event, the reports of the defender behaving inappropriately towards his neighbours in Clyde Tower is strongly supported in the present case by the terms of the telephone call he made on 7 September 2023. CL and KM each confirmed that the letter dated 19 September 2023 accurately recorded the threats made by him including the following:

“You stated you will fight M should she come to your property.
 You stated you will punch M in the face should she attend your property.
 You stated on a number of occasions you will kick M in the head should she attend your property.
 You stated on a number of occasions that you will kick f*** out M...
 You stated you will kick M's c*** in.

You stated that you hate M and will attack her if she comes to your property with the police.

You stated that if M comes to your house it will 'kick off'."

[15] On any view such egregious behaviour cannot reasonably be tolerated and I quite accept and understand that from the Council's perspective this tipped the balance in favour of seeking an antisocial behaviour order rather than a less stringent measure.

Submissions

Pursuer's submissions

[16] The solicitor for the Council summarised the evidence as set out in the foregoing findings and fact and Note. He submitted that based on that evidence on the balance of probabilities the court could be satisfied that the statutory requirements for the imposition of an antisocial behaviour order were satisfied. He submitted that the evidence led by the council was credible and reliable in contrast to the response thereto by the defender. The length of any order was a matter for the court and while it was recognised that there had been a significant period without recurrence of any antisocial behaviour ongoing deterrence was important. Whatever the outcome expenses were not sought.

[17] No authorities were referred to by the solicitor for the Council beyond the terms of section 4 of the 2004 Act. In the course submissions I drew his attention what appeared to be a conflict at sheriff court level as to what the requisite standard of proof was in determining applications of this nature under reference to *Glasgow City Council v Ferguson* 2009 SLT 47 and *Stirling Council v Harris* 2009 SLT (Sh Ct) 106. I also drew his attention to in *Macphail, Sheriff Court Practice* (4th Edition, 2022) at paragraph 21.75 which refers to the latter case as support for it possibly being the criminal standard rather than the civil standard as contended for by the Council.

[18] The solicitor for the Council asked for an opportunity to consider the position and accordingly a further hearing on submissions was arranged. At that further hearing he maintained that the appropriate standard was that of the balance of probabilities relying on the case of *Glasgow City Council v Ferguson, supra*.

Defender's submissions

[19] In a concise written submission the defender challenged the basis and need for the order on substantially three grounds:

1. The absence of any actual witnesses or witness statements from other residents within Clyde Tower to support the complaints of noise or other antisocial behaviour;
2. That he could not comment on the allegations concerning the phone call as it was an ongoing criminal case; and
3. That there had been no complaints since the beginning of October 2023 and that was not due to the interim order but because of the detoxification treatment he had undergone and the ongoing support he was receiving.

Decision and reasons

[20] Section 4 of the Antisocial Behaviour (Scotland) Act 2004 ("the 2004 Act") provides *inter alia* that:

- "1. On the application of a relevant authority, the sheriff may, if satisfied that the conditions mentioned in subsection (2) are met as respects the person to whom the application relates (the 'specified person'), make an antisocial behaviour order.
2. Those conditions are - (a) that the specified person is at least 12 years of age; (b) that the specified person has engaged in antisocial behaviour towards a

relevant person; and (c) that an antisocial behaviour order is necessary for the purpose of protecting relevant persons from further antisocial behaviour by the specified person.

3. For the purpose of determining whether the condition mentioned in subsection (2)(b) is met, the sheriff shall disregard any act or conduct of the specified person which that person shows was reasonable in the circumstances...
5. Subject to subsections (6) and (7), an antisocial behaviour order is an order which prohibits, indefinitely or for such period as may be specified in the order, the specified person from doing anything described in the order.
6. The prohibitions that may be imposed by an antisocial behaviour order are those necessary for the purpose of protecting relevant persons from further antisocial behaviour by the specified person.
11. Before making an application under this section (a) a relevant authority shall consult the relevant consultees...
13. In this section, 'relevant person' means - (a) in relation to an application by a local authority, a person within the area of the authority..."

[21] The definition of what constitutes antisocial behaviour is found in section 143 of the 2004 Act as follows:

"(1) For the purposes of this Act ... a person ('A') engages in antisocial behaviour if A- (a) acts in a manner that causes or is likely to cause alarm or distress; or (b) pursues a course of conduct that causes or is likely to cause alarm or distress, to at least one person who is not of the same household as A; and 'antisocial behaviour' shall be construed accordingly."

Standard of proof

[22] Before applying the facts to the statutory test, it is appropriate that I first deal with the standard of proof to be applied in determining applications for antisocial behaviour orders. That there may be continuing uncertainty as to this issue is evident from *Macphail*, *Sheriff Court Practice* (4th Edition, 2022), paragraph 21.75 which states:

"It has been suggested that the standard of proof required to establish the antisocial behaviour upon which the application is based, is the higher standard i.e. proof

beyond reasonable doubt, because of the serious consequences for the person subject to the order if breached.”

[23] In the footnote to this paragraph, the principal authority cited for this statement is *R (On the application of McCann) v Manchester Crown Court* [2002] UKHL 39; [2002] 1 AC 787 per Lord Hope at [82], being a decision in relation to the making of antisocial behaviour orders under the Crime and Disorder Act 1998. Although this was a case relating to English law it is reasonably clear from Lord Hope’s speech and his reference to the Scottish authority of *Constanda v M*, 1997 SC 217 that he intended his remarks to apply to both jurisdictions. The decision in *McCann* was followed in the sheriff court case of *Stirling Council v Harris* 2009 SLT. (Sh Ct) 106 (also listed in the same footnote in *Macphail*) in which it was held that, in an application for an order under the 2004 Act, the proper burden of proof to be discharged by the pursuers was beyond reasonable doubt.

[24] The sheriff in *Harris*, however, does not appear to have been referred to or addressed on the case of *Mullan v Anderson* 1993 SLT 835, a five bench decision, which authoritatively determined that in civil cases, all facts are found proved in the balance of probabilities, there being no higher test even where serious allegations are made. *Mullan* was referred to and followed by both the Sheriff Principal (Sir Stephen Young) in the case of *Aberdeen Council v Fergus* 2006 Hous. L.R. 90 and Sheriff J Beckett (as he then was) in the case of *Glasgow City Council v Ferguson* 2009 SLT 47. In both cases it was held that it was the civil standard of proof that required to be applied in cases brought under the 2004 Act.

Somewhat surprisingly none of these authorities are listed in the footnote in *Macphail* to which I have referred. In *Glasgow City Council v Ferguson* Sheriff Beckett conducted a thorough review and analysis of the authorities and the conclusion to be derived therefrom all of which I respectfully agree with. It follows therefore, that I consider that the suggestion

of the applicability of the criminal standard, as set out in paragraph 21.75 of *Macphail*, is incorrect.

[25] I am further fortified in this view by the recent seven bench decision of the Supreme Court in the case of *Birmingham City Council v Jones* [2023] UKSC 27; [2024] AC 168. That appeal concerned *inter alia* the power of the courts in England in relation to the grant of injunctions pursuant to part 1 of the Anti-social behaviour, Crime and Policing Act 2014, being the successor (in relation to English anti-social behaviour orders) to the Crime and Disorder Act 1998. Specifically the issue in *Birmingham City Council v Jones* was whether it was the criminal or civil standard of proof which was applicable to the relevant issues in such cases. In determining it was the latter, that is on a balance of probabilities, Lord Lloyd-Jones JSC delivering the judgment of the court *inter alia* stated at paragraph 56 (having considered the *dicta* of Lord Hope in *McCann* referred to above):

“I do not consider that *McCann* is authority for the proposition that anti-social behaviour within section 1(1) (a) of the 1998 Act required to be proved to the criminal standard. The standard of proof under section 1(1)(a) of the 1998 Act was the civil standard of proof on the balance of probabilities and to the extent that any reasoning in the *McCann* opinions is to the contrary effect it is ...wrong.”

[26] Thus, the cornerstone of the decision in *Harris, supra* and cited in support of the suggestion in *Macphail* has been unequivocally removed. Accordingly there can now be no doubt that the standard of proof to be applied in determining applications such as the present for antisocial behaviour orders is the balance of probabilities.

Application of facts to statutory test

[27] In the circumstances of the present case no issues arose in relation to certain statutory threshold requirements for the making of an antisocial behaviour order, namely:

- That the defender complies with the minimum age requirement for a “specified person”;
- That the “relevant consultee” being the Chief Constable of the Police Service of Scotland (per section 18 of the 2004 Act) was consulted
- That the “relevant persons” for whom protection was sought were neighbours of the defender within Clyde Tower and employees of the Council’s housing department with responsibility therefor
- That no issue of reasonability of conduct was engaged as contemplated by section 4(3) of the 2004 Act.

[28] What remains for determination then is whether the defender has engaged in antisocial behaviour by either acting in a manner or pursuing a course of conduct causing or likely to cause alarm or distress to at least one person not of the same household. Thereafter if that conduct has been proved there remains the test of necessity for an order in terms of section 4(6) of the 2004 Act.

[29] Subject to the observations I make below I am satisfied that the first leg of this test has been met. The findings in fact set out the behaviour or conduct which I have found to be established. While I consider that the defender makes an important point in relation to having proper and fair notice of the specific allegations against him, I am satisfied on the balance of probabilities that he did engage in certain forms of antisocial conduct. While I agree that there is a want of detail to cover the 2 year period since August 2021 as referred to by CL, that is not the case in relation to the specific incidents in September 2023. Those are the threatening and abusive telephone call on 7 September 2023 and then the further complaint made on 19 September 2024 as noted in the Police Scotland Disclosure Report and subsequently reported to the Council.

[30] In addition to criticising the reliance on hearsay evidence the defender also complained of the total absence of any specification of the identity of the persons making complaints or any details of the date and times of the incidents relied on by the Council. While I understand and appreciate the basis for the Council's policy of protecting the anonymity of complainers there is a risk that someone in the position of the defender may not be in a position properly to investigate and challenge the detail of complaints made against him. One obvious example of this, pertinent in the present case, are the allegations of antisocial behaviour within the lifts and common areas on the part of persons believed to be visitors to the defender. In my view, standard considerations of fair notice should include the dates and approximate times of any such incidents and possibly even descriptions of the individuals believed to be associated with the defender. I do not consider that it would be unreasonable to expect a local authority to lodge as productions statements taken from those residents making complaints that have been redacted to protect their identities but providing sufficient information so that a defender has proper notice of the case against him.

[31] Nothing of that nature was advanced in evidence. The Council were content to rest their case on the hearsay evidence of CL and KM. As I have indicated I found both to be credible and reliable in terms of the reports they received, but neither gave any significant detail in relation to when and where the alleged incidents of antisocial conduct took place, beyond the two incidents in September 2023. In relation to KM's evidence no explanation was tendered as to why the conduct listed in his letter dated 27 October 2023 is markedly more restrictive than what he said in evidence had been reported by complainers. The letter does not refer to the complaints made of numerous visitors to the defender and the types of antisocial conduct they engaged in. One explanation could be that the conduct referred to in

KM's letter is qualified as being from "recent (my emphasis) reports made to the investigating officer".

[32] The absence of chronological detail as to what has been complained of as antisocial behaviour on the part of the defender also, in my view, has a bearing on the second leg of the statutory test in relation to the necessity for and duration of any order. A consistent and sustained pattern of conduct may well attract a longer period in order to promote deterrence. On the other hand there will be cases where there might be isolated incidents of varying seriousness over a period of time. No evidence was advanced to allow a view to be formed as to where the present case might fall between these two scenarios. What does emerge on the evidence is that there was some sort of escalation of antisocial behaviour on the part of the defender in the period shortly preceding the events of September 2023. That behaviour may have been linked to personal difficulties and addiction issues that the defender was experiencing at the time. He has successfully obtained treatment and support for those issues. There have been no reports of any further incidents since the beginning of October 2023. As this was a good two months before the interim antisocial behaviour order made in December 2023 I am inclined to accept in part the defender's position that it was not only because of the existence of that order that he has desisted from any further objectionable behaviour.

Decision and terms of order

[33] For the reasons set out I do not consider that the necessity for a final order in the full terms craved by the Council is appropriate or necessary. Accordingly the final order I propose to make will be more restrictive than the interim order made on 6 December 2023, which will now be recalled. In particular I have not been persuaded that it is appropriate or

necessary for a final order to contain the prohibitions set out in parts (ii), (iv) and (v) of the interim order. Similarly, there is no basis in the evidence for the inclusion of “fighting” within the prohibited conduct.

[34] I also do not consider that it is necessary that a final order be for a particularly lengthy period. No particular period has been craved by the Council. At the resumed hearing on submissions the solicitor for the Council observed that in the case of *Ferguson, supra* the court restricted the period of the final order for 6 months on the basis that there had been an interim order in place for 9 months. He suggested that a similar approach might be appropriate in the present case. I am inclined to agree except that I consider a shorter period is more appropriate in the present case. Accordingly I shall make an order for a period of 3 months from today’s date.

Expenses

[35] Both parties were agreed that whatever the outcome there should be a finding of no expenses due to or by and accordingly that is reflected in the interlocutor I have pronounced. Although an award of expenses was made in the interlocutor of 6 December 2023 granting the interim order, the solicitor for council confirmed, in my view appropriately, that said award would not be enforced.