

Chris Cuddihee LSG - 22/2/07

Open and shut case

Anonymous hearsay evidence serves a purpose but can be challenged by the defence, says Christopher Cuddihee

The use of anonymous hearsay evidence by local authorities and police in anti-social behaviour civil proceedings in magistrates' courts presents the defence with huge problems – most notably, how do you challenge anonymous evidence effectively?

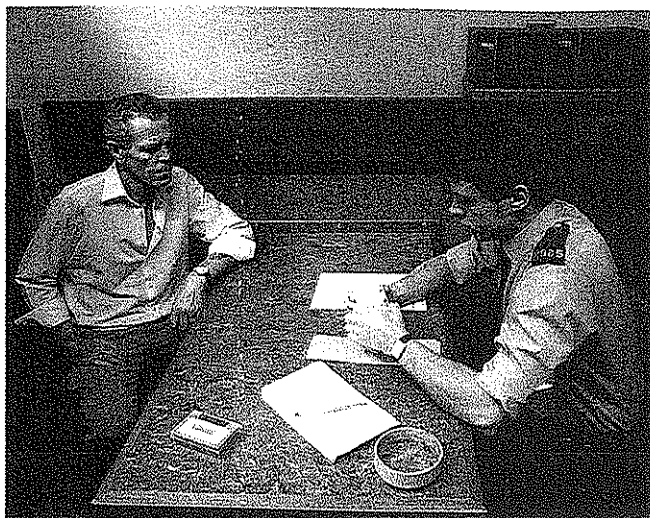
The Administrative Court's decision in *R (on the application of Carol Cleary) v Highbury Corner Magistrates Court* [2007] 1 All ER 270 has levelled the playing field.

In this case, the Metropolitan Police commenced proceedings for a closure order in respect of the home of Carol Cleary under the Anti-Social Behaviour Act 2003. Section 2 of the Act provides that a magistrates' court may issue a closure notice of up to three months, prohibiting anyone from entering the premises for that period if it is established – to the civil standard of proof – that the premises are associated with the use, supply, or production of class A drugs, serious nuisance or disorder, and that an order is necessary.

Ms Cleary was a tenant of the London Borough of Camden. A small amount of cocaine, consistent with personal use, was found in her flat. The police then sought to rely on anonymous hearsay evidence from two residents who reported frequent visitors to the flat to show serious nuisance and disorder – and that a closure order was necessary to stop it.

As can be seen from the judgment, the matter reached the Administrative Court after the defence sought further disclosure from the police that could undermine the anonymous hearsay evidence. As Ms Cleary's solicitors, we were served with summaries of nine crime reports, which the police said supported their case. We requested copies of the original crime reports, any relevant witness statements, and police notebooks. We asked for details of any previous convictions recorded against the anonymous witnesses.

The anonymous witnesses'



Witness: evidence should be revealed to other side in advance

statements were set out in the body of a witness statement from a police officer ('this person told me that...'), so we requested copies of any contemporaneous note made by an officer. We asked for details of complaints about other premises in the immediate vicinity.

The police did not claim that some or all of the material did not exist – instead they refused to disclose anything further, on the basis that it would be 'wholly inappropriate and disproportionate' to do so. The defence made extensive submissions on the basis of common law and article 6(1) of the European Convention on Human Rights that only with disclosure of the material could there be a fair hearing.

The magistrate rejected both arguments and proposed an unworkable and ill-judged plan: as the evidence was heard at the full contested hearing of the application, the bench would decide what evidence, if any, would be disclosed to the defence, and short adjournments granted to the defence team to consider that disclosure. It was perceived by the bench that instructions could be taken on the disclosure made during the course of the contested hearing. Unsurprisingly, the Administrative Court found this approach to be manifestly unfair.

In relation to the use of hearsay evidence, Lord Justice May said in the judgment: 'It may too easily be supposed that people who give information

about drug dealers should not be required to come to court to give evidence. In individual cases, the fear may be genuine. But an easy assumption that this will always be so and that hearsay evidence is routine in these cases risks real injustice.'

Lord Justice May went on to give the following guidance to civil courts in the use of anonymous hearsay evidence: 'The willingness of a civil court to admit hearsay evidence carries with it inherent dangers. It is much more difficult for a court to assess the truth of what they are being told if the original maker of the statement does not attend to be cross-examined. More attention should be paid by claimants to the need to state by convincing direct evidence why it is not reasonable and practicable to produce the original maker of the statement as a witness. Magistrates should have these matters well in mind. The use of the words "if any" in section 4 of the 1995 Act shows that some hearsay evidence may be given no weight at all. Credible direct evidence of a defendant in an application for a closure order may well carry greater weight than uncross-examined hearsay from an anonymous witness or several anonymous witnesses.'

The use of the term 'civil court' suggests that this decision is intended to apply to proceedings for anti-social behaviour orders, closure orders, sex offender prevention orders, and every other type of civil order with which magistrates' courts have

now become familiar. Experience since *Cleary* suggests that while police and local authorities are more amenable to requests for further disclosure, they still rely heavily on hearsay evidence. Where one might have expected a local authority or police force to undertake some surveillance, or obtain CCTV, photographic or other evidence, there is usually none. The decision in *Cleary* is a surprisingly (but rightly) tough piece of judicial guidance – and where the defence can call live witnesses of good character who come up to proof and contradict the anonymous hearsay evidence, Lord Justice May's remarks offer real support.

Following *Cleary*, a reasonable tribunal has little option but to attach greater weight to live defence evidence rather than that of anonymous hearsay witnesses – and this increases the prospects of a defendant successfully defending these types of proceedings.

Of course, the defence may also use hearsay evidence. In civil proceedings, a court can consider evidence either in written or oral form. The issue remains then what 'weight' to give the evidence. Courts have little option but to give greater weight to a written witness statement from a named individual than to a statement from an anonymous hearsay witness. It is recommended that statements are disclosed to the other side in advance, so that they have a reasonable opportunity to check their veracity, and that the witness statement complies with part 22 of the Civil Procedure Rules.

These proceedings can be expensive to defend and legal aid is means tested. Since section 63 of the Magistrates Court Act 1980 provides the court with a power to award legal costs against a losing claimant, as well as a losing defendant where it is 'just and reasonable to do so', those bringing these types of proceedings and relying heavily on hearsay evidence should beware. *Christopher Cuddihee is a solicitor in the public law department of London-based law firm Kaim Todner, which acted for Carol Cleary*