

It has been held, rightly in our view, that an ASBO should not be used merely to increase the sentence of imprisonment which an offender is liable to receive. In *Kirby* [2005] EWCA Crim 1228; [2006] 1 Cr. App. R. (S.) 26 (p.51) an ASBO had been made prohibiting the offender from driving, attempting to drive or allowing himself to be carried in any motor vehicle which had been taken without the consent of the owner or other lawful authority, and driving or attempting to drive a motor vehicle until after the expiration of his period of disqualification. As the Court (presided over by Maurice Kay LJ) found, the judge's purpose in making this order was to secure the result that if the appellant committed such offences again the court would not be limited to the maximum penalty for the offences themselves but would be able to impose up to five years' imprisonment for breach of the anti-social behaviour order. David Clarke J giving the judgment of the Court said:

"In our judgment this decision of the court [in *R. v P*] and the earlier case of [C v *Sunderland Youth Court* [2003] EWHC 2385; [2004] 1 Cr. App. R. (S.) 76 (p.443)] serve to demonstrate that to make an anti-social behaviour order in a case such as the present case, where the underlying objective was to give the court higher sentencing powers in the event of future similar offending, is not a use of the power which should normally be exercised."

That decision was in conflict with an earlier decision *Hall* [2004] EWCA Crim 2671; [2005] 1 Cr. App. R. (S.) 118 (p.671) (Hunt and Tegenhat J. J.), the correctness of which was doubled by Dr Thomas ([2005] Crim. L.R. 152). In *Williams* [2006] 1 Cr. App. R. (S.) 56 (p.305), the Court (Mance L.J., Elias J. and Sir Charles Mantell) preferred *Kirby* to *Hall*. We also agree with the decision in *Kirby*.

Different considerations may apply if the maximum sentence is only a fine, but the court must still go through all the steps to make sure that an ASBO is necessary.

There is another reason why a court should be reluctant to impose an order which prohibits an offender from, or merely from, committing a specified criminal offence. The aim of an ASBO is to prevent anti-social behaviour. To prevent it the police or other authorities need to be able to take action before the anti-social behaviour it is designed to prevent takes place, if, for example, a court is faced by an offender who causes criminal damage by spraying graffiti then the order should be aimed at facilitating action to be taken to prevent graffiti spraying by him and/or his associates before it takes place. An order in clear and simple terms preventing the offender from being in possession of a can of spray paint in a public place gives the police or others responsible for protecting the property an opportunity to take action in advance of the actual spraying and makes it clear to the offender that he has lost the right to carry such a can for the duration of the order.

If a court wishes to make an order prohibiting a group of youngsters from racing cars or motor bikes on an estate or driving at excessive speed (anti-social

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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