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Concerning Litigants in Person, how are the courts rescuing the position in irregular fact-finding hearings or applications over alleged contact breaches?

Caroline Willbourne 2/10/2018 *White Paper Conference 2018*

- Litigants in Person:
- How difficult can it be to go to a private court and tell a judge that the other party is entirely to blame for what has happened and deserves not one penny?

- How do judges manage LIPs?
- How does the court deal with issues arising from LIPs in court, e.g:
  - Non-disclosure, deliberate or innocent;
  - Expectations of outcome;
  - FDRs, where there negotiates the name of the game?

- How does a judge feel when a LIP walks into their court room?
- What is about the hearing that will be different, as compared with one where other parties are represented?
- LIPs unhappy about structure, & the need for a DJ to indicate likely outcome

- Case takes much longer.
- The judge will have to sift the evidence.
- Probably no PD documents to help.
- If a PS has been filed, LIPs find it hard to analyse evidence rather than merely repeat it.
- LIP's natural distrust of the other party

- How can this be ameliorated at least in fact-finding hearings? Could we, for example:
  - Deal with the case on submissions only, & exclude oral evidence?
  - If cross-examination is permitted, the judge usually has to take over, to maintain the structure of the hearing and in case important points are missed.
  - Should the judge indicate what his/her thinking is?
  - Hard for LIPs to 'read' the court's reaction.

Take this scenario:

- One party in person, the other party represented.
- Does this lead to an uneven playing field?
- If so, how to redress that?
- Have to keep LIPs on board.
- Explain procedure/rules.
- Ensure they are complied with.
- BUT some cases are just intractable, hence LIPs

But the judge should

- try to understand what the LIP is going through;
- get LIP to focus on key issues and explain why they are key;
- explain the powers of the court.
- avoid jargon.

Do LIPs choose to be so?

- Why some litigants represent themselves.
- Could be misfortune (eg no Legal Aid); or
- an inflated sense of their ability to manage court, judge and ex.
- LIPs can be very troublesome; they can distort the hearing
- Is it right that the specialist environment of a court should adapt to the demands and requirements of those who don't come with the tools they need to manage it properly?

The process:

- How far should the court go to accommodate those who are unfamiliar with our processes and consequently don't follow the rules?
- How much assistance can a judge properly provide to an unrepresented party; &
- is it right that a LIP is allowed a degree of latitude in compliance with the rules?
- If so, how much latitude?

Compliance

- Do LIPs ‘get away with murder’?
- Dominating the court room by eg speaking for longer;
- handing up documents that should have been filed and served weeks in advance; or
- a general failure to meet deadlines eg failing to reply to questionnaires.

- In Bakir v Downe in 2014, Mostyn J conducted a hearing where Mr Downe appeared in person. After the hearing he emailed Mostyn's J clerk with a complaint about the order made at the hearing. He said it did not reflect the handwritten document he has signed at court.
- The judge deemed this to be an application to vary and listed a further hearing. Having dismissed that application and made a costs order against him, Mostyn J wrote a formal judgment, critical of the manner in which Mr Downe had emailed his clerk directly.
- He said this of the requirement for a litigant in person to abide by the rules:

- *"The courts are now being visited with an increasing number of informal applications made by litigants in person. As I have said in this case, Mr. Downe acts as a litigant in person by election. I am taking the opportunity in this judgment, which will be transcribed at public expense and placed on Bailii, to explain, both for the benefit of Mr. Downe and for any other litigants in person, that the court does not afford any indulgences or deviations to the litigants in person from the clear procedure that is prescribed for all applications that are made to the court. The court is not some kind of advice bureau for the benefit of litigants in person who do not understand how orders have been made. If a litigant in person wishes to make an application to the court, then he must do so in accordance with the procedure laid down by the law of the land."*

- However, the matter takes on a more nuanced dimension when the facts of the case are considered, which were briefly as follows:

- At the hearing before Mostyn J, Mr Downe (the unrepresented party) was asked to give an undertaking to preserve two funds in this country. He indicated that he would agree.

- He was then presented with a draft order, prepared by counsel for the other side to sign.
- Mr Downe did not believe that the wording on the order matched the wording used orally in court, and to which he had earlier agreed, and so he refused to sign it.
- Mostyn J regarded the undertaking as having been given orally in court in any event, and the order containing the general terms drafted by counsel was sealed, notwithstanding that Mr Downe had not signed it.
- He then applied, but this time with representation, to vary the undertaking in the sealed order. That application came before Moor J in June, and new undertakings were (sensibly) made in general terms.

- However…., Mr Downe by then in person again, emailed Mostyn J's clerk to complain about the wording of the original order, as sealed by Mostyn J, despite the variation made by Moor J.
- This generated a number of emails, despite the judge indicating that it was not a matter for him.
- Mr Downe persisted with his complaints so that the hearing was listed.
- In that context, the hard line taken by Mostyn J might have been justified.

The reality for a district judge

- There are many LIPs at Central Family Court in both children and money work.
- Most DJs will take the situation as s/he finds on a case by case basis, relaxing rules on occasions.
- The wilfully non-compliant party may have a costs order made against him.
- “Consistent with the overriding objective”.
- In effect the judge has an eye to that in deciding whether to forgive non-compliance or not.

- Is this unfair treatment in favour of an LIP?
- But is it really?
- More important to get to grips with the issues.
- More than 50% of LIPs produce a position statement.
- Content not always analytical, more narrative.
- McKenzie friends can help, but also hinder.
- Within judicial discretion to admit evidence.
- Judge will do that if it assists overall resolution

- That is not to say that judges will simply forgive failure to comply with the rules.
- They should be complied with for good reason.
- It is a myth, however, to say that the latitude applies only to LIPs.
- LIPs who misbehave get tough time

- Does it matter whether a litigant in person has chosen that position or has it forced upon him by lack of resources?
- Mostyn J said in the Bakir case that Mr Downe could have been represented but chose not to be.
- Does that justify harsh treatment?

- An LIP cannot and should not expect special treatment.
- The question for the court will be to consider the practical reality of the situation:
- Was non-compliance wilful or unnecessary?
- What is the prejudice to the other party?
- Does it affect the court's ability to make a fair decision?

Fact Findings

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- LIPs in these cases do not always appreciate that this is a necessary stage in the litigation and not just an irritating irrelevance before the welfare hearing can take place.
- This has been a trying issue for the family courts for a long time, but has received extra attention in the light of the new PD12J and the recent decision of Hayden J in PS v PB.

- Fact-finding hearings tricky where only party is represented.
- Witness handling is a difficult skill.
- Conducting it properly is an important part of the fact finding process.
- It is the only method we have to test evidence.
- LIPs need help with witness handling in DV cases, especially when the witness is their ‘ex’.

- Compare with criminal cases.
- It would be unthinkable if the prosecution was state funded but no legal assistance was provided to those who are accused of those crimes.
- Not so in the family courts, where the party making the allegations usually has the advantage of representation and the accused party often does not.
- How far should a judge enter into the arena to test the evidence in a fact-finding case?

- In PS v PB [2018] EWCA 1987 reported on appeal on 27 July 2018.
- Hayden J had to grapple with the issue of how to manage a fact finding hearing, and the cross examination, where were contested allegations of domestic abuse.
  - Respondent was an LIP unrepresented at the fact-finding stage before the Circuit Judge.
  - In that case the CJ had entered into the arena to conduct the cross-examination of the mother himself. He soft-pedalled it.

- On the one hand, there are grave concerns about allowing a complainant to be questioned by an accused which are well rehearsed: there is a very real concern that the process itself becomes abusive. On the other hand, evidence in both cases have to be tested. As Hayden J put it:

- [19]. … *"A true assessment of a witness's demeanour can only properly be undertaken when the witness is put to the assay by challenge (adversarial testing 'beats and bolts out the Truth much better', see Crawford v Washington (2004) 541 US 36 at 62 per Scalia J). In this case the witness's account was not satisfactorily challenged and the weight that can be placed on her presentation in the witness box is accordingly, in my view, diminished".*

- Hayden J tries to frame some clear guidance as to how the issue should be managed. He says candidly that this can only be “'forensic life belt until a rescue craft' (ie parliamentary action) – arrives. In summary however he proposes:

- In a case including serious and intimate allegations, these must be put to both accused and accuser, a Ground Rules Hearing ('GRH') will always be necessary:

  - A GRH should usually be conducted prior to the hearing of the factual dispute;
  - Judicial continuity between the GRH and the substantive hearing is essential
  - Burden of proof is with the accuser.
  - This cannot be compromised in response to a witness's distress, and fairness to both sides must be ensured.
  - There is no presumption that the accused may not cross-examine the accuser in every case.
  - The Judge must consider whether the evidence would be likely to be diminished if conducted by the accused or improved if a prohibition on direct cross-examination was directed. In a Family Court fact-finding hearing, these two factors may be divisible.

- If cross-examination of the alleged victim runs a 'real risk' of being abusive;
- Where the factual conclusions are likely to have an impact on the arrangements for, and welfare of, a child, ie in post hearing contact arrangements, consider joining the child as a party; and securing representation. In that instance, the child's advocate could cross-examine;
- If no advocate for accused, and no cross-examination by accused in person, then reduce questions to writing under specific headings.
- The Judge does not have to put every question but will have to evaluate relevance and proportionality. Cross-examination is dynamic and the process cannot become formulaic;
- Although fact-finding hearings tend to be 'highly adversarial', the central philosophy of CA 1989 is investigative.
- A judge may therefore conduct questioning in an open and less adversarial style without compromising fairness to either side.

- Is there a role here for the Children's Guardian?
- If the father is not represented, then the child may be, so the CG could conduct the cross-examination.
- Lesser of two evils?
- Court must consider it but the real difficulty is that many fact-finding hearings take place in private law proceedings where it would be most unusual to have a Guardian appointed.
- Each party self-funding so little scope for a CG.

- Would requiring the CG to take up the mantle of cross examination, which effectively means putting one side's case to the other, compromise their neutrality?

- Arguably the CG should be testing both parties' cases as part of his/her role;
- would that ever be done as comprehensively as by the parent who is the primary challenger?
- Is that a fair position in which to place the Guardian?
- CG may already have filed a report in which he or she has formed a view about the merits of the case.
- In such a case the accused parent would never accept the neutrality of the CG.

- This is ‘work in progress’ until and unless Parliament gets to grips with the problem.
- All guidance is welcome.
- Family courts are left, at present, to muddle through with LIPs as best and as fairly as they can. That applies to judges too.

Thank you!

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