WHITE PAPER CONFERENCE 14TH NOVEMBER 2018

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

1. Litigants in Person (who I shall call LIPs, with no discourtesy intended) are now more prevalent than ever. Lawyers are expensive and in these times of restricted Legal Aid there are increasing numbers of people who either can't afford them, or don't want to spent their hard-earned money on other people sorting out troubles for them. After all 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?

2. During the next 30 minutes I will discuss the every-day experiences of a deputy judge who has to manage LIPs and how that affects the way court deals with the issues that arise. I will also touch on some of the ways that the courts are adapting to the growing numbers of people appearing without representation.

3. 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 both or all the parties are represented?

4. Firstly, the case will take much longer. The judge will have to sift the evidence to identify the key issues in the case. If neither party is represented, then there may well be no Position Statements to distil the key factual and legal issues, even where there might have been a direction for one to be filed. If a PS has been filed, LIPs find it hard to analyse evidence rather than merely repeat it.

5. Where there are no lawyers in the court room, LIPs tend to be more distracted by issues that are not germane to the matters before the court. How can this be ameliorated? One way is just to hear their submissions and exclude oral evidence unless it is crucial. LIPs believe they can cross-examine effectively to support their case but this is not often so. If cross-examination is permitted, the judge usually has to take it over, so that the structure of the hearing is maintained and in case important points are missed.

6. Sometimes one party is in person but the other party is represented. In such cases, it is inevitable that the represented party's case will be more clearly put than the other. Judges naturally rely on legal representatives not to be misleading or unfair in their presentation of the issues to the court, but there is no doubt that a well put together case, clearly put and properly set out in a Position Statement, is highly persuasive. For a busy district judge who may have several cases in their list, it is frustrating to have to find extra time to ensure that each LIP's case is properly extracted and put to the other side. The requirement also encompasses the need to ensure that LIPs understand what is happening.

7. It is easy to forget that a court can be a very daunting experience for someone who is on their own in an unfamiliar environment with a battalion of lawyers ranged against him; it is after all a place where decisions are made that could have life-changing consequences for them, such as the sale of their former home or their future relationship with their children.

8. Like doctors, we lawyers have a whole lexicon of terms we are familiar with and use as a sort of shorthand. We talk about FHDRAs and Legal Advisors, Recitals, undertakings, filing, sealing, Form E, questionnaires, FDAs and FDRs: these words have meaning and consequences for lawyers. To the average lay person, they are meaningless. There is a great deal in every case that we take for granted. It is all too easy in discussions between lawyers, but where there is one unrepresented party, to leave the Litigant in Person behind.

<u>Can we say anymore that that is the LIP's choice?</u>

9. Can we comfort ourselves as lawyers and judges with the thought that: "well, that LIP has *chosen* to be in that position", in the same way as the person who self-medicates rather than going to see a doctor? There are many who do have the resources to instruct lawyers, but choose not to. Sometimes, such LIPs can be very troublesome. 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?

10. But all too often these people come into the legal sphere without proper specialist advice simply because it is not a viable option for them. Now is not the place or time to comment on the changes to the Legal Aid provision, but there can be no doubt that there are many

for whom being an LIP is not a preferred option. That means that we as lawyers cannot really comfort ourselves with the thought that the invidious position that most LIPs find themselves in is a situation of their own making.

11. That leaves the court with a difficult issue to manage in every case with an LIP, which is how far should the court go to accommodate those who are unfamiliar with our processes and consequently don't follow those the rules? How much assistance can a judge properly provide, and is it right that a LIP is allowed latitude in compliance with the rules?

12. That is the first of the two issues that I want to focus on today.

Compliance

13. Now I wonder how many of you will agree that they have at one time or another been frustrated in court by a judge allowing a litigant in person to 'get away with things' that a lawyer would not. Whether it is speaking for longer, handing up documents that should have been filed and served weeks in advance or a failure to meet deadlines.

14. How many of you have made representations that say that the LIP has not followed the rules and therefore should not be allowed to hand up those documents, or be given more time. And how many have been internally furious when the judge says "well we are where we are" - which I know full well is every barrister's least favourite expression - and allows the litigant in person to get away with it ?

15. In the case of Bakir v Downe [2014] EWHC 3318, 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, and Mostyn J deemed Mr Downe to have made 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 judgement, 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 somekind 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."

16. This is couched in stringent terms, and makes quite clear that from Mostyn J's view, the rules should be complied with, whether a party is represented or not. Many lawyers I think would sympathise with that position, and it is a case that is quoted to that end in court.

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

18. At the hearing Mr Downe (unrepresented) was asked to give an undertaking to preserve two funds in this country. Mr Downe indicated that he would agree.

19. 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 agreed, and so he refused to sign it. Mostyn J regarded the undertaking as having been made 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 made in general terms.

20. However, Mr Downe who was 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 that had taken place already. There were a number of emails, despite the judge indicating that it was not a matter for him and it was only when Mr Downe persisted with his complaints that the hearing was listed. In that context, not least the fact that the issue had already been resolved by the new undertakings, the hard line taken by Mostyn J is

clearly explained and justified. I imagine most of us would agree with his view, but just think how much court time must have been wasted by this exercise.

The reality for a district judge

21. Where an LIP wilfully makes a nuisance of himself both in and out of court, he or she should expect to feel the effects of a costs order. However, the reality is that a DJ will take the situation as s/he finds on a case by case basis and there will not be pedantic adherence to rules and procedures at the expense of a practical and just process, which is, after all, consistent with the overriding objective. In effect the judge has an eye to the objective in deciding whether to forgive non-compliance or not.

22. This may sometimes seem like unfair treatment in favour of an LIP. But is it really? In the first place how often are represented parties given latitude for failure to comply with rules and practice directions? The family court is not like the civil courts in that respect; documents are frequently served late, without an application for relief from sanctions. More often than not when I am sitting I only receive counsel's Position Statement on the day of the hearing, rather than by 11am the day before. That is not to say that that is acceptable, but there is a certain latitude allowed to all parties in the family court. As a judge I am always grateful to receive any Position Statements, even at the door of the court.

23. The reality is that the court must fairly deal with the issues before it, and for example, in private children proceedings the paramount consideration is the welfare of the child and the court needs proper information to make those decisions.

24. That means it is within judicial discretion to decide how to manage issues such as accepting new documents at the hearing, or allowing more time for compliance with orders. This applies as much to represented parties as to litigants in person. It may well be a more common issue with LIPs who do not know the rules but it is in fact endemic in the family courts in general.

25. That is not to say for one moment that the courts will simply forgive failure to comply with the rules. They are there for a reason, and there are many who say that the family courts have become too lax. It is a myth, however, to say that the latitude applies only to LIPs.

26. Where it is clear that a litigant in person is acting inappropriately, they can expect a tough time. The same goes for those who are represented. However, it is unrealistic for litigants in the family court not to expect that toughness to apply to them.

27. Does it matter whether a litigant in person has chosen that position or has it forced upon him by lack of resources? I note with interest that Mostyn J expressly said in the Bakir case that Mr Downe could have been represented but chose not to be.

28. My own view is that it doesn't matter. An LIP cannot and should not expect special treatment because we feel sorry about the Legal Aid cuts. The question for the court, on each occasion, will be to consider the practical reality of the situation: what are the reasons for the non-compliance? Has it been 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

29. These hearings present particular problems for unrepresented parties in relation to allegations of domestic abuse. Judges frequently encounter LIPs in these cases, who do not appreciate that this is a necessary stage in the litigation and not just an irritating irrelevance before they can have what they regard as the more important welfare hearing. 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.

30. Fact finding hearings are especially awkward where only party is represented. Witness handling is a difficult skill and conducting it properly is an important part of the fact finding process. It is the only method courts have to ensure that facts are adduced and tested. Where one party cannot fully engage in the witness-handling process then that is a problem for the judge, whether there are issues of domestic abuse or not.

31. What this also means is that all too frequently the party represented by means of legal aid has made allegations against the party who is not represented and the respondent is not. This has led to the rather strange position whereby public funding is made available to those who make allegations, but not to those who need to defend themselves against them. In the criminal courts those who are accused of crimes by the state are provided with resources to defend themselves, regardless of the apparent merits of each case. It would be unthinkable

if the prosecution was state funded but no legal assistance was provided to those who are accused of those crimes. This is not the case, however, in the family courts where the party making the allegations usually has the advantage of representation and the accused party often does not.

32. This was the case in the matter of PS v PB [2018] EWCA 1987 reported on appeal before Hayden J on 27 July 2018. In short, the judge grappled with the issue of how to manage a fact finding hearing, and the cross examination necessitated thereby, in a case that included allegations of domestic abuse, but where the accused had not been represented at the fact-finding stage before the Circuit Judge. In that case the judge had entered into the arena to conduct the cross-examination of an unrepresented father.

33. 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 in PS v BP:

> [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".*

34. 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' (by which he means Parliamentary action) – arrives. In summary however he proposes:
    (i) Once it becomes clear to the court that a case including serious and intimate allegations must be put where the witnesses are accused and accuser, a Ground Rules Hearing ('GRH') will always be necessary;
    (ii) The GRH should usually be conducted prior to the hearing of the factual dispute;
    (iii) Judicial continuity between the GRH and the substantive hearing is essential

(iv) The accuser bears the burden of establishing the truth of the allegations. This burden may not be compromised in response to a witness's distress, and fairness to both sides must be ensured.

(v) 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;

(vi) If cross-examination of the alleged victim runs a 'real risk' of being abusive (if allegations are established, it should bear in mind that the impact of the court process is likely to adversely affect the welfare of the subject children);

(vii) Where the factual conclusions are likely to have an impact on the arrangements for, and welfare of, a child, the court should consider joining the child as a party and securing representation. In that instance, the child's advocate may be best placed to undertake the cross-examination;

(viii) If cross-examination is not permitted by the accused in person and there is no advocate available, questions should be reduced to writing under specific headings. The Judge is not constrained to put every question sought but will have to evaluate relevance and proportionality. Cross-examination is dynamic and the process cannot become formulaic;

(ix) Although fact-finding hearings have a 'highly adversarial complexion', the central philosophy of Children Act proceedings is investigative. A judge may therefore conduct questioning in an open and less adversarial style without compromising fairness to either side.

35. Of these, I will highlight the role of the Children's Guardian as a closing point. This is something often reflected upon as a solution to the issue of cross examination – if the father is not represented, then the child will be, so the lawyer for the child can conduct the questioning. I have reservations about this. It may be that this is the lesser of many evils in proceedings and why the court must consider it. However many fact-finding hearings take place in private law proceedings where it is most unusual to have a Guardian appointed.

36. However, the Children's Guardian plays a special role in proceedings; they are unique in their relatively neutral position with the ability to consider each party's case. So would

requiring the Guardian to take up the mantle of cross examination, and therefore perform the role from the view point of one parent, compromise that position?

37. On one view, the Guardian should in any event be testing both parties' cases as part of his/her role, but would that ever be done as comprehensively and forensically as by the parent who is primarily challenging the complainant's case? Is that a fair position in which to place the Guardian? It also creates the further difficulty that in some sets of proceedings, the Guardian 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 Guardian.

38. Until Parliament gets to grips with this properly, it will have to remain 'work in progress' but there is no doubt that all guidance is welcome. There are lots of questions still to be answered, and the family courts are left, at present, to muddle through with LIPs as best and as fairly as they can.

39. After all, we are where we are.

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