Doing it yourself

Thomas Crockett looks at recent judicial guidance on litigants in person

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It is not an easy task for members of the judiciary to uphold the Overriding Objective as enshrined in the Civil Procedure Rules (CPR) where there is a clear inequality of arms between the parties in terms of legal representation. 'To deal with cases justly' includes 'ensuring that the parties are on an equal footing' and that cases are 'dealt with fairly'. The question as to how courts should best apply this ideal, where one or more parties is unrepresented, is not usually answered uniformly. The Court of Appeal in the recent case of *Tinkler v Elliott* [2012] proffers some useful guidance in respect of this issue.

Litigants in person in the Civil Courts

One of the more widely promulgated arguments against the legal aid cuts and reform of civil justice funding is that any savings will be eclipsed by the additional costs to the courts and to other parties caused by an expected rise in the numbers of litigants in person (LIPs).

Already, most litigators have faced the tribulations involved in facing a LIP opponent. They often seek entirely inappropriate interlocutory orders; they habitually serve papers late or not at all; they frequently fail to attend court; and applications (commonly to set aside judgments or orders) are regularly made out of time. This can lead to considerable frustration on behalf of both lawyers and, more pertinently, their (paying) lay clients. Additional costs are commonly expended upon responding to an LIP's inappropriate and unnecessary litigation, which are not always recoverable from the LIP in the form of a costs order.

It is, however, in my experience, the multiplicity of approaches taken by courts in dealing with LIPs that leads many lay clients to experience such frequent frustration.

Some judges appear to take often extraordinarily lenient lines with LIPs. Such judges are reluctant to ever make an adverse costs order against an LIP or, if they do, their approach as to the payment of such costs is usually to order them paid at the conclusion of the action. If persuaded to summarily assess costs against an LIP, in the experience of many, such a judge is inclined to operate on the very extremes of what could be considered a reasonable exercise of his or her discretion. Conversely, represented parties are frequently criticised by such judges for failing to likewise do everything possible to accommodate their LIP opponent. The fact that 'parties are required to help the court in furthering the Overriding Objective' pursuant to CPR 1.3 could, of course, be used as a justification by such judges taking such an approach.

Conversely, it must be said, other judges treat LIPs as having elected not to obtain legal representation as a matter of choice (as supposed to necessity) and thus do not allow them any more leeway than would be afforded to the represented litigant. Such judges appear to accept that the maxim *ignorantia juris non excusat* – ignorance of the law excuses nobody – extends to the CPR, the Rules of the Supreme Court and the other often-Byzantinely complex procedural rules and practice directions governing civil litigation in the courts of England and Wales.

'It is the multiplicity of approaches taken by courts in dealing with LIPs that leads many lay clients to experience such frequent frustration.'

Tinkler at first instance

At first instance, *Tinkler* involved an entirely routine issue faced by anyone with experience of civil litigation. Mr Elliott, a LIP, did not attend the hearing of Mr Tinkler's application for the imposition of a civil restraint order against Mr Elliott.

Prior to this hearing (which was listed to be heard on the 15 March 2010), Mr Elliott told the court that he was in poor mental health and he provided a letter from his GP, dated 8 March 2010, which opined that Mr Elliott was unfit to attend court. The listing officer responded to Mr Elliott by email stating that, in the absence of an application to vacate, the hearing would proceed. Nothing further was heard from Mr Elliott and perhaps somewhat predictably, he later denied having received this communication.

The hearing proceeded in Mr Elliott's absence and HHJ Tetlow (sitting as a High Court judge) made a general civil restraint order against Mr Elliott for a period of two years.

In Tinkler, *Sharpe J concluded that the specific facts of the case, none less than the fact that Mr Elliott was a LIP, allowed her to exercise her discretion to find that Mr Elliott had acted 'promptly' for the purposes of CPR 39.3(5).*

Application to set aside

Some 18 months later, Mr Elliott applied to set aside the civil restraint order on two grounds, namely his poor mental health and his ignorance that indeed he could apply to set aside the order.

The matter came before Mrs Justice Sharpe on 16 February 2012. The learned judge pithily recited the test Mr Elliott has to meet in this regard (para 58 of the judgment):

> In order to succeed in an application to set aside judgment, the defendant has to satisfy the criteria in CPR r39.3(5) (a) to (c) by showing that he acted promptly when he found out the court had exercised its power to enter judgment, that he had a good reason for not attending the trial, and that he has a reasonable prospect of success, which for this purpose means a defence which carries some degree of conviction.

In the *Tinkler* judgment, handed down on the second anniversary of the order of HHJ Tetlow, after a lengthy consideration of the issues, Sharpe J held that Mr Elliott met the 'merits limb' of the test. This may have been considered rather surprising, given the fact that permission to appeal the order had already been refused.

As to whether Mr Elliott has a 'good reason for not attending the hearing' Sharpe J, citing *Teinaz v Wandsworth London Borough Council* [2002], criticised HHJ Tetlow's failure to give substantive reasons for proceeding in light of Mr Elliott's GP's letter. She also held that there was no evidence to support the contention that the court listing officer's email to Mr Elliott had indeed been received by him. In any case, Sharpe J held, Mr Elliott had a 'good reason' for not attending.

Turning to the 'promptness limb' Sharpe J held that 'what is "prompt" must depend on all the circumstances of the case', citing *Watson v Bluemoor Properties Ltd* [2002], and that (para 105-106):

> ... such an approach enables the court to do justice in the instant case in accordance with the overriding objective, which is what the civil procedure rules are designed to achieve.

The learned judge concluded that the specific facts of this case, none less than the fact that Mr Elliott was a LIP, allowed her to exercise her

discretion to find that Mr Elliott had acted 'promptly' for the purposes of CPR 39.3(5) (see paras 107-109).

The Court of Appeal

Mr Tinkler appealed and, on 10 October 2012, Kay LJ gave the leading judgment with which Munby LJ and Lewison LJ agreed.

It was held that Sharpe J erred in her conception and exercise of her discretion under CPR 39.3(5). It was held that (paras 28 and 34):

> The element of discretion – 'the court may grant the application' – comes into play only after the applicant has satisfied the three positive requirements, including that of promptness. He must show, adopting the words of Simon Brown LJ in *Regency Rolls*, that 'he has acted with all reasonable celerity in the circumstances'. The judge's approach at that stage is essentially evaluative rather than discretionary... CPR 39.3(2), unlike CPR 13.3, makes promptness a mandatory precondition.

It held that, while there were circumstances where the 'disadvantages of being a [LIP]' could be taken into account as regards the issue of acting promptly, these 'will only operate close to the margins' (see paras 31-32).

Kay LJ continued to proffer some guidance as to the approach which courts should take when concerned with a case where one party is unrepresented (para 32):

> An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the fact that a litigant in person 'did not really understand' or 'did not appreciate' the procedural courses open to him for months does not entitle him to extra indulgence... The fact that, if properly advised, he would or might have made a different application then cannot avail him now. That would be to take sensitivity to the difficulties faced by a litigant in person too far... [Sharp J] regarded this to be 'a special case on its facts', but it could only be considered such if one goes too far in making allowances for a litigant in person.

Guidance provided by the Court of Appeal in *Tinkler* as to the courts' approach towards litigants in person

- A litigant in person is not entitled to extra indulgence simply because he or she is understandably disadvantaged by not having instructed lawyers. The fact that an unrepresented litigant 'did not really understand' or 'did not appreciate' the procedural courses open to him or her until after the effluxion of a relevant time period does not entitle him or her to extra indulgence.
- It is not open to an unrepresented party to seek to set aside an order because he or she would or may – if properly advised – have made a different application, or by extension, taken a different procedural course.
- A represented opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person.

Guidance provided by the Court of Appeal in *Tinkler* as to setting aside judgments where a party does not attend trial pursuant to CPR 39.3(5)

- 'Promptness' is one of three positive mandatory preconditions that must be satisfied before the exercise of any discretion.
- Usually, the ignorance of a litigant in person as to time limits and/or procedural courses open to them, will be irrelevant to the assessment to 'promptness'.
- Other such circumstances in relation to a litigant in person, which go to an assessment of 'promptness', will only operate close to the margins.

Ignorantia juris (et ratio?) non excusat

So, is the outcome of *Tinkler* a victory for those who feel, with some consternation, that the courts are frequently too lenient to LIPs at the expense of represented litigants?

Certainly, it appears that Kay LJ – unlikely to have been insulated from the arguments against the changes to legal aid and the expected rise in LIPs – has been forthright in providing some explicit guidance in this case. The part of para 32 cited above is likely to be oft-cited by those appearing for represented parties to dissuade an indulgent approach towards LIP opponents. This is likely to be especially so in the common situation where relief is sought by an LIP on the grounds that they were simply ignorant of the law, rules or procedure. However, it should not be thought that this judgment is altogether a total victory for the represented litigant.

The Court of Appeal has attempted to draw a compromise between the inherent tensions faced by a court in hearing or managing a case where one or more party is a LIP. Kay LJ recognises that courts should extol 'sensitivity' towards LIPs while recognising their 'difficulties' and implicitly therefore should exhibit a certain judicial 'allowance' or 'indulgence'. However, a proverbial 'line in the sand' is drawn. Courts are reminded that such indulgence should not go too far, and any such allowances should be tempered with consideration of the rightful expectations of all litigants to expect consistency in the courts' procedural approaches and finality to litigation. ■

Teinaz v Wandsworth London Borough Council [2002] ICR 1471
Tinkler & anor v Elliott [2012] EWHC 600 (QB); [2012] EWCA Civ 1289
Watson v Bluemoor Properties Ltd [2002] EWCA Civ 1875