Do it yourself: any further guidance since *Tinkler v Elliot*?

Thomas Crockett reviews developments in the treatment of litigants in person

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In recent years the courts have seen a rise in the number of people litigating without professional representation. According to the government's own figures, 623,000 of the 1,000,000 people who previously received public funding each year ceased to be eligible for such assistance when the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force on 1 April 2013. Given that the limit for small claims track cases is to rise from £5,000 to £10,000, it is likely that in the majority of civil cases, the presence of litigants in person (LIPs) will become the rule rather than the exception. Indeed in April 2012, District Judge Richard Chapman, the immediate past president of the Association of Her Majesty's District Judges observed (www.legalease.co.uk/prepare):

> Judges like me are spending more and more of our time having to deal with litigants who simply do not know the law, have never heard of the Civil Procedure Rules 1998 or the Family Procedure Rules 2010 and have breached most of the case management directions.

As a pupil barrister I remember initially being extremely troubled as to how best to deal with such opponents, both as regards as my actions towards them, and also as to how their presence should affect the way I conducted my client's case. This difficulty has not entirely dissipated with experience. What strikes me and many of my colleagues at the Bar is that this question will frequently be determined by the means by which the tribunal sees fit to treat the litigant in person.

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Overriding objective

Judges are rightly mindful of the overriding objective as enshrined in the recently-amended Rule 1 of Civil Procedure Rules, namely that they should 'deal with cases justly and at proportionate cost'. They will properly remind themselves that in order to achieve this ideal, they 'so far as is practicable', must ensure 'that the parties are on an equal footing', and deal 'the case in ways which are proportionate… to the financial position of each party'.

Therefore the courts ought to be mindful of making provision for litigants in person, whom are likely to face an inherent litigation disadvantage in the overwhelming majority of cases. How this translates into practice is naturally determined by the specific facts and issues of each individual case. However, it would also be disingenuous not to concede that inevitably the personal approach of the particular judge is likely to play a part.

It is not without frustration that advocates appearing before certain judges see the making of interlocutory decisions affording their unrepresented opponents degrees of lenience apparently beyond the realms most professionals could dream of achieving for their paying clients. Such apparently clement decisions will very often

equate to prejudicing such clients as to costs in any event, given the obvious inference that those litigating without lawyers generally do so due to their pecuniary disadvantage.

Conversely, it is almost equally worrying when a case or issue has been firmly determined to your client's distinct advantage, where a judge has entirely failed to afford a litigant in person any leeway in cases where there has been some form of minor default as regards a rule or court order. Litigants in person by their nature are determined people and will naturally feel personal iniquity about such a decision. They are thus likely to appeal and even should they be unsuccessful, for the foregoing reasons, are likely to leave their opponents liable for further irrecoverable expense.

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The Court of Appeal case of *Tinkler v Elliott* [2012] concerned an appeal by a represented party against the decision of Mrs Justice Sharp to set aside a judgment against a litigant in person, some two years after it was made.

Lord Justice Kay advocated a robust approach for courts faced with such litigants. Whilst implicitly acknowledging that some 'indulgence' and 'sensitivity' must be afforded those self-representing, thus must not be 'excessive' or go 'too far'. He held:

> 32. I accept that there may be facts and circumstances in relation to a litigant in person which may go to an assessment of promptness but, in my judgment, they will only operate close to the margins. 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 in the court below] 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.

However, since *Tinkler* there has been a certain lack of coherence from the higher courts as to the approach that ought to be taken as towards the burgeoning number of cases involving one or more litigant in person. Indeed, in the few recent cases dealing with this issue, significant lenience appears to have been shown towards litigants in person by the courts, without any consideration of what would be going 'too far'.

Advice and protection

In *obiter dicta* criticisms in the Court of Appeal in the family law case of *Re G (Children)* [2012], Lord Justice Lloyd held that the judge below erred in failing to consider a party's need for advice and protection as a litigant in person. He suggested that the instant case illustrated the difficulties for courts faced when the parties were unrepresented, particularly in complex cases. It was suggested that others involved in the said litigation who were able to do so (in this case, he cited the children's guardian), should be vigilant to avoid procedural or other unfairness to one or other of the unrepresented parties (see para 32).

Lord Justice Lloyd appears to suggest that such vigilance ought to extend to intervening on behalf of the litigant in person, should the need arise in the interests of the justice of the case. While this judgment could be said merely to remind the professional litigator that their first obligation lies with the court and the higher ideals of justice, it could be interpreted that the Court of Appeal expects lawyers to go further, and assist the expedition of the litigation itself.

In *Re G-B (Children)* [2013] (another family law case), the Court of Appeal approved the refusal of the court below to grant an adjournment to a mother so that she could obtain alternative legal representation, on the basis that this did not constitute a breach of the mother's rights under Article 6 of the ECHR (right to a fair trial). However, far from being a ratio extending the tenor of Lord Justice Kay in *Tinker*, this decision, however, very much appears to have turned upon the particular facts of that case, namely the lack of substantial dispute between material expert witnesses on the narrow issue remaining for trial.

What the Court of Appeal particularly commented upon, however, was the 'conspicuously helpful' approach taken by the judge below to make every effort to assist the unrepresented party (see Lord Justice Macfarlane at para 55 *et seq*). This assistance included assisting the litigant to decide which witnesses to call, allowing her a free reign as to the questioning of witnesses, intervening on her behalf when her own witnesses were being cross-examined, and advising her as to the (re-)instruction of her legal team. G-B may, in time, be cited as authority as to what constitutes judicial mercy ought to be properly afforded to litigants in person whilst not apparently constituting 'undue lenience'.

Human Rights Act

A further example which many may have thought to cross the subjective Rubicon of 'undue lenience' can be found in the unreported decision of the High Court in *Tan v Law* [2013].

HHJ Burrell QC (sitting as a High Court Judge) allowed an application by the defendants (acting in person) to adjourn on the morning of trial. This was despite it being the second time such an application had been made, and despite the failure by the defendants to resolve the issues regarding funding for representation, which led to the first trial to be adjourned.

The issue was interpreted to involve questions of the defendants' Article 6 ECHR rights to a fair trial. It held that, while Article 6 did not necessarily envisage a right to representation, this was a proper consideration for the court when addressing the issue of what constitutes a 'fair hearing'. The court's departure from the 'checklist' of CPR 3.9 was justified by the court taking a fact-specific approach. The judge held that there really had to be an equality of arms and, to ensure this, it may be necessary for one party to have access to legal aid. This was especially so in a case involving complex facts, law and argument, and where a party could not speak English.

Tinkler did not attempt to place limitations upon or seek to define what degree of clemency none would deny need almost always be afforded to those litigating on their own. The question of how a court should 'do justice' will inevitably vary in every case.

Certainly, the last eight or so months' worth of authorities have similarly not sought to move away from the axiomatic and all-powerful trump, that each case must turn on its own facts, particularly where questions of a party's right to a fair trial is concerned. However, it has to be said that there has been a somewhat softer judicial interpretation, as to the form and extent of such indulgence required of judges and opposing lawyers, than many expected following the much-cited judgment of Lord Justice Kay.

Perhaps uniformity will be imposed should the proposals of the Judicial Working Group on Litigants in Person be acted upon. Their report was published on 5 July 2013 and contains proposals as to how the judiciary should deal with the increase in LIPs in courts and tribunals (www.legalease.co.uk/lip).

The Report recommends that the Ministry of Justice and Her Majesty's Court and Tribunal Service should – with judicial involvement – produce appropriate materials (including audio-visual materials) to inform LIPs what is required of them and what they can expect when they go to court as well as reviewing the information that is currently publically accessible on the various judicial websites (see [2.8] and [3.49-3.52]). The Bar Council has pre-empted this recommendation having produced an extremely comprehensive guide to representing yourself in court (www.legalease.co.uk/representing-yourself).

It is also recommended that The Judicial College should urgently assess the feasibility of providing training to judges on LIPs together with developing a 'litigants in person toolkit' utilising the existing judicial guidance (see [2.9] and [4.9-4.19]). However, more far-reaching proposals include: the inclusion in the CPR of a dedicated rule which makes specific modifications to other rules where one or more of the parties to proceedings is a litigant in person; the introduction of a power into Rule 3.1 CPR to permit the court to direct, where at least one party is an LIP, that proceedings should be conducted as a more inquisitorial form of process; and the introduction of a specific general practice direction or new rule in the CPR to address, without creating a fully inquisitorial form of procedure, the needs of LIPs in obtaining access to justice whilst enabling courts to manage cases consistently (see [2.10] and [5.11]).

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Summary

- The number of cases where one or more parties are not represented are continuing to rise, and the approach taken by the courts and that they expect of opposing legally-qualified representatives also continues to be inconsistent.
- Since *Tinkler* was decided by the Court of Appeal in October 2012, there has been little further guidance from the courts as to this issue, other than the tenor of the reported judgments appear to advocate a greater degree of lenience than suggested in *Tinkler* itself.
- It is doubtful however that any firmer guidance is likely in the immediate future, given the inevitable fact-specific nature of questions concerning a litigant's right to a fair trial. ■

Re G (Children)
[2012] EWCA Civ 1434
Re G-B (Children)
[2013] EWCA Civ 164
Tan & anor v Law & Anor
(Unreported 24 June 2013).
Tinkler & anor v Elliott
[2012] EWCA Civ 1289