The interventionist judge

by Simon Tolson

The recent judgment of Mr Justice Coulson as the assigned judge at the end of last month in Brookfield v Mott MacDonald - [2010] EWHC 659 (TCC) is a fine illustration of the Courts showing leadership in the judging arena, and well before the trial is listed in telling the parties what they should be doing. Whereas 20 years ago judges were 'generally' tame at the interlocutory stages and on a tight lead, they now regularly bark and bite when they need to!

The aim of the judge is after all by judicial intervention to promote justice by saving time and costs and concentrating on essential issues. Not every intervention is of this character or achieves this goal and not everyone has adapted to this change or approves of it. However, my perception is that the appreciation of its value is on the rise and that the aim of judicial intervention is to considerable degree being achieved.

The Mott MacDonald pronouncement last month got me to reflect on how much more outspoken the judiciary are now where they see actions proceeding on the wrong path. This is not peculiar to the Wembley litigation of which there has been wide public coverage but also is seen in other cases. However, TCC judges are rather good at it presently.

The philosophy governing the judge's conduct of proceedings and limiting his role in those proceedings have been the subject of debate from the earliest times.

The Book of Genesis informs us that the judge is bound to revere the rules of natural justice and give both sides a fair crack. Before he pronounced judgment God gave Adam the chance to put forward his defence to the charge of having eaten the forbidden apple (he pleaded obedience to the superior orders of his wife) he gave Cain the opportunity to explain the disappearance of his brother Abel (he pleaded amnesia).

In the great Hebrew Talmudic work and the ethical teachings of the 200 years before, The Ethics of the Fathers, Verse 7 of Chapter 4 gave this advice to judges: "In the judge's office, act not the counsel's part" - do not act as an advocate for one side or the other, but retain and be seen to retain your detachment and impartiality.

These codes governing judicial conduct ("the Principles") are everlasting and we can see retain their full force today. Put succinctly, they provide that the parties are entitled to a fair opportunity to present their cases before a judge who is open minded as to the merits and outcome. However, is active trial management and a degree of active judicial participation in the trial process compatible in what we are seeing today from our courts?

Whilst judicial intervention is not new: the reports of counsel and the Court of Appeal suggest that the form, which some judges' intervention took in earlier days, was not always such that the experience was particularly agreeable or elevating. This gave judicial intervention a bad name. However, in my view the increasing interventionist role of modern judges in civil proceedings is not merely entirely compatible with the Principles but is intended and calculated to advance them as well as the pursuit of 'justice'.

The interventionist judge must at all times keep the Principles in mind and the Principles must inform and temper his intervention. However, subject to this call for proper self-restraint, the interventionist role is both healthy and to be encouraged save where it might prevent a case being put which a party has every reason to prosecute.

I identify some of the advantages and goals of judicial intervention and marker areas where judicial restraint is called for to ensure that the Principles and hose of CPR (which are designed after all to secure a fair trial) are safeguarded.

First I go to skeleton arguments, 'skeles' in the trade, once the skeleton has been read, the purpose of the advocates' speeches is essentially (where required) to elaborate and supplement the skeletons and answer the questions raised on them by the judge. This is an area where (paying respect to the Principles) the judge must be particularly cautious. His questioning out of turn may frustrate a planned cross-examination, and if he asks (as he is entitled to) leading questions, (questions suggesting their own answer); the advocate (and witness) may psychologically find it difficult to resist the perceived judicial pressure to give that answer.

However, judicial intervention can have the effect of converting the advocate's monologue into a debate which concentrates on the issues selected by the judge. This has an impact on the roles of the advocate and often too on the expectations of the client.

Judicial intervention has the most important and far-reaching implications for advocates. The skill in preparation to be valued is in preparation of quality and informative skeleton arguments and chronologies. Skeleton arguments, properly prepared and used, are the primary weapon in the advocate's armoury and the medium for short and focused hearings.

Until recently that is not a skill taught at law schools. The force on the judge of a quality skeleton argument cannot be over-estimated. It is the party's first "speech" to the judge which he is allowed to deliver without any interruption by the judge.

The judge may legitimately assume that it is the advocate's best effort on which the judge is asked to make at least his provisional judgment, and the advocate must realise that it may be difficult thereafter (if not impossible) to shift that view.

The talent in advocacy is no longer the ability to drone on incessantly for hours: that is the privilege of the judiciary alone. It is the ability to aid the judge, most particularly in answering his questions and resolving his doubts. The advocate must have the resources to deal with the judicial intervention - the confidence not to be repressed, the resilience to respond, the tenacity to challenge, the tact to placate, the authority to inform and persuade. This requires having the facts at the advocate's fingertips and the legal principles in mind and relevant passages in authorities and textbooks at hand - a far greater knowledge of all these is now required than was the position when the judge remained recumbent throughout the proceedings.

The premium today is upon flexibility - to deal with issues raised on the hoof often, not as the advocate may have planned, but as they are raised by the judge and in the TCC one sees this with all the 'red' Judges. I cannot over-emphasise the substance of gaining the judge's trust and confidence in the advocate's preparation and accordingly the solidity of his submissions and answers to questions asked of him.

As for what the client expects, and as readers most of you will be on that side of the room, the traditional course of litigation afforded the litigant of listening to the mellisonant presentation by his advocate of the history and facts as he contends for them and of the law as it appears to his legal advisers - a presentation on occasion directed as much to the press as to the judge. This was his "day in court".

Any continuing expectation is likely today to be disappointed. If the client has still any such expectation, it is the duty of my profession to disabuse him of it and explain the critical role of the skeleton argument (which can contain the input of the client and be sent beforehand to the client for his approval).

He should be told the skele takes the place (at least in part) of the opening address. I regret that the complaint of the client is often attributable to the failure to appreciate the role and importance of the skele - and the failure of his legal advisers to give the preparation of the skeleton the importance and attention it requires.

The trial judge until my youth was generally tamer and on a tight lead. He may now be found barking - on occasion at the ankles of advocates.

Hooray for the interventionist judge. However, a last word on the Motts case, will mediation be the medicine the parties require? We shall all have to see.

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