

# FAIR PROBING – OR DESCENT INTO THE ARENA?



**Paula Gray** and **Melanie Lewis** discuss the issue of judicial intervention in light of the increasing number of cases where parties are unrepresented.



WE ARE ALL AWARE of the importance of the issue of judicial intervention in cases involving litigants in person, particularly in the current climate of austerity which has resulted not only in more LIPs but a lack of even pre-case advice for many of those who appear before us. There is a clear need to discuss the extent to which judges may, without trespassing into the arena, intervene in probing the evidence or in relation to points of law.

There are a number of moves afoot, including a working party under the auspices of Mrs Justice Aspin on the extent to which judges hearing civil and family cases should intervene to facilitate a fair hearing where one or both parties are unrepresented. The intention is to produce a DVD with a number of scenarios to provoke discussion and enable judges to benefit from the views of others as well as to offer guidance for judges.

The group consists of both tribunal and courts judges. Given the remit of the group this is perhaps an acknowledgement that this is an area where tribunals, which broadly speaking have an inquisitorial function, have a great deal of practical experience which can be shared to general benefit.

## Levels of expertise

The writers of this article are the tribunal judge members of this group and, while we believe that the concept of judicial collaboration and the mining of our ideas is a good one, we would be the first to acknowledge that, just as tribunals

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themselves are not homogeneous and there are certain tribunal jurisdictions that are unsuited to an interventionist approach, some courts judges have at least equivalent experience to tribunal judges in dealing with unrepresented parties. What comes across in discussions with the various judges from High Court to District Bench in what we often refer to as the ‘Uniformed Branch’ is the very different experiences and thus levels of expertise that they have in relation to LIPs.

Judges who sit on the District Bench in particular are used to having people before them who are unrepresented. They also frequently sit in their chambers, a more informal venue than many tribunals. Despite their loftier position, both physically and metaphorically, High Court judges encounter LIPs not infrequently, so are used both to explaining complex legal concepts simply and, often, communicating the unpalatable fact that this is probably the end of the road in relation to the claim.

## Diverse backgrounds

When considering judicial experience of LIPs we must not overlook the fact that, particularly recently given the advent of more judicial progression through the ranks, many judges now have experience of a variety of jurisdictions including tribunal appointments and so have experience and awareness of the issue in differing contexts, and as the judiciary tends towards more diverse backgrounds a multiplicity of experience and skills are available to meet the challenge.

In light of the above, we have asked ourselves whether the perceived distinction between the court versus tribunal approaches may be unhelpful. In our experience as judges and former members of the Bar, a court judge who has familiarity with their legal area, tends to act in a similar way to a tribunal judge with an inquisitorial function, in that they will ask relevant questions of witnesses despite counsel's presence as well as when representation is not there.

#### **Points of law**

In point-of-law jurisdictions, whether the Court of Appeal or the Upper Tribunal, a judge experienced in the area of law, given sufficient time to research the points at issue, can generally manage quite well without an advocate. That is certainly not to concede that this is easy; it is considerably more difficult where the fundamental legal parameters are not laid out by the parties and without the benefit of balancing arguments, but it is yet possible to do justice. The procedure, however, may need to be markedly different.

In making submissions, a party acting for themselves, even if they have had some preliminary legal advice, may have written submissions that they simply want to read out. What they want to say may not be of particular relevance to the legal issues under consideration. Nonetheless, a judge trying to shortcut that approach by insisting on reading the submission to themselves, or asking questions during the presentation can lead to objective concerns as to possible injustice in relation to the right to be heard, and, in a very practical sense, may result in the LIP needing to go back to the beginning and start again.

An LIP is unlikely to have the ability of a competent advocate to argue point A, but be taken by an astute (or irritating) judge to a

different point, which they have as their point E and deal with it, continuing the submission from point F onwards, perhaps realising that the points in the middle are no longer material or, if they are, being able to come back to them later in a circular way. This of course is an academic approach which as lawyers we are used to, both in front of and on the Bench, but we would probably all agree that it is our legal training and experience which has enabled us to think in that way. If that is accepted, it is probably uncontentious to say that any probing of the legal submissions of an LIP is likely to be of little value and may even be counterproductive. Patience is truly a virtue in these cases, and adequate time both in preparation and for the hearing is critical.

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#### **Fact-finding**

In the fact-finding arena, whether that is the High Court or a First-tier Tribunal, the judicial role should be one of enabling a litigant to participate in the proceedings by telling their story. A series of short, easily comprehensible open questions from the judge is the best way to facilitate a good account. If oral evidence is being heard on the issues from the outset, the questions that are asked by the judge appear to arise naturally from the evidence, whereas if the evidence in chief is paper evidence which a judge has read and then asks questions about, those questions may appear to the litigant as cross-examination by the judge; a perception of pre-judgement can be created where there is no 'preamble'.

To have the evidence in chief on paper only is generally the practice in the civil courts, and the difficulty of a judge asking questions in these circumstances may be a potential problem as to the perception of fairness for unrepresented litigants. Difficulties, however, can be avoided by giving a witness a chance to tell a little of their story even where it is already on paper. Once

again allowing sufficient time is important; hearings may be longer not simply because counsel is able to concede or shorten points that an LIP cannot, but because more evidence may need to be heard, as opposed to just read to guard against perceptions of injustice in the judge appearing to play the part of the advocate rather than a neutral interlocutor.

Additionally, the judge who has a good factual command of the papers can more easily intervene yet retain their neutrality. Asking generalised questions risks the appearance of bias far more than asking specific questions based upon the documents; where judicial knowledge of the background is not apparent, questions may be seen as the judge requiring lifestyle or behavioural justification because of a preconceived attitude.

A relationship with litigants which has been built up as part of early and effective case management can help to confirm the judge's position as an impartial facilitator enabling intervention to be seen in those terms – such investment of judicial time, sometimes in person, sometimes by telephone hearings, can be effective in explaining the process and narrowing the issues, particularly given the wide discrepancy in the amount of detailed information available to litigants in advance in the various jurisdictions. A pro-active approach to case management could be adopted in many jurisdictions in both courts and tribunals and, while not always possible, continuity of judicial care can be of significant assistance in demonstrating the even-handedness and independence of the judge, with resulting confidence in the final tribunal.

### **Conclusion**

The short answer to the difficult question as to whether intervention is appropriate and where it may become inappropriate is that this varies

between the jurisdictions, not merely tribunals which frequently have an inquisitorial approach and the courts with a more adversarial practice, but between the courts and tribunal jurisdictions themselves. This conclusion tends to preclude bright-line rules – a 'one size fits all' approach to the problem of when and how to intervene is not the solution. That does not mean, of course, that working groups such as ours should not strive to assist in answering this complex question with useful scenarios for discussion out of which may be derived some helpful guidance, but it is, we think, important to understand that this is a difficult issue which will take a great deal of judicial thought and acumen to be applied to each and every individual case.

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Key to all of the above is sufficient judicial time to prepare the case papers properly, including time for legal research, as well as sufficient time for hearings, which will inevitably be longer than those to which we are more generally accustomed. Short cuts in either regard may create the risk of a judge being perceived as not independent, upon which genuine Article 6 issues may arise.

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