CIArb East Anglian Branch – Society of Construction Law

Annual Summer Seminar: Friday 14th June 2013

"THE MAN IN THE MIDDLE"

Mike McCourt – Deputy District Judge

Introduction

The district judge (DJ) deals with the preparation of cases for trial and final hearings (small claims up to £10,000, fast track trials up to £25,000, financial orders on divorce, possession proceedings, insolvency and enforcement etc, all subject to statute, procedural rules (eg the Civil Procedure Rules 1998) practice directions, protocols and previous decisions of the High Court and the Court of Appeal. The DJ also deals with papers ("box work") and telephone hearings. The DJ fulfils a similar function to a mediator when conducting financial dispute resolution hearings in divorce.

Reasons

Whether the matter before the Judge is procedural ie the giving of directions or for a final hearing the Judge must give reasons for his decision which may be the subject of an appeal

The following is based upon general guidance given to Judges during training

1. Focus your attention on the real issues; it is sometimes easy to the side tracked into an interesting, but ultimately irrelevant, points.

2. Keep the judgement as brief and clear as the subject matter allows. It is even more important to spell out your reasons fully enough to make your conclusions and your reasons clear to the parties.

3. Jokes indignation and snide comments are best avoided. Jokes in judgments (like jokes in court) may seem to be appreciated at the time (especially if made by the Judge), but they normally look pretty lame afterwards. In judgment a joke may

suggest that you are not concentrating on the real issues. Indignation and snideness smack a bias. They all too often produce an adverse re-action in an appellate court.

4. Make all the necessary findings of fact and law on the issues which you have identified; if you do not do so, explain briefly why you have not.

5. To whom is your judgment addressed?

   (a) The parties especially if they are litigants in person and notwithstanding they will normally only be interested in the outcome but they will need to know the findings on the law for the purpose of an appeal etc.

   (b) The loser.

   (c) The lawyers for the parties who may be scrutinizing the judgment for errors in the light of an actual or potential appeal.

   (d) The Court of Appeal! (usually via the Circuit Judge)

   (e) Law reporters and the general public [More likely in the case of the circuit bench and the High Court].

6. You must give sensible reasons which can be shortly expressed for preferring one version of the facts to another. You may prefer one witness's version to another based on the impression made by that witness and it may sometimes be the only reason available to you, but as the primary fact finder you have the advantage of the seeing the witness and it is better to give a weak reason rather than an insupportable reason or no reason at all.

Types of judgment

Little or no discretion by reason of statute or case law. For example orders for possession of rented property may be based on ground 8 a mandatory ground relying upon two months arrears at the time of notice seeking possession and at the hearing and by section 89 of the Housing Act 1980 the courts power to defer giving of possession is six weeks from the date of the original order so that an application to suspend the warrant of possession cannot succeed. In mortgage possession cases if the mortgagor cannot show that he can pay the arrears off over the remaining life of the mortgage he is not likely to get a suspended order for possession (Cheltenham & Gloucester Building Society v Norgan [1996] 1WLR 343).

Judgments based upon exercise of discretion by reference to "a check list"

The judge will work through a number of matters set out in statute, rules or a practice direction as a guide to exercising his discretion. For example before determining financial provision on divorce a DJ will consider the matters set out in section 25 of the Matrimonial Causes Act 1973 and will refer to them in his judgment,

(a) First consideration is the welfare of children not 18.

(b) A financial resources enjoyed and foreseeable

(c) Financial needs and responsibilities now and in the future

(d) Standard of living prior to breakdown

(e) Ages and length of marriage

(f) Physical and mental disability

(g) Contributions to the welfare of the family

(h) Conduct where inequitable to disregard

(i) Loss of pension etc.

Judgment based upon drawing adverse inferences. For example in divorce proceedings the parties must give full disclosure of their assets. In NG v SG [2011] EWCH3270 Mostyn J held where the court is satisfied that the disclosure given by one party as being materially deficient then:-

(a) by the process of drawing adverse inferences the court is duty bound to consider whether funds have been hidden

(b) such references must be properly drawn and reasonable

(c) if the court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds even in the broadest terms

(d) in making its judgment as to quantification the court will first look to direct evidence such as documentation and the observations made by the other party

(e) the court will then look at the scale of business activities and lifestyle

(f) vague evidence of reputation or the opinions or beliefs of third parties is inadmissible

(g) the previous technique of concluding that the non disclosures must have assets at least twice what the claimant is seeking should not be used as the sole metric of quantification

(h) the court must be astute to ensure that the non disclosures should not be able to procure a result from his non disclosure better than which would have been ordered if the truth were told. If the result of an order is that it is unfair to the non disclosures it is better than one which is unfair to the applicant.

Form of judgment

In Crinion v I G Markets Limited [2013] EWC Civ 587 the CA criticised the practice of first instant judges who plagiarise counsel's submission verbatim in their judgments rather than expressing their decision in their own words. The case before HHJ Simon Brown QC involved dealings on stock market movements involving complex agency agreements. The judge found for the claimant in respect of all of the issues agreed for his decision. Most of the judge's judgment was taken word for word from the claimant's counsel's submission altered only so far as necessary to convert the submissions to judicial findings.

Over 90% of the judgment was adopted from counsel's closing submissions. The appellant sought a new trial. The appellant submitted that the judge created the impression that he had abdicated his judicial responsibility to think through for himself the issues which it was his job to decide and that he had simply slavishly adopted counsel's arguments as his own. Ie that justice should not only be done but should manifestly and undoubtedly be seen to be done.

The appellants were not able to argue that the trial judge's decision was wrong but they were given leave to appeal on the narrow ground that the judge's conduct in putting together his judgment in a way he had amounted to such a serious procedural with irregularity that it would be unjust to allow the judgment to stand.

Underhill L J said:-

"I agree with (counsel for the appellant) that appearances matter. For the judge to rely as heavily as he did on (counsel's) written submissions did indeed risk giving the impression that he had not performed the task of considering both parties' cases independently and

even-handedly. I accept of course that a judge will often deprive great assistance from counsel's written submissions and there is nothing inherently wrong in his making extensive use of them with proper acknowledgment, whether he is setting out the facts or in analysing the issues or the applicable legal principles or indeed the actual dispositive reasoning. But where that occurs the judge should take care to make it clear that he or she has fully considered such contrary submissions as have been made and has brought their own independent judgment to bear. The more extensive the reliance on material supplied by only one party the greater the risk the judge will in fact fail to do justice to the other party's case – and in any event that will appear to have been the case. (The CA however accepted the judge had performed his "essential judicial role" and the appeal was dismissed)

Reconsidering judgments

The Supreme Court in re L (Children) [2013] UKSC8 held as follows:

(1) in giving judgment, a judge has jurisdiction to change his or her mind up until the order carrying the judgment into effect is drawn up and perfected

(2) an order is perfected by being sealed by the court

(3) whether a judge should exercise the discretion to recall a judgment will depend upon all the circumstances of the case

(4) its exercise is not limited to "exceptional" circumstances

(5) relevant consideration include

(a) a plain mistake by the court

(b) the failure of the parties to draw the judge's attention to plainly relevant fact or point of law

(c) the discovery of new facts after judgment was given

(d) whether any party has acted upon the judgment to his detriment (especially where this would be expected), but a carefully considered change of mind can be sufficient

In modern times, not only in family and children proceedings, but in civil proceedings generally, there has been a growth in the instances in which cases are disposed or, not in a single trial judgment. Sometimes the several judgments will deal with quite discrete matters, sometimes a latter judgment will supplement a former. Perhaps this tendency fosters both in judges and legal representatives the impression that judgments may be treated as "provisional". Baroness Hale stressed that a judge's best safeguard against having to revise a judgment is to give, in the first place, "a fully and properly reasoned judgment". The original judgment given by the judge variously described as a "preliminary outline judgment" or a "summary judgment" was not fully or properly reasoned.

The DJ is expected to give ex tempore judgments ie immediately after the submissions of counsel have been made but a judgment can be reserved. Hearings including judgments are recorded.

After submissions I usually ask the parties to leave court so that I can marshal my thoughts, and set out what findings of facts and law I need to identify, unless it is a telephone hearing when I am lucky I will have an agreed case summary/chronology/draft directions.

Usually the question of who has the burden of proof will be obvious, but that may have been the subject of submissions by Counsel and may need to be expressly referred to in the judgment.

Costs

The judge will have regard to all the circumstances including:

Conduct of the parties

Whether a party has succeeded in part or his or her case even if that party has not been wholly successful

Any admissible offer to settle made by a party that is drawn to the court's attention and which is not an offer to which the cost consequences in Part 36 apply

Conduct before as well as during the proceedings and in particular the extent to which the parties follow practice direction pre-action conduct in any relevant pre-action protocol

Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue

The manner in which a party is pursued or defended case or a particular allegation or issue

Whether a claimant has succeeded in a claim in whole or in part exaggerated his or her claim

Powers of the Court include making orders in relation to stated amount in respect of another party's costs, costs from or until a certain date, costs incurred before proceedings had begun and costs relating to a particular step in or part of the proceedings and give wide scope to take into account reasonable attempts to settle by negotiation and via ADR etc.

If one party makes an offer under Part 36 or an admissible offer which is nearly but not quite sufficient and the other party rejects that offer outright with any attempt to negotiate then it might be appropriate to penalise the second party in costs.

NB Important new cost rule. R44.3(2):-

"Where the amount of costs is to be assessed on the standard basis [any doubt be exercised in favour of the paying party] the court will –

only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sum in issue at the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance".

Increasingly therefore the difference between solicitor/from client costs (indemnity) and standard costs should be an encouragement to ADR.

After the decision I will hear argument on the question of costs but the general rule of course is that they follow the event and will usually be the subject of summary assessment even though the costs may run to many thousands of pounds. The decision on the award of costs may require some reasoning if there is a mixed outcome.

A statement of costs from both sides should be served and filed in all cases estimated for a day or less, and I will be aware of the effect of an order of costs on the party I am going to find against.

Appeals

Appeals lie from the DJ to the Circuit Judge by way of review (no longer by way of re-hearing) and then to the CA.

Permission to appeal

It is very rare indeed that it is appropriate to give permission on any issue of facts or on the exercise of discretion save where a point of principle is involved.

Permission may well be appropriate on issues of law. The test is whether the proposed appeal stands a real prospect of success. Form N460 reasons for allowing or refusing permission to appeal.

Compliance

In Fred Perry v Brands Plaza and others [2012] ECWA CIV 224) the Court of Appeal took the opportunity to endorse the point raised in Jackson L J's Final Report that courts of all levels have become too tolerant of delays and non compliance with orders and it was vital that the Court of Appeal supported first instance judges who made robust but fair case management decisions. The court should intervene only as satisfied that the judge erred in principle, took into account irrelevant matters or was otherwise plainly wrong.

The relief from sanction rule has been simplified so that on an application for relief from any sanction imposed for a failure to comply with "any rule practice direction on court order the court will consider all the circumstances of the case so as to enable it to deal justly with the application including the need –

(i) for litigation to be conducted efficiently and at proportionate costs; and

(ii) to enforce compliance with rules practice directions and orders".

Will this mean that district judges will get tougher with litigants in person? ("LIPs")

In Wright v Michael Wright Supplies Limited [2013] EWCA Civ 234 a case which concerned LIPs Sir Alan Ward L J said the judge should not have to "micro-manage cases, coax and cajole the parties to focus on the issues that need to be resolved". He added that the appeal would never have occurred if the parties had been represented.

At first instance some assistance was provided to the judge by the first defendant's accountant who explained the complex financial issues of the dispute. The judge decided to dispense with a trial and provide a judgment by considering the documents including the expert's report. One party insisted upon an oral hearing and he did not agree to a trial on the documents only and the C A decided that the judge should have exceeded to the request to hear witnesses that the parties wished to call.

So emasculation of legal aid equals more LIPs and longer hearings (or more mediation?)

ADR

Sir Alan Ward also indicated that there may be the need for a possible review of Halsey the Milton Keynes N H Trust [2004] EWCA Civ 576 in the light of redevelopments over the last 10 years.

All judges now have "The Jackson ADR Handbook".

Paragraph 9.21 says “the court does not have to accept the reasons put forward by any of the parties or refusing to try to settle the action or consider ADR at (allocation) stage. “If the court considers those reasons to be weak or inadequate it will direct the parties to attend a case management conference to consider whether ADR should be attempted. The court can direct the parties to attempt ADR even if one party objects to this”.

“The court’s general power of management includes the power to make orders staying the whole or any part of any proceedings until a specified date or event….. the court can grant a stay of its own motion or at the request of one or more of the parties at the tracking allocation stage **or at any other time** (my emphasis) for ADR to be considered r3(1)(f), (r26.4(2) and r24.4(2A)).

As a DDJ considering a directions questionnaire in Form N181 fast/multi-track concerning a case where the costs are likely to be disproportionate to the sum claimed such as boundary disputes - building and landlord and tenant disputes I will be ordering the parties to attend a CMC to consider whether ADR (ie mediation) should be attempted (unless of high value).

Recent Cases

In Faidi v Elliot Corp [2012] EWCA Civ 287 an action for breach of covenant between neighbouring residential flats centred on the installation of wooden floors when the lease said they should be covered carpet and underlay. The landlord gave permission for the installation but in the same document preserved the obligation in the lease. CA confirmed the trial judge’s conclusion that by giving consent to the work the landlord was precluding itself from relying on the original covenant in the lease. The litigation cost £140,000. Ward L J said “I wish enthusiastically to associate myself with the observation of my lords on the desirability of mediation in neighbourhood disputes. To repeat what I recently said in Oliver v Symons a boundary dispute:

I wish particularly to associate myself with Elias L J’s pointing out that this is a case crying out for mediation. All disputes between neighbours arouse deep passions and entrenched

positions are taken as the parties stand upon their rights seemingly blissfully unaware or unconcerned that they committing themselves to unremitting litigation which will leave them bruised by the experience and very much the poorer win or lose. It depresses me that solicitors cannot at the very first interview persuade their clients to put their faith in the hands of an experienced mediator a dispassionate third party to guide them to a fair and sensible compromise of an unseemingly battle which will otherwise blight their lives for months and months to come".

In ADS Aerospace Limited v EMS Global Tracking Limited [2012] EWHC2904 Akenhead J said (following Halsey) the question whether a party has unreasonably refused ADR will include (but is not limited to) the following

(a) the nature of the dispute

(b) the merits of the case

(c) the extent to which other settlement methods have been attempted

(d) whether the costs of the ADR would be disproportionately high

(e) whether any delay in setting up and attending the ADR would have been prejudicial

(f) whether the ADR had a reasonable prospect of success, and the fact that a party unreasonable believes that his case is watertight is no justification refusing mediation. The fact that the party reasonably believes that it has a watertight case may well be sufficient justification for a refusal to mediation.

In Rolf v Deguerin [2011] EWCA Civ78 the owner claimed £70,000 in damages and made several offers early in the proceedings to enter into a mediation together with a Part 36 offer.

These were spurned by the builder. At trial the owner was awarded £2,500 and ordered to pay the builder's costs from the date she made her first offer. She appealed.

The builder argued that if he had mediated he would have had to accept "his guilt" also he would have been unable to persuade a mediator about the conduct of the claimant's husband. Rix LJ said "as for wanting his day in court that of course is a reason why the courts have been unwilling to compel parties to mediate rather than litigate: but it does not seem to me to be an adequate response to a proper judicial concern that parties should respond reasonably to offer to mediate or settle and that their conduct in this regard should be taken into account in awarding costs".

Small claims

The parties to small claims cases, (apart from RTAs including credit hire claims) are usually LIPs who can take advantage of the HMCTS small claims mediation scheme, which is usually undertaken by telephone.

If it is unsuccessful then the matter will be determined by a DJ.

Legal costs are generally not recoverable and all the winner will generally be able to recover are the fixed costs on commencement, court fees, travelling expenses, loss of earnings capped at £90 per day and expert fees increased with effect from 1st April 2013 to £750. This will allow a jointly instructed single expert to report for a total sum of £1,500 on the basis that each side pays one half each at the outside. The small claim limit is now £10,000 and there is now a discretion for the DJ to allocate to the small claims track a claim with a value of more than £10,000 without the consent of the parties. When will a DJ exercise that discretion? If a party is represented and has an expectation that he will win and recover his reasonable and proportionate standard basic rates it may be unfair to track the case down leaving him with the restricted costs on the small claim especially if eg witness statements are ordered (as they usually are but ignored for a small claims hearing is in any event), and the case may concern expert evidence.

In an appropriate case however a strike out before allocation on the ground that the particulars of claim disclosed no reasonable grounds of claim or the claimant has no real prospect of success will usually result in a claim for solicitors' costs.

In Alliott v Cheeld (Blacksmith) [2013] EWCA Civ 508 a case concerned a metal porch unsatisfactorily constructed by a blacksmith. The case was allocated to the small claims track and it was directed that no expert evidence would be permitted and at the small claims hearing the judge made her valuation of the sums needed for remedial works based upon the evidence before her. Although the CA had no problem with that approach I find it difficult to see how the judge was able to properly value the claim without some evidence of the cost of the remedial work. If liability was not in issue would expert determination have been more effective?

For the "man in the middle" his task is made easier where the parties are represented. Removal of legal aid will result in more LIPs both in civil and family cases. This will result in cases taking longer, more applications to the court and appeals. The government appears to be hoping that this will be offset by an increase in mediation.