JUDICIARY OF
ENGLAND AND WALES

'In the Public Interest'

The 'Disciplinary Conference' 2013

Keynote address by the Hon. Mr. Justice Foskett

8 February 2013

The list of those invited in the past to give the keynote address to this conference contains some very distinguished names – so distinguished that it seemed to me that your Chairman's email containing my invitation must have been misdirected.

However, if the only way to secure for myself a small degree of smug self-satisfaction is by turning a blind eye to the obvious, so be it.

It may, of course, be the case that your Chairman this year wanted a judicial figure whose interests, talents and achievements went far beyond merely trying cases and endeavouring to come to a just conclusion. An Internet search may have led him to the view that I was just the man.

There is a particular website[1] out there in cyberspace that gives some revealing information about me. It states that "David Foskett is an author", it gives the year of my birth and, with a distinct lack of feeling, reminds the reader how many years ago it was, and it then lists my written works. These include "The Law and Practice of Compromise" - so far so good - "War and Peace", "Food Preparation and Cooking", "Life and Soul", "Inspirations from Yorkshire", "Lines and Rhymes", "The Cream of Eastern England", "Advanced Practical Cookery", "Kitchen and Larderwork" and "Patisserie and Confectionery".

Whether it is in the public interest, or indeed of interest to the public, that a modern day judge should apparently have such an eclectic range of interests is, I suppose, a matter for debate. However, if there is anyone in the audience who thought they would receive in these few words of mine some handy tips on how to avoid soufflé deflation, now is the time to leave: you cannot, I fear, always believe everything you read on the 'net'.

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1 http://www.searchdictionaries.com/?q=David+Foskett.

There is only one book in that list for which I can claim at least some personal credit. However, there is one further piece of written work that, I suppose, might now be added to the list and that is the recently published 'Guide for self-represented litigants in the Interim Applications Court of the Queen's Bench Division in the Royal Courts of Justice'[2].

One responsibility I have in addition to the 'day job' is to keep an eye on the working of that court, known generally as 'Court 37'. History shows that many self-represented litigants come to that court, either as applicants for relief or as respondents to claims for relief. All applications, whether involving represented or unrepresented parties, are dealt with as quickly as possible so that the judge on duty in that court is always available to hear an urgent application.

Anyone who thinks about it will understand that in the vast majority of cases a litigant who represents him or herself in court will face enormous pressures. But, as the excellent report on self-represented litigants prepared in November 2011 by the Civil Justice Council[3] shows, pressures exist also for others in the system who have contact with self-represented litigants – court staff, opposing legal teams, the *pro bono* advice and support sector and, if I am allowed to say it, the judiciary. Judges take an oath to "do right by all manner of people, after the laws and usages of this realm, without fear or favour, affection or ill will." The oath does not include the word "represented" before the word "people".

The general perception is that a judge will bend over backwards to ensure that a self-represented litigant has a fair hearing. That carries with it the risk that the opposing represented party will believe that the judge will simply accept or accede to the position of the self-represented litigant even though justice according to the law requires the opposite position to be taken. Equally, a judge's intervention by asking questions of a self-represented litigant may be interpreted by the litigant as a sign of hostility or pre-judgement. Neither is the case or is how things work in practice, but it is easy to see how these perceptions may arise, perhaps particularly when, as in Court 37, applications have to be dealt with speedily.

As with every court in the land, it is likely that there will be an increase in self-represented litigants in Court 37 in the not-too-distant future. The Guide was produced to help those who elect, or are forced, to represent themselves in applications before that court to present their cases in the most favourable light. In consequence it will help the court staff who are often asked questions by self-represented litigants about what to do, the voluntary agencies within the Royal Courts of Justice who help self-represented litigants and, ultimately, the judge who has to deal with the particular case - along, I should emphasise, usually with many other cases in that court each day.

Although it is true that I wrote the Guide, I did so, as the Foreword clearly states, with the assistance of the two most important voluntary sector organisations within the Royal

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2 http://www.judiciary.gov.uk/publications-and-reports/guidance/2013/guide-self-represented-qbd.

3 Available on the judiciary.gov.uk website.

Courts of Justice that deal with self-represented litigants. From the start I had the full assistance of some of the most experienced volunteers who work with the Citizens Advice Bureau and the Personal Support Unit all of whom have had direct, actual experience of dealing with litigants who appear in Court 37. They know, therefore, the kind of issues that need to be dealt with in such a guide and how it needs to be expressed.

It will obviously be necessary to keep the Guide under review and to modify it in the light of experience. Those who have commented upon it have generally done so in supportive and appreciative terms. I, of course, take full responsibility for its present content notwithstanding the invaluable input I received from the sources I have mentioned, but I would say to those commentators who have sought to criticise some limited phraseology within it[4] that the phraseology has been approved by those with real experience of the particular court in question and the type of litigants who appear in it – and, may I emphasise, some of those who commented on the drafts of the Guide were not lawyers?

The process by which the Guide was formulated followed the advice in the Civil Justice Council report which recommended as follows:

> "If the civil justice system is to be there for self-represented litigants, it must try to improve further all its interfaces: between judiciary and court staff; between court staff and the advice and pro bono sectors; between the advice sector and the pro bono sector; between the judiciary and the advice and pro bono sectors. There is an increased imperative for all concerned with access to justice for self-represented litigants to share ideas and experience."

Obviously any guide for self-represented litigants must be appropriate to the kind of dispute in the kind of court concerned – this is not a "one cap fits all" area. Doubtless we will be seeing other guides in due course for other parts of the court system.

What has all this got to do with the disciplinary process? Indirectly, I think it has quite a lot to do with it. Many delegates at this conference will have daily experience of disciplinary procedures in many different areas – medical, nursing, legal, veterinary, sporting and so on. Whilst provision exists for the representation of many in the early stages of disciplinary processes through, for example, defence organisations and trade unions, that is not always the case and, of course, every institution of that nature is faced with the same kind of funding issues that every other organisation faces at present. Support for individuals cannot, it may be thought, always be taken for granted in all disciplinary contexts either at present or, perhaps more particularly, in the years to come. By the time disciplinary matters reach me in my present capacity, usually in the Administrative Court, many of the individuals affected by a disciplinary process about which they seek to complain are unrepresented.

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[4] http://www.guardian.co.uk/law/2013/jan/23/jeopardising-legal-advice-services-reckless; http://thejusticegap.com/2013/01/listen-carefully-try-to-understand/; http://www.lawgazette.co.uk/blogs/blogs/news-blogs/putting-it-simply-a-handbook-lips.

That, of course, is a feature of the current climate. We do, however, also live in an age in which there are people who simply prefer to conduct their own cases in the courts from the outset and I am sure the same applies in the disciplinary sphere. There is a great deal of information and assistance available, mostly on the Internet, that they will use to assist them.

I had hoped to create for myself some small footnote in history by using for the first time today the expression "self represented disputant" to embrace all those who take the course I have mentioned. It was an expression that came to mind whilst I was considering what to say. Unfortunately, a Google search reveals that it is an expression already in use, although it should be said that one has to get to the 18th item on the Google list before the expression is used in full. That item shows that it was used in an article in Milwaukee in the Marquette University Law Review entitled "Remodeling the Multi-Door Courthouse To 'Fit the Forum to the Folks': How Screening and Preparation Will Enhance ADR"[5]. In that article it was used to describe a litigant rather than someone involved in a non-litigation process such as a disciplinary procedure. The interesting article ends with the conclusion that "if the courts can focus on the disputant, as well as the dispute, the system can better meet every party's needs".

That may well be so and it seems to me that that is precisely what is happening now, perhaps everyone's minds being focused by the impacts that the reduced public funding available for litigation is bringing.

However, looked at more widely than merely in the litigation process, and focusing exclusively for today's purposes on the disciplinary processes, I am sure there must be parallels.

The engagement by self represented disputants in disciplinary processes will, I am sure, produce similar pressures and tensions to those that can arise in the litigation context. I suspect it is happening already, but if it is not, I can foresee the need, or the increasing need, for guidance to those who wish to represent themselves in this kind of context. To produce guidance that is useful to all concerned will require a collaborative effort of the sort envisaged in the litigation context by the paragraph from the Civil Justice Council report to which I have referred.

As in that context, those who contribute to any such collaborative process must, of course, retain their own integrity and independence in playing their part in it once it is embarked upon by a self-represented litigant with whom they have to deal. But each element in the process - including, most importantly, the self-represented disputant - ought to welcome a joint effort of the sort I have described to make it more efficient, more just and less stressful for all concerned.

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5 http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5118&context=mulr.

The slant of these remarks of mine may be slightly different from the slant that your lectures and discussions will take today concerning the public interest. The difficulty with my expressing any views on that general issue in the context that is of particular interest to you today is that, by the operation of a well-known law, it will be an issue that I will have to face judicially next week and someone will complain that I have pre-judged it. So you will, I hope, forgive my somewhat oblique approach to the subject-matter of your conference. However, I hope you agree that the issue I have raised is a matter of public interest and is one in which it is in the public interest, in its usually accepted sense of the term, to address.

May I thank you again for the invitation to address you this morning and may I wish you a very successful annual conference?
