Barristers' Chambers

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Issue 38
RE: H-L (A Child) [2013] EWCA Civ 655

Experts 'Necessary' or Not

Introduction:

1. As anticipated in Flyer 35 when introducing the new Rule changes to engaging Experts in family cases (**FPR 2010 Part 25**) – the Ryder reforms are bringing with them the message that Court case management is to get a great deal more robust. Already we are seeing a number of strike out applications being upheld (see latest eg Coleridge J in **T v M** [2013] EWHC 1585 (Fam)**)** and in this most recent pronouncement of the President in a children law appeal, every opportunity is being taken to suggest that judges will be almost 'bullet proof' to challenges made to any case management decision (see also Black LJ reference to 'uphill task' in **Re B (A Child)** [2012] EWCA Civ 1742**).**

2. The Court of Appeal's decision in **Re TG (Care Proceedings. Case Management. Expert Evidence)** [2013] EWCA Civ 5, [2013] 1 FLR 1250 drew attention to the important change to **rule 25.1** of the **FPR 2010** where the previous test for permitting expert evidence to be adduced, being whether it was "reasonably required to resolve the proceedings", was now to be whether it is "necessary to assist the court to resolve the proceedings."

3. The President had then stated that:

> "*It is a matter for another day to determine what exactly is meant in this context by the word 'necessary', but clearly the new test is intended to be significantly more stringent than the old. The text of what is 'necessary' sets a hurdle which is, on any view, significantly higher that the old test of what is 'reasonably required'.*"

‘Necessary’

4. Now was the time to decide what ‘*necessary*’ meant. After unhelpfully stating that as a common English word ‘necessary’ meant necessary (!), the President went on to elaborate. He suggested we were, as practitioners, more than familiar with its meaning by reason of its use in Article 8 (Oh, of course!!). But more practically, he cited with approval the reference to the word adopted in **Re P (Placement Orders. Parental Consent)** [2008] EWCA Civ 535, being:

> *‘….it “has a meaning lying somewhere between ‘indispensable’ on the one hand and ‘useful’, ‘reasonable’ or ‘desirable’ on the other hand”, having “the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable.” In my judgment, that is the meaning, the connotation, the word ‘necessary’ has in rule 25.1.*

Case Managament:

5. Returning to the Court of Appeal’s ‘hobby horse’ of case management, the President went on to restate what he had also said in the **TG case**, namely:-

> *‘[5].* There are, however, some more general points that merit brief discussion. In Re TG *I encouraged case management judges to apply appropriately vigorous and robust case management in family cases; I emphasised the very limited grounds upon which this court – indeed, I should add, any appellate court – can properly interfere with case management decisions; and I sought to reassure judges by pointing out how this court has recently re-emphasised the importance of supporting first-instance judges who make robust but fair case management decisions. I take the opportunity to reiterate these important messages.’*

6. And he also referred to what he had said in **Re B (A Child)** [2012] EWCA Civ 1545, para [19]:

> *"[28] ….even in family cases the days are long past when a litigant was entitled to call however many witnesses he or she wanted. The court as part of its case management powers has undoubted jurisdiction to determine the way in which the case is to be argued, whether the case is to be argued on paper, whether the case is to be argued with witnesses giving oral evidence, who those witnesses should be, what issues they should give evidence on, and so on and so forth. Plainly, this being a final hearing, it was appropriate for the judge to contemplate that the witnesses would give oral evidence, but the mere fact that she limited the number of witnesses in the way in which she did does not of itself demonstrate any error on the part of [the judge]; it was in principle within the scope of her case management powers to determine that*

the witnesses she had identified were the witnesses who the court required to hear in order to determine the issues raised before it."

7. Again the President added in respect of expert evidence case management:-

> *'[32]. In every care case, as indeed in every case, the case management judge will need to assess and evaluate the degree of likelihood that a particular expert's evidence, or the evidence of an expert in a particular discipline, will or will not be of assistance to the parties in exploring, and to the judge in determining, the issues to which the evidence in question is proposed to be directed. It is vital that the case management judge keeps an open mind when deciding whether or not to permit expert evidence….'*
>
> *'[37] None of this, of course, is intended to encourage excess on the part of case management judges or inappropriate deference on the part of the Court of Appeal. There is, as always, a balance to be struck. As Black LJ went on to observe in* **Re B**, *para [48]:*
>
> *"Robust case management … very much has its place in family proceedings but it also has its limits."*
>
> *I respectfully agree. The task of the case management judge is to arrange a trial that is fair; fair, that is, judged both by domestic standards and by the standards mandated by* ***Articles 6*** *and* ***8****. The objective is that spelt out in* ***rule 1.1*** *of the* ***FPR 2010****, namely a trial conducted "justly", "expeditiously and fairly" and in a way which is "proportionate to the nature, importance and complexity of the issues", but never losing sight of the need to have regard to the welfare issues involved.'*

Commentary:

7. The central point is the new gateway to obtaining expert evidence, which from

> *"the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable."*

now suggests that a Court must be persuaded that to decide eg. the asset value in issue, the evidence from an expert, when weighed against what is *"proportionate to the nature, importance and complexity of the issues", will be vital, crucial or indispensible (see Thesaurus 'demanded').*

8. Accordingly, if the difference in value of an asset in issue between the parties is only modest in the overall scheme of the case, or there is other evidence from which the value can be assessed in broad terms – then there is now likely to be even more resistance than before to the introduction, cost and delay of expert analysis.

9. This however should not be seen as a mandate to disallowing in all but the exceptional case the direction for a forensic accountant valuer where there is a real dispute as to the value of company shares. Certainly, some years ago there was for a time a misguided practice of certain judges, particularly in Manchester, of refusing accountancy valuation of companies – which contrary to the '*overriding objective'* led to more delay and an inability of the parties to reach sensible settlement and thereby an escalation in costs.

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