Barristers' Chambers

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Issue 40
Warnings to the Profession from the President

Introduction:

1. Sir James Munby has made no secret of the fact that the time has come to ring in the changes to make the Family Justice system fit for purpose. It is apparent that if necessary to get the message over, The President will not shy away from making examples of professionals or authorities and this week's report of his outrage at the lack of compliance by social workers to Court orders relating to adoption proceedings and his threat of imprisonment for contempt of those responsible if it happens again is a warning which none of us involved in family law practices can afford to ignore.

2. Let's be frank – the compliance attitude by some in the profession to Family Court orders has become almost contemptuous. An attitude has developed over the last decade towards timings incorporated in case management orders that if the actual compliance is within a week or so of the time stated in the order then that is 'good enough'. In short, it's not – it reflects a fundamental lack of respect at the heart of our system by those very professionals who are there to implement and administer it for the benefit of the public.

3. The legal system is not owned or controlled by us as professionals – we are part of it and if we let our standards fall and our attitude to be disrespectful to compliance within the system – we encourage disrespect generally to the legal system and the administration of justice as a whole by the public and then we all become diminished as a society when the view that anyone can decide for themselves whether to obey or disobey a Court order becomes common coinage.

The President:

4. The President meets the problem head on in his most recent comment:-

> *'What I fear is an even greater cause for concern – and it is for me a real concern – is something symptomatic of a deeply rooted culture in the family courts which, however long established, will no longer be tolerated. I refer to the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts. There is simply no excuse for this.* ***Orders, including interlocutory orders, must be obeyed and complied with to the letter and on time. Too often they are not. They are not preferences, requests or mere indications; they are orders. This principle applies as much to orders by way of interlocutory case management directions as to any other species of order. The court is entitled to expect – and from now on family courts will demand – strict compliance with all such orders. Both parties and non-parties to whom orders are addressed must take heed****. Non - compliance with an order by anyone is bad enough. It is a particularly serious matter if the defaulter is a public body.* ***Non-compliance with orders should be expected to have and will usually have a consequence****: see Re W (A Child), Re H (Children)[2013] EWCA Civ 1177.*

5. The President takes further aim at the professional advocate's behaviour also within the Court room. He highlights what has already been criticised by Lord Judge CJ, in regard to the habit of advocates to make comment or assertions within their examination of witnesses, as an unprofessional approach.

> *'Skilled advocacy has a vital role to play in the family courts as elsewhere. I stand by everything I said in Re TG (A Cgild) [2013] EWCA Civ 5. May I, however, draw to the attention of advocates in the family courts, for it is surely as applicable in family courts as in criminal courts, a point made by Lord Judge CJ in his very last judgment: R v Farooqi and others [2013] EWCA Crim 1649, para 113:*
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> *"What ought to be avoided is the increasing modern habit of assertion, (often in tendentious terms or incorporating comment), which is not true cross-examination. This is unfair to the witness and blurs the line from a jury's perspective between evidence from the witness and inadmissible comment from the advocate. We withhold criticism of [counsel] on this particular aspect of his cross-examination because he was following a developing habit of practice which even the most experienced judges are beginning to tolerate, perhaps because to interfere might create difficulties for the advocate who has been nurtured in this way of cross-examination.* ***Nevertheless we***

deprecate the increasing habit of comment or assertion whether in examination in chief, but more particularly in cross-examination. The place for comment or assertion, provided a proper foundation has been laid or fairly arises from the evidence, is during closing submissions*"'* The President.

Comment:

6. I recall many years ago in a robing room on Circuit that one aspiring member of the local Bar informed me that our role as advocates was to attack a witness on behalf of our client and if possible to reduce them to tears. Of course, there are some who also believe it is the barrister's role to be overly aggressive on behalf of the client they represent both inside the Court room and outside in the corridor when negotiating. Neither approach is attractive or acceptable and both are equally indicative of a lack of true professionalism and any real understanding of the role of the skilled advocate. The more the advocate is concerned to impress his client the less independent and dispassionate will be his advice and overall representation of that person and ultimately his case before the Court.

7. A witness giving evidence is not a justifiable target for abuse or intimidation from the advocate or for that matter from the Judge adjudicating over the proceedings. Indeed, Judges who allow a witness to be so treated in the Court room fail properly to carry out their judicial responsibilities. The witness is there to give their account and it is the advocate's job to test that evidence as to its accuracy and credibility; not to attempt to ridicule or insult. Comment based upon the evidence is to be left to final submissions and even there it is wholly impermissible to attack a witness or their character unrelated to the evidence given.

8. The skilled advocate appreciates from the beginning the issues that need to be determined by the Court and deals with the examination of a witness entirely focused on attempting to highlight those aspects of the evidence given, which will assist the Judge in reaching conclusions on the evidence favourable to his client's case. Incisive examination takes careful and not infrequently lengthy preparation of the case material available and logically rather than emotionally tests the witness as to the evidential account given. The skilled advocate remains just that and neither attempts to give evidence himself as a witness or to seek to make judgement in place of the Court. He is there to help clarify the evidence given, persuade

in final submission and assist the tribunal in reaching the findings upon which the judgment is to be made.

PS.

Following years of being the original protagonist and campaigner for the 'Money Judge' system, which was finally set up a few years ago on the Northern Circuit, I have now, with immediate effect from August 2013, been uniquely authorised as a Recorder by the President to also hear appeals from District Judges in cases involving divorce finance orders.

28th October 2013

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