Outer Temple Chambers

Litigation Friends in Tribunals (especially Employment Tribunals)

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- No express powers to appoint litigation friends.

- For some time it was thought that there was no such power - see judgment of Underhill J in *Johnson v Edwardian International Hotels Ltd* (UKEAT/0588/07) (2008).

- Although there had been some subsequent indications to the contrary (in non-ET contexts) - *R v First Tier Tribunal (exp C)* [2016] EWHC 707 (Admin) – Picken J in High Court deciding FTT did have power to appoint LF.

- *AM (Afghanistan) v SOS Home Dept* [2018] 4 WLR 78 – Sir Ernest Ryder, Senior President of Tribunals, saying that *"there is ample flexibility in the* [FTT] *Tribunal rules to permit a Tribunal to appoint a Litigation Friend"* (if otherwise party will not be able to represent him or herself and obtain effective access to justice – para 44), but also in which Underhill LJ doubted the correctness of what he had said in *Johnson.*

- See also Underhill LJ's comments on procedure for appointing LFs.

- ET position addressed directly in *Jhuti v Royal Mail Group* [2018] ICR 1077 – EAT (Simler J) decided that the ET did have the power to appoint LFs.
- Under Rule 29 general case management powers, and by analogy with CPR.
- See Guidance in para 38.
- But no detailed guidance as to the procedure, and no amendment to the ET rules as yet to reflect this development.

See Underhill LJ's comments in *AM* – *"a litigation friend has wide authority to dispose of a party's legal rights, either directly by bringing and/or compromising proceedings, or indirectly by the way in which he or she conducts those proceedings. Those powers ought to be clearly defined and regulated, as they are by rule 21 in cases that come under the Civil Procedure Rules . It is very unsatisfactory that they should be exercised simply on the basis of the general case-management powers in rule 4 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (or its equivalent in other chambers). The Senior President says at para. 4 of his judgment that he will ask that this decision be considered by the Tribunals Procedure Committee. I hope that the Committee will consider this aspect in particular, and as a matter of urgency."*

- *EG v Parole Board* [2020] EWHC 1457 (Admin) – Parole Board has the power under the 2019 Rules to appoint a LF to act on behalf of a prisoner.

- *"Having a litigation friend was so fundamental to ensuring a fair hearing for a person who lacked mental capacity that it would require words which clearly excluded such an appointment before a court could find that it was not provided for."* – Per Mrs Justice May.

- ET President's Guidance for Vulnerable Witnesses (2020) – touches on LF issue, but also some useful broad guidance of vulnerable witnesses, which may be relevant in many cases involving LFs.

- *AB v RBS* [2019] (UKEAT/0266/18/DA) – where there is legitimate reason to doubt a litigant's capacity to litigate, that issue must be addressed.

- Also an illustration (though not guidance) on the practicalities of appointing a Litigation Friend – application made, opposed by R, but granted by HHJ Auerbach: *"the Respondent would not ordinarily have any arguable interest in this matter, and could not be prejudiced by the appointment."*

- Where does that leave us?

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What can the Court of Protection teach us about litigation friends?

Katarina Sydow

29 July 2020

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What can the Court of Protection teach us about litigation friends?

1. When do you need a litigation friend?
2. Who would be suitable and how should the litigation friend behave?
3. A recent worked example in the civil courts – Hinduja v Hinduja & Ors [2020] EWHC 1533 (Ch)

When do you need a litigation friend?

The capacity to conduct proceedings

When do you need a litigation friend?

- CPR r. 21.2(1) – A protected party must have a litigation friend to conduct proceedings on his behalf
- CPR r. 21.1(2) – A protected party is a party, or an intended party, *who lacks capacity to conduct the proceedings within the meaning of the Mental Capacity Act 2005* (emphasis added)

Capacity within the meaning of the MCA 2005

- A person lacks capacity…if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. (s. 2(1))
- There is a presumption in favour of capacity (MCA 2005 s. 1(2))
- Whether someone lacks capacity is decided on the balance of probabilities (MCA 2005 s. 2(4))
- Lack of capacity cannot be established merely by a person's age, appearance, a condition they have, or an aspect of their behaviour (MCA 2005 s. 2(3))
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision (MCA 2005 s. 1(4))
- A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success (MCA 2005 s. 1(3)) including explanations in simple language, use of visual aids etc (s. 2(2)

Capacity to…

Conduct the proceedings

- Capacity must be assessed in respect of the specific decision(s) at issue, not globally (Dunhill v Burgin [2014] UKSC 18)
- A person may have capacity to conduct some proceedings but not others – what issues are to be determined in these proceedings? How complex are they?
- All aspects of the proceedings – not just a part (e.g. to settle on liability – Bailey v Warren [2006] EWCA Civ 51)
- The fact that the client has a deputy for property and affairs may be relevant but not determinative – these are different decisions

Litigation Capacity – the case law

"…whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings."

Masterman-Lister v Brutton & Co [2003] 3 All ER 162, Lord Justice Chadwick [75]

"The client would need to understand how the proceedings were to be funded. He would need to know about the chances of not succeeding and about the risk of an adverse order as to costs. He would need to have capacity to make the sort of decisions that arise in litigation. Capacity to conduct such proceedings would include the capacity to give proper instructions for and to approve the particulars of claim, and to approve a compromise."

Bailey v Warren [2006] EWCA Civ 51, Lady Justice Arden [126]

Litigation capacity - practicalities

- Balance of autonomy with protection.
- Nothing in the rules says a medical report is required.
  - CPR r. 21.6(4) – an application for appointment of a litigation friend by court order must be supported by evidence.
  - CPR PD 21 para 2.2 – if a litigation friend wants to rely on expert evidence in support of their belief in lack of capacity it must be attached to the certificate of suitability.
- Must be sufficient evidence (expert or lay) to displace the presumption in favour of capacity on the balance of probabilities. What evidence will be sufficient will depend on the facts.

Who should be a litigation friend and how should they behave?

Suitability and best interests

A person will be suitable to act as litigation friend if they:

- Can fairly and competently conduct proceedings on behalf of the protected party
- Have no interests adverse to the protected party
- Re: NRA [2015] EWCOP 59. It is inevitable that family members will have "an interest" in the outcome of proceedings. This does not preclude them acting as litigation friend in COP proceedings. However, family member may not be suitable to act as litigation friend where:
  - There is a dispute within the family about what is best for the protected party
  - The way in which the issue has arisen will mean that the pressures on, or interests of, family members of friends make this inappropriate
  - The protected party is objecting to the course of action advanced by the proposed litigation friend, or to action previously taken by them

Once appointed, how should a litigation friend approach their role?

- An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his **best interests** (MCA 2005 s. 1(5))

- In determining what would be a person's best interests, a decision-maker must: (MCA 2005 s. 4)
  - So far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible

- Consider, so far as is reasonably ascertainable
  - The person's past and present wishes and feelings (in particular, any relevant written statement made when he had capacity),
  - The beliefs and values that would be likely to influence his decision if he had capacity, and
  - The other factors he would be likely to consider if he were able to do so.

- He must take into account, if it is practicable and appropriate to consult them, the views of
  - anyone named by the person as someone to be consulted on the matter,
  - anyone engaged in caring for the person or interested in his welfare,
  - any donee of a lasting power of attorney granted by the person, and
  - any deputy appointed for the person by the court.

What if the litigation friend and protected party disagree?

"The role of a litigation friend…involve[s] them forming a view on what is in P's best interests and advancing it although it may not accord with what P is asserting…It follows that…anyone performing those roles may well have to advance a solution that does not accord with objections being expressed by P."

Re: NRA, Charles J [170]

DM v Dorset County Council [2019] EWCOP 4 – the protected person (DM) appealed against a decision that they lacked litigation capacity. The Official Solicitor did not advance any positive case in support of DM's position.

A recent example

Hinduja v Hinduja & Ors [2020] EWHC 1533 (Ch)

- Chancery dispute between brothers and business partners.
- Claimant's daughter and proposed litigation friend failed to file certificate of suitability when issuing claim.
- Certificate later filed stated father had "deteriorated in health", no longer able to give instructions and does not have capacity due to "age related disease". Witness statements from C's wife and solicitors. No medical evidence.
- D opposed appointment as litigation friend – incapacity not established and daughter not suitable.
- Judge held:

<u>Capacity to conduct proceedings:</u>

- No rigid principle that medical evidence is always required. Depends on the circumstances. More likely in PI cases with dispute between medical experts
- Daughter lived with parents and cared for them daily. Appropriate to accept her view on capacity. Evidence need not address the statutory test in detail.

Suitability:

- Function of a litigation friend is to *"guard or safeguard".* Must acquaint themselves with the nature of the action and, under proper legal advice, take steps to further the protected party's interests.
- The litigation friend need not be independent or impartial *vis a vis* both parties to adversarial litigation. They are conducting adversarial proceedings on behalf of the protected party. A relative with a financial interest is not necessarily disbarred from acting as litigation friend. This will depend on the nature of the interest – does it run in the same direction as the protected party's?
- Approach with some caution? NB: no evidence presented to dispute lack of capacity. Concern that Ds' stance prompted by desire to avoid or delay proceedings.

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Questions?

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