

Choosing the right judges



Thursday 07 July 2011 by **Mark Humphries**

There are many mysterious features of the legal world that baffle clients.

But there is perhaps none quite so surprising as when they discover that the judge about to hear their case has little experience in the field of law with which their case is concerned.

Recorders - the first rung on the judicial ladder for senior judges - are often selected from the ranks of experienced civil and commercial practitioners, but they are then expected to try criminal cases in the Crown court with only minimal training.

Similarly, life-long criminal or family lawyers promoted to the Court of Appeal are expected, by little more than osmosis, to get to grips with civil and commercial cases way outside their comfort zones.

In days gone by, this was not considered an issue. Judges were selected purely on the basis of their quality as advocates and, so it was thought, quality advocates could turn their skills to any field of law.

But lawyers are no longer the general practitioners they once were.

As the law has developed to become increasingly complex and specialist, lawyers have followed suit and are now more specialised than they have ever been.

Today it is by no means unusual for a lawyer to practise in one particular field for an entire career of 30 or more years before applying to become a judge.

Why, therefore, do we continue to expect these specialists to transform themselves overnight into generalists when they are selected to become senior judges?

Is this not the legal equivalent of asking cardiologists and oncologists to turn their hands to general surgery?

And even if a judge has the requisite experience to try a case, what steps are taken to ensure that the judge is independent of the parties to the case and has no connection with other aspects of the case which might otherwise become a source of embarrassment?

These are important questions, yet very little is known by the general public about how judges are selected to hear particular cases.

A number of recent cases have highlighted the need for a transparent process to: ensure that judges who are asked to try cases are competent to hear them; check whether the particular requirements of the case disqualify certain judges from trying them; and, most importantly, to enable litigants and their advisers to have confidence that an open and fair process has been used to select the right judge for the case.

Foreign fields

In *Kookmin Bank v Rainy Sky SA and Others* [2010] EWCA Civ 582, the Court of Appeal heard an appeal from the Commercial Court in a case involving advance payment guarantees relating to shipbuilding contracts.

The lineup in the Court of Appeal was one former Commercial Court judge, one former Chancery Division judge and one former Family Division judge.

The commercial judge delivered a classic commercial judgment including the citation of pure commercial authorities such as *The Antaios* in support of a commercial construction of the contract.

The chancery judge adopted a modern approach to construction of the contract without reference to the commerciality or uncommerciality of particular constructions.

The family judge delivered a four-sentence judgment beginning: ‘I find myself in the invidious position of expressing a decisive opinion in a field that is completely foreign.’

He sided with the chancery judge.

The purpose of this article is not to question the correctness of the decision.

But can it be right that an appeal from a Commercial Court judgment is ultimately decided by a judge whose expertise is largely confined to family law? Justice must not only be done but must manifestly be seen to be done.

Even if the decision is correct, what message does this send to the general public about the way in which the decision was made?

Legal lottery

At the very least, the public is entitled to expect that the law will be administered by those who have sufficient expertise.

Without that expertise, the rule of law becomes little more than a lottery.

It is particularly interesting that when *Kookmin* was reported in *TradeWinds*, it was not the result that was greeted with the most consternation but the way in which the decision had been made.

But it is not just the expertise of the judge that should be taken for granted. A judge must also be completely independent of the parties to the dispute, otherwise the fairness of the decision will be open to question.

In *Howell and Others v Lees Millais and Others* [2007] EWCA Civ 720, with echoes of the notorious debacle in the House of Lords in *Pinochet*, a judge was asked to recuse himself due to his previous dealings with one of the firms of solicitors involved in the case, to which the judge had allegedly showed disappointment and even animosity.

He refused, and the Court of Appeal decided that he ought to have recused himself because a fair-minded and informed observer would conclude that the judge was biased against the solicitors.

But how could such a situation have been allowed to arise?

Registering interest

Surely there should be an obligation on all senior judges to disclose information which would give rise to issues of apparent bias, so that the listing officers would know not to assign a case to that judge in which particular parties, solicitors or counsel are involved.

A suitable way to do this would be to maintain a register in a similar way to that in which members of parliament are required to disclose personal interests.

Not every situation can be covered by advance disclosure, but it is at least a start.

A member of the public observing some of the exchanges between counsel and the judge in *Howell* would be shocked that anyone could think it possible for the judge to try the case in those circumstances.

Such situations should not be allowed to occur again.

Appearances matter

In *Radmacher v Granatino* [2010] UKSC 42, the recent decision of the Supreme Court on pre-nuptial agreements, the court decided the appeal by a majority of eight to one in such a way as might normally be expected to benefit husbands rather than wives.

But it just so happened on the facts of the particular case that, exceptionally, the beneficiary of the decision was a wife.

The eight judges in the majority were all men; the one judge in the minority was a woman.

Once again, the purpose of this article is not to suggest that there is anything wrong with the decision of the majority.

But can it be right that a decision of this magnitude, determining a question of great interest to members of the public whose opinions may very well be divided according to their gender, should have been heard by a court largely composed of male judges? Many will argue that this is merely because there are more male judges than female judges.

But that is not an answer to the objection.

How are lawyers to expect members of the public to accept the rule of law when decisions have the appearance of having been made on gender lines?

To restore public confidence in judicial decision-making more thought needs to be given to who are the right judges to hear particular cases.

There is no reason why this cannot be achieved within the courts service by the adoption of transparent listing guidelines and better information relating to the experience and personal interests of individual members of the judiciary.

Getting this right will obviate the wasted costs of challenges to judicial decisions which have the appearance of being incompetent or biased, and enable the English courts to retain their reputation for fair and high-quality decision-making.

Mark Humphries *is a solicitor-advocate and senior director of Mark Humphries Legal. He spent 23 years at Linklaters, latterly as a partner and head of advocacy in London*