Regulating litigation in the 21st century

The line between regulated and unregulated legal activities has become increasingly blurred, as Michael Stacey explains

Michael Stacey

Michael Stacey is a partner at Russell-Cooke LLP and a contributor to The Law of Legal Services and Practice by John Gould (Lexis Nexis), the second edition of which was published in December 2019

An unqualified person can do anything a solicitor can do in conducting litigation, provided the client is formally an LiP and court documents are filed in their name

In simpler times, parties to litigation were either litigants in person (LiP) or represented by a lawyer authorised to conduct litigation. However, innovations in technology, increasing competition from unregulated providers and the withdrawal of legal aid have changed the landscape, and the line between regulated and unregulated activities has become increasingly blurred.

RESERVED ACTIVITIES

It is a criminal offence to carry on a reserved legal activity without authorisation by an approved regulator. The reserved legal activities include (subject to limited exceptions):

- The exercise of a right of audience;
- The conduct of litigation: including issuing proceedings in any court in England and Wales... and the performance of any ancillary functions in relation to such proceedings;
- Reserved instrument activities.

The scope of 'the conduct of litigation' has proved difficult to pin down, particularly because the scope of 'ancillary functions' that are caught is unclear. It was held in *Agassi v HM Inspector of Taxes* [2005] EWCA Civ 1507 that these ancillary functions must be "formal steps" required in the conduct of litigation; and giving legal advice in connection with proceedings and correspondence with the opposing party are not such functions.

Any activity prior to issuing proceedings is also excluded, including drafting particulars of claim. The thrust of the decided cases is that the conduct of litigation must be construed narrowly and given a restricted ambit.

JK V MK

Against that background, the High Court recently considered in *JK v MK* [2020] EWFC 2 whether a company operating an online divorce service (Amicable) was providing reserved activities.

JK and MK wished to divorce amicably; had no capital assets; were both earning and wanted to agree a simple clean break financial remedy order. They jointly approached Amicable to help them navigate the procedural requirements.

Amicable helped to prepare a divorce petition and later the application for decree nisi and statement in support. It also drafted the financial remedy order using the relevant court precedent, and supporting documents form A and form D81. These documents were sent to the court under cover of a letter on Amicable's headed note paper but signed by their client JK. The letter requested that the court fee be paid from Amicable's HMCTS fee account.

The essential data populating the forms and other documents filed with the court is inputted by customers on Amicable's website and the forms generated using commercial software. The completed forms and other documents generated by the software are checked by members of staff. Amicable emphasised that its role is to assist parties in filling in the relevant forms and drafting the necessary documents, leaving customers to file the court documents themselves as LiPs.

CONDUCT OF LITIGATION

Relying on the Court of Appeal decision in *Agassi* that legal advice in connection with court proceedings does not come within the definition, the judge decided that nothing which Amicable did amounted to the conduct of litigation. He considered such advice might extend to drafting a claim form such as a petition, or an application for decree nisi or the statement in support. In relation to the Form E financial statement, the judge likened Amicable's support to an accountant's assistance in filling in the numeric parts of a travelling draft of the form.

He considered that Amicable's headed notepaper should no longer be used for covering letters sending documents to court, but found the use of Amicable's fee account unobjectionable.

RESERVED INSTRUMENT ACTIVITIES

The judge also considered whether anything that Amicable did amounted to a "reserved instrument activity" because it was an "instrument relating to court proceedings in England and Wales". He considered that reference to "instruments" should be given a purposive interpretation and read as a reference to "legal documents which create, settle, transfer or otherwise dispose of a legal or beneficial interest in either realty or personalty", although he acknowledged that on a literal interpretation

"instrument" could capture virtually any piece of legal writing.

He noted that in a 1980 case (*Powell v Ely*) the court decided that drafting and filing a divorce petition was "drawing or preparing an instrument relating to any legal proceedings" under a previous statutory restriction in the Solicitors Act 1974. However, he contrasted the practice in 1980 of drafting elaborate divorce petitions in arcane legal language with the largely 'tick box' exercise required today (which can be completed online using a government service).

The judge's primary finding, on the basis of his purposive interpretation, was that no document prepared by Amicable was an "instrument relating to court proceedings", therefore, Amicable had not done anything which was a reserved instrument activity.

He also expressed two alternative conclusions in the event his purposive construction was wrong:

1. While the human intervention by Amicable means that its staff member has to some extent prepared the instrument, he could foresee that in future, artificial intelligence will do the checking; and in that case it could not be said that anybody at Amicable had prepared the instrument. The person preparing the instrument would simply be the customer by virtue of them inputting the data into Amicable's website.
2. An unqualified person will not have prepared a document for use in legal proceedings unless they have been a major contributor to its drafting; and they have filed the document with the court. A key distinction between this case and previous decided cases was that Amicable files nothing at the court; it's done by the customer. A restrictive interpretation of the statutory wording is justified having regard to the potentially penal consequences.

PAID MCKENZIE FRIENDS

LiPs have the right to reasonable assistance from a lay person (McKenzie friend). They have no right to act as an advocate or conduct litigation but the court may grant a right of audience in relation to particular proceedings. The person is then exempt from the requirement for authorisation. In recent years there has been a rise in professional McKenzie friends providing services on a fee-paid basis.

There have been several instances of the court refusing to grant rights of audience to paid McKenzie friends and restraining people from acting in that capacity.

In 2016, the Judicial Executive Board consulted on potential reform of the Court's approach to McKenzie friends. It concluded it was for government to consider appropriate steps to be taken enabling LiPs to secure effective access to legal assistance, advice and representation.

The Board expressed deep concern about the proliferation of McKenzie friends, observing that "the statutory scheme was fashioned to protect the consumers of legal services and the integrity of the legal system". However, it stopped short of prohibiting the recovery of expenses and fees incurred by McKenzie friends (as proposed by the consultation paper).

CONCLUSIONS

The decision in *JK v MK* continues the theme of previous cases in its narrow interpretation of the scope of reserved activities. However, there's still significant uncertainty as to which side of the line particular activities fall and the extent to which the requirement for regulation can be avoided by presenting activities as advice and assistance to an LiP. Similar issues arise in respect of McKenzie friends.

Taking the reasoning of Justice Mostyn to its logical conclusion, an unqualified person can do anything a solicitor can do in conducting litigation, provided the client is formally an LiP and court documents are filed in their name. This would be a triumph of form over substance putting consumers at risk. It seems unlikely to be sustainable. The focus should be on who in substance has responsibility for the relevant steps, not whose name is on the form.

It will be interesting to see how the law develops as the use of artificial intelligence becomes more widespread. However, it's difficult to see in principle why the entity providing the service using the relevant software should not be accountable for the software in the same way it would be accountable for its staff's actions. To say the entity has no responsibility because it was the software that took the relevant steps would be unreal and create an unacceptable regulatory gap. SJ

To say the entity has no responsibility because it was the software that took the relevant steps would be unreal and create an unacceptable regulatory gap