

Memorandum

To: Lord Justice Neuberger
Date: 01 November 2006
Re: ALMOs and Rights of Audience

Background

1. Local authority officers, typically housing officers, have rights of audience in the County Courts (*section 60 County Courts Act 1984 (CCA)*).
2. A number of local authorities have recently started to sub-contract their housing activities to Arms Length Management Organisations (ALMOs). The ALMOs may then further sub-contract those activities to managing agents.
3. ALMO employees and/or managing agents have recently started appearing before judges in the County Court on applications that would previously have been carried out by local authority housing officers. They do not have rights of audience: they are not authorised local authority officers per *section 60 CCA*.
4. A question has arisen as to the proper approach County Court judges should take when ALMO employees appear before them on such applications. Different courts are adopting different approaches. Some refuse to grant ALMO employees rights of audience, others adopt more pragmatic responses. At least one local authority, the London Borough of Hackney, has applied for a blanket permission to be represented in rent possession cases by ALMO employees and sub-agents. HHJ Mitchell, sitting in Clerkenwell and Shoreditch, refused that application on the basis that it would be inappropriate for him to take what in effect is a policy decision with wide-ranging ramifications.

Legal Framework

5. ALMO employees do not have rights of audience; either under section 60 CCA or otherwise. There is no common law right to conduct litigation (*Paragon Finance plc v Noueiri (Practice Note)* [2001] 1 WLR 2357 (CA)). Nor can rights of audience be granted by individuals obtaining the consent of other parties to the action: parties cannot consent to an unqualified individual exercising a right of audience (*D v S (Rights of Audience)* [1997] 2 FCR 206 (CA)).
6. Local authorities cannot authorise ALMO employees to exercise their rights of audience. They cannot do so as rights of audience are non-delegable (*Gregory & Another v Turner & Another* [2003] 1 WLR 1149 (CA)).

Grant of Rights of Audience

7. ALMO employees are, in light of the above, lay individuals. Three issues thus arise:
 - i) Can and if so should ALMO employees be granted blanket rights of audience?
 - ii) If blanket rights of audience cannot or ought not be granted can they be granted on an individual case-by-case basis?
 - iii) If rights of audience can be granted on either a blanket or case-by-case basis, can guidance be given as to how applications for rights of audience should be dealt with by the Courts?

8. I deal with each issue in turn

Should ALMO employees be granted blanket rights of audience?

9. In my view the Court has no power to grant ALMO employees blanket rights of audience. I reach this conclusion for the following reasons:
 - i) First, the grant of rights of audience to an organisation, or organisations carrying out the same function as would be the case here, is outside the scope of the Court's discretionary power to grant rights of audience to

individuals. The Court's discretionary power to grant rights of audience to individuals under *section 27 of the Courts and Legal Services Act 1990 (CLSA)* is confined to individual applications made on a case-by-case basis: see *Gregory & Another v Turner & Another* [2003] 1 WLR 1149 (CA); *Izzo v Phillip Ross & Co (a firm)* [2002] BPIR 310 (ChD); and *Cooper v Rhuscott Estates & Others* [2004] EWCA Civ 673. *Cooper* in particular emphasises this in that it held that it could amount to a contempt of court to argue at a later hearing that a grant of a right of audience at a previous hearing served as a precedent justifying grant of rights of audience at the latter and any subsequent hearings.

Taken together *Gregory* and *Cooper* emphasise that the limit of the court's power to grant rights of audience is a power that is exercisable on an individual case-by-case basis only. If, as is the case, individual lay representatives, cannot be given a blanket right of audience under *section 27 CLSA*, a fortiori, professional organisations or companies cannot be granted such blanket rights of audience.

- ii) Secondly, the grant of blanket rights of audience to specific classes of individual is provided by *section 11 CLSA*. This power enables rights of audience to be granted to lay representatives in the County Court in a number of discrete areas (*section 11 (2)*). One of those areas is proceedings relating to domestic premises (*section 11 (2) (d)*). The power under *section 11* can only be exercised by the Lord Chancellor. It has only been exercised once, to grant lay representatives rights of audience in matters allocated to the small claims track (*Lay Representatives (Rights of Audience) Order 1990*). I would also note that in light of this fact, and given the extensive consultation exercise that took place before the Institute of Legal Executives were granted an extension to their rights of audience (admittedly in a different context) I would anticipate that the Lord Chancellor would not exercise this power without first conducting a detailed consultation.

The right of audience sought by ALMOs falls under the ambit of *section 11 (2) (d) CLSA*, as the types of proceedings they wish to appear on are those

which would fall under *section 60 CCA* if carried out by a local authority housing officer i.e., recovery of possession of a house belonging to the authority and the recovery of any rent, mesne profits, damages or other sum claimed by the authority in respect of occupation of that house by any person. House is defined in *section 60 (3) CCA* as ‘*a part of a house, a flat or any other dwelling and also includes any yard, garden, outhouse or appurtenance occupied with a house or part of a house or with a flat or other dwelling.*’

In the premises the right of audience sought by ALMOs is one which relates to proceedings in the County Court regarding domestic dwellings. In my view the existence of *section 11 CLSA* is strongly suggestive that if ALMOs are to be granted blanket rights of audience in this type of action they can only be granted by the Lord Chancellor. Any attempt to grant a blanket right of audience by the court would arguably be, and in my view would be, *ultra vires* in light of this statutory provision.

Can rights of audience be granted on an individual case-by-case basis?

10. ALMO employees who seek a right of audience do so as lay representatives. The grant of rights of audience to lay representatives is exclusively governed by *section 27 CLSA*.
11. In *principle* rights of audience for individual ALMO employees could be granted under *section 27 CLSA*, just as such grants could be made in favour of any other lay representative e.g., McKenzie Friends.

Can guidance be given as to how applications for rights of audience should be dealt with by the Courts?

12. There is a good deal of authority as to how the power to grant rights of audience under *section 27 CLSA* should be exercised. While these authorities arise in the context of granting McKenzie Friends rights of audience I can see no reason why that guidance should not apply equally to ALMO employees seeking rights of audience. I summarise the main points of that guidance:

- i) Unqualified individuals should be granted a right of audience in exceptional circumstances only (*D v S (Rights of Audience)* [1997] 2 FCR 206 (CA); *Paragon Finance plc v Noueiri (Practice Note)* [2001] 1 WLR 2357 (CA). The Court should take a generally strict approach to such applications (*Clarkson v Gilbert* [2000] 2 FLR 839 (CA));
- ii) It must be in the interests of justice, of genuine assistance to the court and further the overriding objective for such rights to be granted (*Clarkson v Gilbert* [2000] 2 FLR 839 (CA); *Izzo v Phillip Ross & Co (a firm)* [2002] BPIR 310 (ChD); *Gregory & Another v Turner & Another* [2003] 1 WLR 1149 (CA);
- iii) Any such application for a grant of a right of audience should be made at the outset of the hearing. The application should be made by the litigant, who must himself persuade the court to exercise its discretion under the CLSA to grant such rights (*Clarkson v Gilbert* [2000] 2 FLR 839 (CA)).

13. These authorities present a problem for ALMOs. They make clear that the grant of a right of audience to unqualified individuals is something which can only be made in exceptional circumstances. ALMOs seek the grant of such rights on a routine basis. They do so not because the litigant is inarticulate or unable to understand the proceedings, or has health problems (*Clarkson v Gilbert* [2000] 2 FLR 839 (CA); *Gregory & Another v Turner & Another* [2003] 1 WLR 1149 (CA)). They do so because the local authority has chosen to divest itself of direct responsibility for housing matters. In essence the right of audience is sought because of organisational and financial considerations on the part of local housing authorities and those organisations which sub-contract housing work from them as a consequence of those considerations. In my view, these reasons cannot amount to exceptional circumstances. In general therefore the application of authority supports the view that ALMOs should not, even on a case-by-case basis, be granted rights of audience as they cannot show that the basis of their application is exceptional circumstances.

14. I further note that *if* the above circumstances are treated as exceptional it would almost inevitably mean that all such applications would be granted. The effect of

this would effectively be to grant ALMOs blanket rights of audience; although as a matter of form each grant would be made at the outset of each hearing. As this consequence would in practice infringe the general prohibition on the grant of blanket rights of audience and the Lord Chancellor's power under *section 11 CLSA* I would conclude that it supports a strict application of the exceptional circumstances test as per *D v S (Rights of Audience)* [1997] 2 FCR 206 (CA); *Clarkson v Gilbert* [2000] 2 FLR 839 (CA); and *Paragon Finance plc v Noueiri (Practice Note)* [2001] 1 WLR 2357 (CA).

Conclusions

15. I conclude as follows:

- i) ALMOs' employees cannot lawfully be granted blanket rights of audience by the Courts;
- ii) ALMOs' employees can in principle be granted rights of audience on an individual case-by-case basis;
- iii) The grant of such rights of audience on a case-by-case basis is governed by the general authorities on the exercise of the discretion under *section 27 CLSA* (set out above). Given that exceptional circumstances are needed to justify the exercise of such rights of audience, and given the basis on which such applications in this of proceedings, generally such applications should be refused.