Falcon Chambers

ARBRIX SPRING CONFERENCE

"CROSS EXAMINATION"

13TH MAY 2005

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CROSS EXAMINATION – WHAT IS IT FOR?
HOW CAN IT HELP YOU?
HOW TO CONTROL IT.
CAN SURVEYORS DO IT?

1. I blame Sir Norman Birkett KC. He was appearing for the prosecution in the trial of Alfred Arthur Rouse for murdering a passenger in his car by setting light to it. The defence was that the fire was an accident. They called an expert witness. He said that he was an engineer and fire assessor "with very vast experience as regards fires in motor cars". He advanced the theory that the junction in the fuel line had become loose. He gave his evidence with great confidence. The cross-examination by Birkett began as follows:

> *"What is the coefficient of the expansion of brass? --- I beg your pardon.*
>
> *Did you not catch the question? --- I did not quite hear you.*
>
> *What is the coefficient of the expansion of brass? --- I am afraid I cannot answer that question off-hand.*
>
> *What is it? If you do not know, say so. What is the coefficient of the expansion of brass? What do I mean by the term? --- You want to know what is the expansion of the metal under heat?*
>
> *I asked you: what is the coefficient of the expansion of brass? Do you know what it means? --- Put that way, probably I do not.*

You are an engineer? --- I dare say I am.

Let me understand what you are. You are not a doctor? --- No.

Not a crime investigator? --- No.

Nor an amateur detective? --- No.

But an engineer? --- Yes.

What is the coefficient of the expansion of brass? You do not know? --- No; not put that way."

Rouse was found guilty of murder. The appeal failed. Rouse was hanged at Bedford goal on 10th March 1931.

2. That has always been held up to students as the classic way to cross-examine an expert witness. Let us analyse what Sir Norman was doing. He was setting out to (a) rattle and (b) discredit the witness and to establish a psychological superiority: rattle him by making him feel foolish and at a loss; discredit him by implying to the jury that if he were an engineer, he could not be a very good one if he did not know a simple scientific fact; and establish psychological dominance by making the witness feel inferior to his questioner.

3. But that was jury advocacy. A rent review arbitration is not a murder trial and the tribunal is not a jury. In truth, those sort of techniques are usually inappropriate and unpersuasive, though not all members of the Bar seem to realise that. Yet the image persists that cross-examination has to be dramatic and confrontational and is only effective if the witness breaks down in the witness box, confesses that he is an habitual liar and leaves Court a

broken man. In fact the task is much more subtle, the aim much less offensive and the product should be more useful.

4. By way of a digression, those of you who know the gentlemen in question may enjoy the following vignette from a recent judgment reported at [2005] 14 EG 130. In the course of cross-examining a witness in a rights of light case, Paul Morgan QC put to him that his evidence was "twaddle". The Judge commented in his judgment that this, with hindsight, ought to have attracted an adverse judicial comment and referred to an earlier case. I had to look it up. In the earlier case[1] Megarry J had ticked off Jeremiah Harman QC for calling a witness's evidence "hogwash". And who was the pillar of rectitude ticking off Paul Morgan – none other than Peter Smith J, the erstwhile scourge of the north. The story has a point. Even when conducting the most probing cross-examination, the questioner is expected to remain courteous and you, as arbitrators, are entitled to ensure that he does.

5. It may help you are arbitrators to understand what a cross-examiner is trying to achieve, the rules by which he is constrained and some of the techniques that he uses. Thus equipped, you may be able to get more out of the exercise or, at least, bear it with greater patience. I too sit as an occasional Judge and know what torture a poor advocate can inflict, not on the witness, but on the tribunal. A good advocate tries to keep his tribunal at least interested and, occasionally, fascinated.

[1] St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No.2) [1973] 2 All ER 903.

6. I learnt long ago from a silk who was a renowned cross-examiner that the best way to prepare a cross-examination is to write your closing speech. Why? Because you work out where you want to go and what you want the evidence to prove. Cross-examination is a form of advocacy. The tribunal is given a foretaste of the case that is to be made. But it is not enough for the advocate to assert things to the witness and express incredulity at his predictable denials. A degree of agreement has to be extracted. So it is often effective to proceed by way of open, non-leading questions that do not indicate the answer that is desired.

7. The object of cross-examination is to build a case by establishing areas of agreement of fact and opinion that lead logically to the conclusion the advocate wishes to commend to the tribunal. But there are certain rules. Before he can made a submission to any given effect, the advocate must put it to the relevant witness to enable him to comment. In a rent review arbitration, this duty is qualified. There is a mass of fact and many expressions of opinion and to invite comment on every one would take weeks. Moreover, both valuers will have exchanged counter-submissions and so already have had an opportunity to comment on each other's submissions. Moreover they are usually invited in chief to comment on the other side's counters. So the questioner can concentrate on the areas that matter: (a) the really contentious aspects; (b) the pick of the comparables; and (c) the building blocks that he hopes will sustain his own final argument.

8. If, however, in his final address he starts urging on you considerations, facts or views on which the other side's witnesses had not had a chance to comment or which are contrary to facts and views that he has not challenged, you are entitled to point that out to him and to reject those arguments on that

ground. Indeed, to accept a submission which had not been put to the other side or which was inconsistent with a view expressed by the other side which had not been challenged might well found a challenge based on failure by the arbitrator to comply with the general duty in section 33 of the Act to give each party an opportunity of dealing with his opponent's case.

Some common techniques

9. (1) **"The Birkett**" – rattle, bully and dominate. I hate this. You hate it too, which is why it does not work and it bad advocacy in arbitrations – but it is still done. The questioner aims to catch the witness out on a small point at the outset and to make him feel foolish. The arbitrator, being a member of the same profession as the witness and remembering that the same was once done to him, immediately sympathises with the witness and regards the advocate as something that has crawled out from under a stone.

(2) **"The lack of experience line**" – this is often attempted naively at the outset of the cross-examination because the valuer starts his proof with an account of his unparalleled experience in the field. I find it is more tellingly deployed when one has established precisely what elements of the evidence the witness seeks to justify by reference to his experience and then to return to whether he in fact has the relevant experience. It can also be quite telling when the big city man is up against the local agent: "So, Mr Gyngell, when did you last let a fish shop in Buxton?"

(3) **"The collusion exposure**" – a famous example of this saved Dr Bodkin Adams from the rope in the mid-50s. It can, nevertheless, be deployed in a rent review where an agency

witness is called to back up the valuation of the "professional". To what extent have they discussed their valuations? To what extent is the view of each based on material provided by the other? What if some of those shared assumptions are shown to be wrong? Are their views really independent?

(4) **"Where do I find *that* in your report?"** – this is a little theatrical and can be done to death, but it can also be telling. If a witness who has written a report (in which he is required to set out all the material for and against his conclusion), commented in counter-subs on the other side's subs and commented in chief on their counter-subs, then comes up under cross-examination with a wholly new line for justifying his opinion or rubbishing the other man's, that is something which at least deserves an explanation. Of course, if the new line is convincing, so be it, but it often is not and neither is the explanation why it did not surface earlier.

(5) **"Keep the bugger off balance**" – the advocate confuses the witness by dotting around, asking unconnected questions, the answers to which he hopes the witness will later contradict. Some think this is clever. I think it is tricky, faintly disreputable and ineffective, again because it irritates the arbitrator and enlists sympathy for the witness. That said, a cross-examination by topic, which does not simply follow the order of the proof, but lays the ground for what is to come, *is* effective because neither witness nor arbitrator knows what is coming next or quite where it is leading and it is therefore interesting.

(6) **"The critical assumption gambit"** – if a valuer makes a great play of some feature of the property which makes it particularly valuable/valueless or of the effect of some valuation direction, it can be interesting to see by how much he would adjust his valuation in the absence of that feature. This is particularly good fun if there is some ground for doubting whether the feature in question really exists or whether it is properly to be taken into account. The hedging that then takes place can be wonderful to behold.

10. So what is it all for? It is to test those craftily composed reports and their underlying and perhaps not fully acknowledged assumptions and the facts upon which the opinion of value is based. Done well, it can be genuinely revealing. Done badly, it is purgatory. But you have to be patient. Sometimes the advocate is preparing the ground for a good point which you have not seen coming. Bear with him. Sometimes – quite often actually – something he tries just does not come off and runs into the sand. Stuff happens, but he had to try.

11. Advocates can, however, persist too long with a point, either because they have succeeded with it and are feeling triumphant or because they have got nowhere and fancy banging their head on the same wall one more time. Don't hesitate to move them on. In the first case, you can say "*I **have** understood that point, Mr Gaunt*". In the second, kindly, "*Perhaps, Mr Gaunt, it is time to move on*". Your intervention will not be resented and it is a perfectly proper exercise of your general duty to avoid unnecessary delay or expense.

12. You are also entitled, as I mentioned earlier, to insist on high standards of courtesy and professional behaviour. It must be said that these are regrettably not always observed by surveyors in their written evidence but the arbitrator should not hesitate to show the yellow card to an advocate if his language becomes intemperate or tempers get out of control. Step in early. If you don't, like a weak referee, you will lose control of the match. Believe me, I have seen it happen.

13. If the other side keeps interrupting and making speeches, as can happen, crack down. "*Yes, Mr Reynolds, and* ***what*** *is your application?*" That will shut him up. He hasn't got one and is just sounding off.

14. Have you ever considered setting a time limit on cross-examination? You can only do it by agreement but it is worth considering with the parties at the directions stage. In my experience, it is rarely necessary to cross-examine the chief valuation witness in a rent review based simply on comparables for more than 2½ hours and it is therefore perfectly possible to timetable an arbitration hearing involving two valuers so that it will not exceed two days. I have only once conducted an arbitration to such an agreed timetable, but it worked a treat. I published the timetable in the Estates Gazette but nobody seems to have taken up the suggestion.

15. Can surveyors do it? Not really – nor can most solicitors and quite a few barristers. One reason is that, on the whole, they misapprehend the nature of the exercise. Steeped in the detail of their own case, they want to argue with the witness. Listen to the inexperienced cross-examiner. He finds it very difficult to ask a question. He makes an assertion. He makes a little speech. When he does get to ask a question, he cannot repeat it because

it was so convoluted. In this respect Norman Birkett shows us how. In a perfect cross-examination, no question would be longer than "What is the coefficient of the expansion of brass?" and all the questions would be open and not leading.

16. Secondly, the man who is giving the evidence is too close to the case. He finds it difficult to stand back and pick a course through the evidential minefield. He often makes his case worse by giving the other side an unnecessary chance to elaborate their's. He tends not to isolate and develop his best points or the points which will give his closing submissions that edge. It is not his fault – he is the witness, not the advocate and the two roles are frankly incompatible. As a witness he must preserve his impartiality and independence, which the advocate neither pretends to nor practices. By trying to be an advocate he risks undermining his credit as a witness.

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