GRAYA NEWS

LEADING BY EXAMPLE *Civil Cases*

Introduction

'I have been a judge for 20 years. I started off life in the times when you didn't have any skeleton arguments, the only things you had were pleadings. You didn't have witness statements and the judge would have the case opened to him, and he wouldn't have a clue what the evidence was going to be until it turned up.' **A Judge writing in December 2014.**

Court time is increasingly precious, both because there is more demand than supply and because time is money when everyone is tied up in court, paying lawyers. The production of witness statements to stand as the evidence of witnesses in civil cases has been the usual practice for many years. Court time is therefore concentrated on cross-examination rather than examination-in-chief, but the rules are flexible – when should you examine-in-chief and for how long?

The main reasons for examining-in-chief in civil cases are:

(a) Correcting of mistakes in the statement
(b) Clarification of points made already in the statement
(c) Updating evidence since the statement was made.

Another reason, although not necessarily legitimate in its own right, is to try and settle the witness into their environment before they face cross-examination.

Preparation

CPR Part 32 provides the court with wide powers to control evidence. In the normal course of events, by the time the witness arrives in the box, they will already have provided a witness statement setting out their evidence. You may or may not have had a hand in that. It may contain all you want it to say, or there may be very large holes which you are keen to bridge.

Consideration of examination-in-chief should start when reading the witness statement. You might not understand certain aspects; if you don't, then it is likely that the Judge will need assistance too. Preparation should continue when you ask the witness, before the hearing, whether they have read their statement. At that point they may offer corrections or clarifications. Make a note.

Before asking for permission to examine-in-chief, a short outline to your opponent of the areas you want to cover is a good idea.

(a) Correction of mistakes

This is an obvious one. The witness says beforehand, 'I meant to say 2012 rather than 2002.' Take the witness to their statement:

Q. Turn to p20 please, is that the beginning of your statement?
A. Yes
Q. Turn to p49, is that the end of your statement?
A. Yes
Q. Is that your signature?
A. Yes
Q. Did you sign the statement believing the contents to be true?
A. Yes
Q. Have you had a chance to read it recently?
A. Yes
Q. Are there any corrections you would like to make?
A. Yes, on p245, I meant to say 2012 rather than 2002.

(b) Clarification

Looking at a structural engineer's report and the pictures attached to it, I wasn't clear on how the various terms related to what I was seeing in the pictures. So I asked the expert and was given a clear response. I went through the process again when the expert was called:

Q: You refer at paragraph 3.14 of your report to the truss. Can you turn to plan A?
A: Yes
Q: Can you identify for the court, where the truss is?
A: Yes, it is the top part of the picture, above the opening, you can see two horizontal timbers spanning the picture and diagonal timbers between them. All together that is the truss.

(c) Updating

In some cases events between the date of the witness statement and the hearing can be crucial. In possession claims based on anti-social behaviour, the court will want to know whether there have been any recent incidents of anti social behaviour as part of its consideration as to likely future conduct.

Q: You made your statement in December 2014?
A: Yes
Q: Have there been any further incidents involving the defendant since then?
A: Last week, just as I was about to go to bed, I could hear her turning up the music and I thought, oh no here we go again. She continued to play her music at full volume, so that I could hear my flat shake and I couldn't sleep. I couldn't believe that after all this, she was still playing music loudly.

Some Don'ts

Over-kill
Whilst it is advisable to provide some examination-in-chief to enable a witness to settle in, simply getting the witness to recite what is already in their witness statement is likely to be cut-off fairly quickly.

Q: Can you describe what you saw when you finally entered the room?
A: I went in about half past 10, I entered through the hall-way and saw the opening into the living room …
Judge: Hang on, isn't this all set out at paragraphs 10 to 20 of the witness statement?
Counsel: Yes, sir
Judge: Well, why am I hearing it in chief then?

Stealing thunder
There is also a careful line to draw between stealing your opponent's cross examination and putting new matters forward. Examination in chief is not an opportunity to take the witness through all the points that will be put in cross examination.

Final point to note

Many witnesses come out of giving evidence feeling like they have not had a chance to have their say, but have just been subject to cross-examination. It is usually a good idea to explain before they give evidence that their written statement stands as their evidence and the judge has (hopefully) read their witness statement already and taken all their points on board and that you will be drawing them out further in submissions.

Future of examination-in-chief?

In the *Chancery Modernisation Review: Final Report* – December 2013. Briggs LJ considered the recommendation by the Bar Council for the scrapping of witness statements and the re-introduction of examination-in-chief:

'This well-argued proposal derives from a widely shared perception that the preparation and deployment of witness statements in chancery (and other civil) cases has now reached a stage of such excessive cost, effort and irrelevance that the only workable solution is now largely to get rid of them.

There were three main objections to [the Bar Council's proposal].

1. *examination in chief would cause a disproportionate increase in the duration and therefore cost of trials;*

2. *the exchange of full, verified witness statements remained a valuable tool in the parties' mutual understanding of the strengths and weaknesses of their opponents' cases, contributing greatly to settlement, even if relatively shortly before trial;*

3. *the ever-increasing complexity of modern business life makes it only fair to witnesses to be able to prepare and reflect upon the detailed content of their evidence'.*

Whilst not recommending the proposal, Briggs LJ concluded on this point:

'I accept without hesitation that a limited amount of examination in chief on specific central factual issues in a case may be the best way to a just result, fully justifying the additional trial time involved.

That said, the Bar Council's proposal of witness summaries and limited examination-in-chief may nonetheless be a useful case management tool in appropriate cases, either for all the evidence, but more likely for evidence about particular events, or from particular witnesses'. ■