ADVOCACY *IN THE*

Q & A WITH MASTER PETER COULSON

What is the biggest difference sitting in the Court of Appeal compared to the High Court?

The biggest difference is the intensity of the hearings in the Court of Appeal. At first instance, there can be slower moments, when a witness is being laboriously cross-examined on a topic of dubious relevance, or when counsel is making a submission on his fourth alternative response to the Part 20 defendant's rejoinder. There are moments – happily rare – when it can be difficult to maintain concentration.

It is completely different in the Court of Appeal. Everything is much more condensed. Time seems to flash by because the concentration levels are at such a high pitch. In a typical morning, I look at the clock for the first time and it's almost lunchtime!

Advocates need to up their game accordingly. Everything matters.

These Q & A sessions often ask for Do's and Don'ts. Cutting to the chase, what is your best 'Do' for an advocate in the Court of Appeal?

Following on from my previous answer (as the best witnesses say), advocates need to be crisp and efficient. They should always assume that the Lord or Lady Justices have done the necessary reading and will have identified the particular matters on which they are concerned or on which they require assistance. So there is no need to pad or waffle: the advocate can just focus on the critical points.

An appeal hearing can sometimes be more of a dialogue than the hearing below. How should the advocate handle the questions that they are asked?

Top tip: Answer them! There is a tendency amongst advocates to think that the questions they are asked are merely designed to show off either the intellect or the preparedness of the judge asking the question. In the Court of Appeal, I can say that that is genuinely not the case. If one of the judges asks a question, it is because the topic is a matter to which (as a result of their pre-reading) they attach importance, and the question will require a careful answer.

Sometimes, of course, the question will stem from a misunderstanding of a point. That is not uncommon or surprising: the advocate may have been involved in the case for three years, whilst in contrast the judges may have had a maximum of two days to pre-read. So be patient when explaining why a question may miss the point.

If it is at all possible, it is much better to answer the question then and there. Sometimes it is necessary for the advocate to delay answering a question, but that is to be avoided if possible, because it inevitably gives the impression that the advocate does not have an immediate answer.

In similar vein to the earlier question, what is your worst 'Don't'?

That is easy. It is taking the court to interminable passages of erudite judgments in factually-complicated authorities, without any proper explanation of why the court is being shown these passages at all. It is usually possible to refer to one or two short passages in a judgment to support the point being made. Most judgments are concerned with the application of a few well-known principles to the particular facts of a case, and so will usually contain very little of direct application to any other situation. Fillet out only the point that matters to your argument.

If (despite all that) it is still felt necessary to refer to six or seven paragraphs, then explain why it is necessary to look at so much material before going to the passages, and then always give the court the option of reading those passages for themselves.

How should the advocate deal with his or her skeleton argument?

The Court of Appeal will not only have read the skeleton arguments but will probably have made their notes on the issues by reference to them. It is therefore unnecessary to take the court laboriously through those skeletons at the oral hearing.

However, sometimes doing the opposite is even worse: the situation where the advocate ignores the skeleton argument altogether, and organises his or her oral submissions in a completely different order, often taking different points to those set out in the skeleton. The oral hearing is not an excuse or reason to wipe the slate clean and run an entirely new case.

COURT OF APPEAL

There is an obvious happy medium. Make your oral submissions without repeating the formulations in the skeleton but following its structure and cross referencing to it from time to time. That will chime with the judges' notes of the issues, and assist the judgment-writing exercise.

What works better: a 'softly softly' approach or all guns blazing?

Whilst individual advocacy is a matter of style, I am often surprised by how often advocates in the Court of Appeal adopt a 'no concessions, no surrender' approach. That is not generally the approach in the TCC (the part of the High Court in which I sat the most), so I was surprised to see just how often advocates in the Court of Appeal insist on taking every point. A recent example involved a 15-minute disquisition in the appellant's reply about a variety of footling pleading points.

This is a mistake. Judges inevitably think that if every point is being argued without discrimination, there must be a risk that all the points are equally bad. In my experience, some judicial review appeals, and some planning appeals, have fallen into that category. In the Court of Appeal in particular, it is a much better policy to make proper concessions up front.

You mentioned that Court of Appeal hearings are intense for the judges. How can advocates help with that?

That has been another slight surprise. In the High Court, counsel will have prepared and agreed a detailed timetable for the trial or for any significant hearing. In the Court of Appeal, there seems to be an assumption that that sort of preparation is unnecessary and that somehow, as if by magic, the hearing will finish at the correct time with each party having a proper opportunity to make their case.

Of course, it does not work that way. It is extremely important for counsel to agree a timetable for the hearing, to tell the court what it is, and then stick to it. The intensity of the hearing to which I have already referred sometimes means that counsel will lose all track of time and the hearing is at risk of going over time. That is potentially disastrous because other commitments mean that it is usually impossible for the court to sit late or go into another day. So the agreement of a timetable in advance of the hearing is a critical necessity.

What element of advocacy strikes you as more important in the Court of Appeal than it was at first instance?

Funnily enough, it is the reply. The reply is an undervalued weapon which in the Court of Appeal can have particular impact. Almost inevitably, the shorter the reply, the better. When at 4.10pm the appellant's counsel stands up and says 'I have four points and I shall be 10 minutes', the court inevitably pays much more attention to what is then said than to a long, rambling repetition of the appellant's earlier submissions. I have seen a number of appeals turn on an effective reply.

What is the standard of advocacy like in the Court of Appeal?

Generally, it is as high as you would expect. However, it has been interesting to see that, often, the best advocates are well-prepared and enthusiastic juniors who so obviously care about the case and the outcome. In the last few weeks I can think of a number of hearings where experienced leaders have been outshone by such juniors.

Who is the best advocate you have seen in your three years in the Court of Appeal?

That is obviously an unfair question and not one that a prudent judge would answer. Well, twist my arm. In commercial appeals, leading counsel from the major sets are so uniformly good that it would be quite wrong to single out any particular individuals. But in another field of law, one of the very best advocates I have seen in the Court of Appeal is Michael Mylonas QC, a member of the Inn. In stressful, difficult cases, such as those involving sick children and whether or not they should continue to be treated, he is remarkably calm and clear, firm and fair. And he will doubtless be properly embarrassed to be singled out in this way. ■