The Usefulness of Cross-examination in the Decison-making Process

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Recently I was in Warwick where I had been asked to lead a series of seminars under the title (for which I have nobody to blame but myself) of "What Appeals to the Inspector". This event, if the word "Warwick" hasn't already led you to the conclusion, was part of the Town and Country Planning Association Summer School so I was then (if not now) speaking to an audience of eager and inspired (not I hasten to say by what I had to say) town planners and assorted types mainly pretending to be town planners, at least for the purpose of the event.

I began then, as I do today, by reminding them of the two main duties of a Planning Inspector—to prepare for and control an inquiry, hearing or site visit. I gave this the sub-title ("justice has to be done and be seen to be done") and, secondly, to gather sufficient information to be in a position to reach and communicate a reasoned decision.

My first warning to my audience in Warwick was to be as economical as is possible with the information you load into the appeal process.

At Warwick my call for relevance, structure, conciseness, timeliness and brevity covered all the processes of the appeal system—inquiries, hearings and written representation appeals—but today I am applying their virtues to only one aspect of the appeals process, namely to cross-examination in inquiry cases the first question I posed for myself under this topic is—"why have cross-examination at all?"

I was drawn to two inescapable experiences—the first involves my own training as an Inspector in the early 1980s and the second, shortly afterwards, involves Richard Phillips (not then Queen's Counsel). Cross-examination I had been told upon my entry to the Inspectorate involves testing the evidence. For years afterwards I and countless other Inspectors had instructed parties that "the best evidence is that which has been available for cross-examination". The consequences of doing other was brought home by Mr Phillips, I think at the third inquiry I had held. It was an amusement arcade appeal (this time) in Kendall and Richard and his witness Roger Echells had almost completed delivering a case extolling the noble art of slot machines—footfall, housewives, coffee breaks, self closing doors and no boys under 18—a case I was to hear several times over the years ahead, when the Council and third parties wanted to put in written representations by a number of local people. Naturally Richard Phillips objected to me being given them unless he too had copies and (for some reason which I never did get to the bottom of) the Council refused this. The Council submitted that the reason for their objecting to Mr Phillips having copies would be clear once I had them. Clearly an innovative procedural approach was called for and so, with all the authority I could muster on my third inquiry, I announced "I propose that the way forward here is for the Council to give me their representations overnight, I will consider their contents and then give a view first thing tomorrow morning as to whether they should be put in as Inquiry documents." Council's advocate nodded agreement, a row of local people saw the Council's advocate's contentment and nodded. Mr Phillips was on his feet, he had some difficulties with the proposition which to me had seemed so eminently sensible. "Once you have read these letters Sir," he began "you will have received evidence which, whatever your ruling tomorrow morning, I put it to you, you will not be able, with the best will in the world, be able to expunge from your mind. However more important even than that, is that this will be evidence which I will not be able to test by

cross-examination, or rebut by evidence. I will not be able to comment on what you have read or, perhaps more importantly, Sir, what you think you have read." I looked again at the advocate for the Council—again he nodded and, once again, the third parties nodded—indeed one even having the audacity to add "good point".

So I had learned my lesson that evidence should be available for testing and in the telling of that anecdote I hope I have informed you as to where I stand on cross-examination as the principal method of so testing the evidence. For the avoidance of doubt (and the comfort of many), I am one who believes in the art (for that is what it is if done properly) of cross-examination. Having dealt then with the concept, I now need to move on to discuss with you some of the aspects of the practice. I shall do so using the bold headings below. I do this in the firm belief that, whether your experience of cross-examination at inquiries is as the advocate or as a witness you will see the benefits of how your behaviour and approach are likely to help your case, and, from my point of view, equally importantly the inquiry process. I am not, for one moment, going to even try to deal with the psychology of what unfolds before the Inspector but human nature being what it is you will not want to offend. I am, therefore, suggesting (indeed I am seeking to persuade you) that there is, in terms of providing the best focus of your client's case, a vital link between providing Inspectors with clear, unambiguous material in a structured and helpful way, and the way the Inspector can be expected to place that material either side of the balancing scales.

The technique of casting doubt on the authority of a witness

From time to time the person put up as the witness is, clearly, the wrong person. She or he may know little about the case, or have scant professional or other experience which is relevant to the case. The Inspector (who may well remember being in a similar position himself or herself when a Junior Planning Assistant at Blogshire Rural District Council) is, I suggest, likely to be sympathetic to the witness. Ringing in his ears will be the instructions of those that trained him "protect the witness from hostile cross examination". The skill therefore is to lay bare the witness's shortcomings whilst still allowing the witness to keep his self respect and without casting yourself (however temporary or undeserved) as "that horrid person who marmalised that poor chap".

Clarifying the Development Plan and its relevant policies

I spoke before I began these points of the function of the inquiry to include gathering sufficient information to be in a position to reach and communicate a reasoned decision. Here then is *the* most important gathering ground. The Inspector is required to determine the appeal in accordance with Development Plan (unless . . .) (the section 54A point) and it would be folly for you to miss the opportunity to clear up any doubt as to the status and relevance of plan policies, set them in the context of all other plan policies and of Government policy. You and I know that section 54A only applies to the approved or adopted statutory Development Plan so you must pick these out for the Inspector setting for him the hierarchy which should guide the decision-making process.

The sequence of questions: the "issue" related base

Let me here sidestep from my main theme—that of cross-examination—and share with you a basic assumption about all decision letters—THAT THERE *IS* A STRUCTURE TO THEM. Early on in the letter the Inspector will set out what are considered to be the main issues. These are usually broad topics of planning and other material considerations against which the proposal will be tested, *e.g.* the effect on the street scene, the effect on road safety and so forth. If this, then, is the end result which the

Inspector is working to, you will see the obvious benefits to him (and your case) if you structure your cross-examination to group your questions issue (or topic), by issue. You may, with this in mind, find it useful if Inspectors announce at the outset what they see the issues to be from their reading of the case papers.

The length and style of cross-examination

Clearly there are matters which will depend on the individual judgment and style of the advocates (and his client?). All I will say is that cross-examination is a difficult area for the Inspector. He has to be alert to the questions and responses; there is a lot of notetaking and it is a time when the public gallery, if it is ever likely to erupt, will do so. We, therefore, like short cross-examination. Indeed it is in the advocate's interest to have short cross-examination because it makes it easier for the Inspector to focus on the best points in that case. We positively abhor long repetitive cross-examination and have been known to glaze over when an advocate and witness decide to chew the cud in an unimpassioned way, their voices being just audible over the gentle unforgiving soft whining of the air conditioning!

Style is very much "of the person", but can I just flag up a few key words which I trust will trigger ideas:

- use short questions following the topic-led approach:
- avoid questions that continuously sprout aerial roots leading to a matrix of semi-questions, thoughts, tangents, confusion. (Ask yourself how will this go into the Inspector's notebook?);
- don't *try* to confuse a weak witness? (There is little/no advantage in a confused concession?);
- ask yourself what points to pursue, in what depth and, most importantly, to what purpose;
- consider whether it is worth trying more than twice (three times?) to get an answer;
- think about when the Inspector's next "natural break" is due;
- consider whether the point might be better dealt with outside of the inquiry (usually an euphemism for "is this too complicated, in this way, for the Inspector?");
- consider whether the point would be best left for your own witness to deal with; and just occasionally, look to see how interested the Inspector is in the point.

Submission of documents during cross-examination/trailing your own case

Inspectors expect that, in general terms, an advocate will want to be able to put their case whilst cross-examining an opposing witness.

This may involve putting in documents for the witness to give comments on, or making points from your own case so that the witness can comment and the Inspector get a view of the areas of agreement and disagreement. Answering questions based on a document can obviate the need for lengthy cross-examination; the document can focus the witness's attention and (and this is important) it is a hard copy which is left behind with the Inspector.

However, there are occasions when the practice is taken to unnecessary extremes. It is not, I suggest, helpful to Inspectors for advocates to put their own witness's proofs to the opposing witness, paragraph by paragraph. Nor is it necessary for advocates to produce documents to achieve the same objective. It is generally sufficient for witnesses on each side to be given a broad opportunity to comment on the evidence of the other side, assuming, that is, that their own advocate has not already done this in evidence in chief.

Interventions by the Inspector

One of the aims of the Inspectorate and I know it is one shared by the Planning and Environmental Bar Association (PEBA), is that Inspectors (who should be well prepared) should feel sufficiently confident to be more proactive. Indeed the PEBA committee now send someone to our Inspector training courses to speak about the inquiry process and the message of each speaker to date has been that they want the Inspector to intervene more, to stamp his authority, to prevent repetitive questions and so forth.

On the whole the number of interventions is directly proportional to the number of inquiries the Inspector has taken, but let me say that if, and the PEBA experience seems to bear this out, you want us to be more proactive—please don't make it difficult for us to be so. So when an Inspector says what he thinks the issues are, or says he thinks he's got enough on a particular point, don't bridle and be difficult.

This raises another point—the need of coded messages between you and the Inspector. Code is often used so that each person appears (probably even to themselves) to retain respect and onlookers would (in theory) at least be completely unaware that anyone was being checked or revoked by anyone else.

So when the Inspector says "Mr Van Rental I think I have that point" he really means "For goodness sake chuck it in and move on" or when the Inspector has to add "Mr Van Rental I really don't feel it's necessary for you to pursue that point any further" he really means "That's it, sit down or I'm taking my bat home".

Equally when a barrister says to his witness "Yes, now don't go so fast. Let's see if we can deal with that to help the Inspector for his note" he really means "The Inspector looks bemused (obviously thick?) and if you don't spell it out he'll never get it." This word "help" can be synonymous for "tell", "persuade" or even "save".

The reluctant witness and the difficult advocate

Next I return to the *phenomenon of the reluctant witness*. You know the sort of person I have in mind—the one that doesn't include the words "yes" and "no" in her or his inquiry vocabulary. The advocate wearily says "Come, come Mr Jones—you have understood the question haven't you?" . . . [pause of 30 seconds before] "I am not sure that my understanding of the question is precisely the same as yours erh . . . there could well be two different constructions." Large intake of breath from advocate who looks at the ceiling, face reddens and then puts the question (half leaning precariously on the *Planning Encyclopedia* and half turned to the Inspector) . . . "Mr Jones the question is, are you a member of the Royal Institution of Chartered Surveyors."

Really just being aware of the phenomenon of the reluctant witness is almost enough. But it is an area where you should expect a rapid intervention from the Inspector who should press witnesses to answer clearly and straightforwardly the fair questions put.

The last of this mixed batch of points could be called "*Advocates* Behaving Badly" because I am here focusing on that biologically significant tendency of some advocates to delight in a verbal boxing match. Objection follows objection, outrage follows indignation, Inspectors either love it or hate it and most hate it. It takes time and deflects from the main issues. It provides the Inspector with a control problem he could well do without. It always reminds me of the nursery story about "crying wolf too often".

Control of the inquiry during cross-examination

I have already said that during cross-examination the Inspector needs to think (which one hopes is a full-time experience throughout the inquiry) but also write, consider his own questions or an adjournment, *and* control the proceedings. For the Inspector, the inquiry (especially the control of it) has an horizon beyond the exchange of questions and answers going on at the front of the room. And, not surprisingly, just as the intensity of the cross-examination heats up at the front, passions are likely to rise at the back amongst local residents and others.

Loath though we are to interrupt during cross-examination it is often necessary to do so whilst the Inspector asks people "at the back" not to call out during Miss Pendle's questions please. This is, I hope you will appreciate, necessary if the Inspector is to retain control (*per se*), and provide a proper atmosphere for advocates and witnesses to continue cross-examination. Once again here is an area where you should expect to have the Inspector's support. If it doesn't come readily you may have to do something about it ("would you like me to pause, Sir, as the lady at the back doesn't seem to have understood your earlier remarks about procedure at the Inquiry?"). But do, please, be ready to pause as the Inspector must deal with inquiry control in a timely and effective way.

By now you're probably beginning to wonder how much longer I intend to go on—how many more points I have. Inspectors wonder exactly the same about cross-examination. Harping back to the control point, such phrases as "I'm about to turn to a new point if that would be a convenient place to take the lunch adjournment" or "looking at the clock it may help you to know that I will be another 30 minutes in cross-examination". This not only signals that the end is getting near, but it also allows the Inspector to programme routine (or non-routine for that matter) adjournments. There is probably nothing worse (and this is why we hesitate to interrupt during cross-examination) for an advocate to be at the height of the development of a main argument or at the brink of a major concession, and for the Inspector to chime in "Mr Humphries I see it is now almost 5 o'clock!". The anticlimax of all anticlimaxes!

Notes taking during cross-examination

Barristers tell me that they like nothing more during cross-examination than to see the Inspector alert and interested and his pen moving purposefully across the pages of his notebook. Indeed, I am told that at the Terminal 5 inquiry where the Inspectors use laptop computers, the advocates listen attentively for the *click* of the Inspector's mouse. Whereas the Inspector has the witness's full proof and (should) have had time to read it and prepare himself for it beforehand, and whereas he may anticipate other aspects such as inquiry documents, legal submissions and (even!) closing during speeches in writing, he knows that concessions or strong points made in cross-examination may not be replayed. The other spur to notetaking (generally, but particularly so during cross-examination) is the fact that it may be necessary to return to it later. Advocates have the habit of jumping up and saying "This was dealt with by Mr Doolittle in my cross-examination at 3:15 on Monday, Sir—perhaps you would wish to refer back to your note of it." Only one thing can be worse and that is if he adds the word "now".

So to summarise, although cross-examination, in style and length, wants to be easy on the ear and concise, its presentation needs to allow for the other things (note taking, inquiry control and even phrasing questions) which the Inspector has to do whilst it is going on. This means that in being selective (anyway) about what you decide to examine on, you need to be equally selective in how you pause and/or re-emphasise important points, whilst moving on rapidly from trivial points or red herrings. Indeed you can comfort the Inspector by saying something like "Well, that's not going to be part of my case".

From notebook to decision letter

Let me use this heading to pull together some of the more important points I hope I have made:

(i) We know that the decision letter will be *structured*.
(ii) We know that somewhere near the start of the letter will be a definition of the Inspector's *main issues*.
(iii) I have spoken of the importance of closely analysing the relevance of the statutory development plan.
(iv) To those of you who read decision letters you will know that each issue is progressed by the Inspector setting out facts, applying her or his reasoning, which should lead to a conclusion on each issue.
(v) Finally comes the balancing of the conclusions on all issues; the meshing of all other material considerations, and the statement of the decision.

The Inspector during the inquiry should be left in no doubt as to what the main issues are (indeed he may well have set the ball rolling by arranging that himself) and *particularly during cross-examination* he should be helped to *establish facts*. By and large the facts he will use are the facts you give him. If a witness's evidence is left unchallenged it seems reasonable for the Inspector to reply on it. If it is challenged by the evidence of an opposing witness but itself is not tested in cross-examination then the Inspector may not have much to go on when deciding which evidence to prefer.

Thus the Inspector needs this from cross-examination. He needs to be reassured that the evidence is either accepted, considered unimportant, or is challenged. And if it's challenged he needs to be provided with enough material to be able to reach a reasoned decision as to who is right.

End with "six of the best"

Therefore I hope it has become clear from all that I have said that the best, the most useful cross-examination is:

1. well prepared. (It doesn't seek to challenge everything regardless of its importance);
2. not unnecessarily hostile—especially involving personal unpleasantness for the witness;
3. clear in style and, very importantly;
4. short and concise (attending to preparation and being selective in the points which generate cross-examination) will help enormously;
5. alive to what the Inspector needs—remembering the Inspector's wider duties to the inquiry and his ultimate duty to write a structured, well reasoned decision letter on a topic or issues basis; and
6. professional in content and sympathetic to the inquiry process at all times.

The two principal players in the inquiry "theatre", he who gives evidence and she who tests it, are also two of the key figures in making sure that the Inspector takes away with him the appropriate and most reliable facts upon which his decision will ultimately be based. And, for all those advocates and witnesses listening that, from the Inspector's point of view, is the real usefulness of cross-examination in the decision-making process.