The Benefit and Purpose of Cross-examination

By Lionel Read Q.C.

The context of the paper

There are moves afoot to curtail, and in some cases to eliminate, cross-examination at planning and development plan inquiries in furtherance of the "... aim ... to improve the efficiency and effectiveness of the planning system".[1] They currently resurface in the form of two Consultation Papers issued by the Department of the Environment in January 1997, dealing with Planning Appeals and Local and Unitary Development Plans.[2] In the first of these the Department express their view that "a proportion of appeals currently dealt with at inquiry could be handled just as adequately by hearing or written method ...".[3] Beneath this expression lies the Department's belief that the parties to a hearing have no right to cross-examine,[4] and the decision of the last Secretary of State, expressed in Circular 15/96,[5] that: "The choice of the hearings procedure will no longer require the agreement of both principal parties and will be determined by the Planning Inspectorate following consultation with them."

In the second Paper suggestions for changes to the current public inquiry process into objections to draft plans include the "EIP Type Hearing",[6] involving a "round table (EIP) discussion"[7] and excluding, necessarily, the concept of witnesses and cross-examination, though it appears from a recent statement by the Minister for London and Construction that the present Administration will not "pursue changes which would reduce the rights of people to be involved in the preparation of development plans."[8]

Apart from the Secretary of State's decision announced in Circular 15/96[9] to deprive the principal parties to a planning appeal of the choice of an inquiry or a hearing, the circular is expressly written against the background of the personal view of the last Secretary of State of the need to "curtail excessive or over-agressive cross-examination".[10] I have little doubt myself that the principal complaint by the parties to the 1,139 planning appeal inquiries conducted in 1994/5[11] did not centre on a claim of such excessiveness or over-agression in cross-examination. It is, moreover, a fact of forensic life that it is usually the cross-examination on behalf of the other party to the inquiry which provokes any such complaint. Yet the criticism is highlighted in the Circular, and I cannot avoid the fear that it stems from an instinctive dislike of the right to cross-examine as an obstacle to a speedy, cheaper and hence more "efficient" inquiry process. If it does, it is a matter for serious concern.

This paper is not, however, directed to a consideration of the arguments, both ways, arising from the Department's current proposals. That is for others, though for my part I do not believe that any step should be criticised which would lead to a speedier and cheaper process between the preparation and adoption of a development plan, or between a planning application and a decision on appeal or call-in,

[1] DoE News Release: "John Gummer Proposes Measure to Improve the Planning System": January 14, 1997.
[2] "Planning Appeals" and "Speeding up the Delivery of Local Plans and UDPs".
[3] para. 7.
[4] See Annex 2 to Circular 15/96.
[5] At para. 5.
[6] At para. 3.6.
[7] Report on the Review of Development Plans (Local Plans and UDPs) April–September 1996: December 1996: DoE, at para. 5.9.
[8] Nick Raynsford to the Royal Town Planning Institute in Edinburgh, June 11, 1997.
[9] Issued on September 20, 1996.
[10] Circular 15/96: Background.
[11] "Planning Appeals" by Sasha White: Appendix A.

provided that it does not deprive the parties to an objection to a draft plan proposal or to a planning appeal of a fair opportunity to put their arguments and evidence or affect the ability of the Inspector or the Secretary of State, as the case may be, to reach the right decision in the public interest. My concern is that elimination or curtailment of the current right and opportunity to cross-examine could have that effect.

That is not to say, however, and I do not say, that a right to cross-examine is necessary or beneficial on all development plan objections or planning appeals, or that an unprejudiced examination into that right and the operation of it should not be made. Nor should an Inspector hesitate to control irrelevant or unduly repetitious or lengthy cross-examination, whatever the seniority of the advocate. A judge does—often—and so should an Inspector. I only ask that any appraisal of cross-examinations should be infused with an understanding of their real purpose and benefit, and acknowledge the rights of the individual. In any informed and unprejudiced debate on the place of cross-examination in planning inquiries, whether arising from objections to a draft plan proposal or from the refusal or call-in of a planning application (and hereafter my use of the expression "planning inquiries" covers both types), it is imperative to understand the benefit and purpose of it. This paper is directed to that element of the debate.

It is essentially, and necessarily, a personal contribution governed by personal experience. It does not presume to teach fellow Members of the Bar, with their individualistic styles and idiosyncrasies, how to cross-examine. Nor is it designed to teach expert witnesses how to deal with cross-examination, though it may help some of the less experienced. Still less do I dare to instruct Inspectors on why and how they should listen to cross-examination, though this Paper may give some of them a better understanding of what an advocate is trying to do and the difficulties of doing it.

Although I have suggested how a good cross-examination should be conducted, I do not pretend that my cross-examinations match up to those ideals. It is like golf. Most of us know what is required of a good swing; but few of us have actually got one. Nor should an Inspector expect every, or perhaps any, cross-examination he hears to be a model. None of us is Hartley Shawcross, and advocates—including barristers—have varying degrees of experience and skill. But I hope that this paper aids an understanding of the true purpose and benefit of cross-examination and how ideally it should be conducted.

The right to cross-examine

It would be wrong to look at the benefit and purpose of cross-examination at planning inquiries without regard to the historical context in which the current right to such cross-examination is set. Much of that will be dealt with by Garry Hart, and so I say but a few words of direct relevance to this paper.

The common law right of cross-examination in civil and criminal cases in the courts of law is ancient, though, curiously, the right of the accused to give evidence in a criminal trial in defence of the charge against him was only granted in 1898.[12] Until then his counsel defended him by cross-examination of the prosecution witnesses and his closing speech, and by calling other witnesses for the defence.

The current right to cross-examine at planning inquiries grew up against this ancient common law background. Arguably it has its origin in the right to cross-examine given not later than early in the eighteenth century to counsel on the hearing of private Bills before the House of Commons.[13]

[12] Criminal Evidence Act 1898, s.1.
[13] Frederick Clifford, *A History of Private Bill Legislation* (Butterworths, 1887), Vol. 2, p. 860.

Legislation in the nineteenth century, from at least as early as 1846, initiated the concept of a public or local inquiry[14] which became in 1909 a public local inquiry.[15] But no statutory right was given to cross-examine at such inquiries, though in 1915, on a dispute arising under the 1909 Act, the House of Lords expressed the opinion that the "obligation of the Local Government Board to hold a public inquiry . . . is to enable the facts on either side to be ascertained by oral testimony subjected to the test of cross-examination . . ."[16]

The right to appear before and be heard by a person appointed by the Minister of an appeal against a refusal of an application for permission to develop land was first introduced in 1932,[17] and carried forward into the Town and Country Planning Act 1947.[18] But it was not, and still is not, a right to an inquiry, and no statutory right to call evidence or cross-examine at a planning inquiry, if ordered, existed until the Government of the day accepted and implemented the principal recommendations of the Franks Committee in 1957.[19] That Committee enunciated the principles which have since governed the conduct of inquiries, as well as of all other tribunal proceedings, namely "openness, fairness and impartiality",[20] principles which the Planning Inspectorate rightly uphold.[21] In that context the Committee were of the view that[22]:

> "While the chairman must retain control of the proceedings we do not think that this justifies a limitation upon the right of a party to examine his own witnesses directly or to cross-examine directly the witnesses of his opponent, and we recommend that any restriction on this right should be removed."

The Franks Committee recommended the establishment of two Councils on Tribunals, one for England and Wales and one for Scotland, and that the detailed procedure for each tribunal should be formulated by the Council on Tribunals.[23] Parliament in 1958 then established in fact one Council on Tribunals for England, Wales and Scotland,[24] and in 1959 empowered the Lord Chancellor after consultation with the Council on Tribunals to make rules for regulating the procedure to be followed in connection with statutory inquiries held by or on behalf of Ministers.[25] The first such rules regulating the procedure for inquiries into planning appeals and called-in applications were made in 1962,[26] and are currently to be found in the Town and Country Planning (Inquiries Procedure) Rules 1992. They established for the first time the statutory right of persons entitled to appear at inquiries into planning appeals to cross-examine.[27] Comparable rules have been made and are in force in relation to other forms of inquiry.

Whilst, however, by reason of section 9 of the Tribunals and Inquiries Act 1992 and sections 16(3) and 42(6) of the Town and Country Planning Act 1990, the Lord Chancellor may make procedural rules governing both an inquiry and a hearing into planning appeals and objections to draft UDP and Local

[14] *e.g.* Preliminary Inquiries Act 1846; Public Health Act 1848, s.8; Elementary Education Act 1870, s.9; Public Health Act 1875, s.176; Housing of the Working Classes Act 1890, s.8; Local Government Act 1894, s.9. Note also the Provisional Order procedure used extensively in the mid-nineteenth century.

[15] Housing, Town Planning, etc., Act 1909, s.61.

[16] *Local Government Board v. Arlidge* [1915] A.C. 120, *per* Lord Parmoor at 144.

[17] Town and Country Planning Act 1932, s.10(5). Regulations would provide for the hearing of objections to town planning schemes under Housing, Town Planning, etc., Act 1909, s.56 and Sched. 5, para. 2(c).

[18] ss.15(2), 16(2). Now TCPA 1990, s.79(2).

[19] Report of the Committee on Administrative Tribunals and Enquiries: HMSO Cmnd. 218: July 1957.

[20] At para. 23.

[21] Planning Inspectorate Executive Agency Framework Document (1992), section 2.6.

[22] At para. 93.

[23] See Summary of Main Recommendations; para. 409(1) and (8).

[24] Tribunals and Inquiries Act 1958.

[25] Town and Country Planning Act 1959, s.33, inserting s.7A into the Tribunals and Inquiries Act 1958.

[26] Town and Country Planning (Inquiries Procedure) Rules 1962, S.I. 1962 No. 1425.

[27] See now rule 14(3) of the Town and Country Planning (Inquiries Procedure) Rules 1992.

Plan proposals, he is not obliged to do so. He has made no rules governing UDP and Local Plan inquiries, or hearings into planning appeals. The former is the subject of the Guide to Local Plan Inquiries written by the Chief Planning Inspector[28] and a Code of Practice prepared by the Department applies to the latter.[29]

In the result there is no right in primary legislation to an inquiry, or to call evidence or cross-examine at a planning inquiry if one is ordered, nor any right in subordinate legislation to call evidence or cross-examine at hearings into planning appeals or at UDP and Local Plan inquiries or hearings. The ability of the Secretary of State under statute to deny the parties to a planning appeal or a draft plan proposal the right to an inquiry and to call evidence and cross-examine is accordingly apparent.

Any action by the Secretary of State in reliance on this ability will, and has already, come under the watchful eye of the Council on Tribunals who deprecated[30] his proposal in 1989[31] to repeal what became section 79(2) of the 1990 Act and replace it by a power in the Secretary of State to determine the procedure to be used for planning appeals. Then and thereafter the Council have stressed their view of the importance of the statutory right to be heard.[32] I understand that the Council expressed similar views this year in response to the January 1997 Consultation Papers. Although, I trust and believe, the views of the Council on Tribunals carry great weight with Ministers and Parliament, their powers are nevertheless only advisory, even when the Lord Chancellor comes to make procedural rules "after consultation with the Council".[33]

The object of an inquiry

Before I suggest the purpose of cross-examination before a Planning Inspector I stress a point which too often is not understood or accepted by some Planning Inspectors, or by some members of the Department of the Environment, but which I believe is fundamental to the planning system in this country.

The purpose of a planning inquiry is to give the parties to the planning dispute—applicant, local planning authority, affected local residents for example—the opportunity to put their case to the determining authority, whether he be the appointed Planning Inspector or ultimately the Secretary of State himself. Fundamental to that purpose is the belief that as a result the determining authority may be better informed to make the best decision in the wider public interest.

No less important, however, is the simple opportunity for those parties to put their case to the determining authority and to be heard. It reflects the system of justice in England. It is recognised by the rules which govern the procedure for planning inquiries. The parties to most planning inquiries are in more or less fierce dispute. The developer, whether he wants an attic extension or a regional shopping centre, is frustrated by the planning authority's refusal. Local residents may be deeply concerned at what they believe to be the loss of their amenity. Often the planning authority itself will be seriously concerned at a possible inroad into local policy or possible harm to local amenity. All will want a fair opportunity to put their case and to be fairly heard—in time honoured language to have a "fair crack of the whip", an expression sometimes attributed to Lord Denning, but the derivation of which the House of Lords confessed in 1976 they had been unable to trace,[34] and neither have I. It is important

[28] Annex B to PPG 12.
[29] Annex 2 to Circular 15/96 replacing Annex 2 to Circular 10/88.
[30] Council on Tribunals Annual Report 1989–90, paras 1.52 *et seq*.
[31] DoE Consultation Paper "Efficient Planning", July 28, 1989.
[32] *ibid*. paras 1.57 and 1.58; and Council on Tribunals Annual Report 1990–91 para. 1.60.
[33] Tribunals and Inquiries Act 1992, s.9(1).
[34] *Fairmount v. Secretary of State* [1976] 1 W.L.R. 1255, 1265/6.

that those parties should leave the inquiry reasonably happy and in the belief that they have had that crack. They will more readily accept an unfavourable decision if they have. By fair analogy a convicted criminal will usually go down to the cells for a long spell of prison with little or no grudge against the system if he thinks his case has been fully put and fairly heard.

I respectfully agree with the words of Sir Douglas Frank Q.C. sitting as a Deputy High Court Judge in *Nicholson v. Secretary of State for Energy* (1977) 76 L.G.R. 693 at 700, 701:

> "... persons and bodies opposed to a project now expect to take an active, intelligent and informed part in the decision-making process. If that expectation is denied, a sense of grievance results and public opinion is affronted ... a reasonable person viewing the matter objectively would consider that there was a risk that injustice or unfairness would result if a person considering himself injuriously affected by a proposal was denied cross-examination of a witness who had given evidence contrary to his case."

What the learned deputy judge and President of the Lands Tribunal there said in relation to objectors must be, and is, if anything more true for the applicant for planning permission and the local planning authority.

Hence, and this is my point, the object of a planning inquiry is not simply to assist the Inspector, and I shall return to that point later. It is also to give the parties the opportunity to put their case to him. It is for him to sit there and listen, though he may sometimes learn nothing new as a result. An advocate may know this, but his duty requires him nonetheless to put his client's case. As part of that case he must cross-examine as briefly as he may, albeit in the belief or knowledge that it will not advance his case, but in the hope that if well done it will not worsen it. The client must hear his advocate putting a significant point in dispute to a witness and challenging the witness's answer, or he will not leave the inquiry in the belief that he has had his fair crack of the whip. Planning Inspectors must realise this and listen patiently and fairly to the cross-examination. If the Government of the day should ever forget this fundamental point, and in the professed interests of efficiency should seek unduly to curtail the right to oral hearings and in particular to cross-examine, it will be a sad blow to the system of justice as we know it in England.

The purpose of cross-examination at an inquiry

A leading practitioners' textbook on criminal practice gives as the object of cross-examination[35]:

> "(a) to elicit from the witness evidence supporting the cross-examining party's version of the facts in issue;
> (b) to weaken or cast doubt upon the accuracy of the evidence given by the witness in chief; and
> (c) in appropriate circumstances, to impeach the witness's credibility."

I have no criticism of this as a broad statement of the general object of cross-examination, and as such it is equally applicable to civil cases and, more or less, to planning inquiries and other forms of tribunal proceedings. But it does not advance an understanding of the means by which this general object is to be achieved. More importantly, it does not identify—or at least it pre-supposes an understanding of—the reason for cross-examining. I raise this fundamental point at the outset because the question is constantly asked—sometimes by an Inspector, sometimes by an expert witness and not infrequently by a lay client—why is it necessary to cross-examine? The answer may sometimes be that it is not, and if it is not, it is best not to do so. But the reason for that answer in a particular case lies in the true purpose of and reason for cross-examination.

[35] *Blackstone's Criminal Practice* (1966), para. F7.1.

Advocacy is, in general, all about persuasion. It is the art of persuasion. The purpose of advocacy is in general to persuade the tribunal to accept the case which the advocate's client is placing before it. To that generality there are limited exceptions, the extent of which I spend no time in defining, for example where the advocate is appearing as an *amicus curiae* or as counsel for the Tribunal, or is prosecuting for the Crown in a criminal trial. Subject to those exceptions, in any cause and before any kind of tribunal where oral evidence is led the cross-examination of the witness is usually an essential tool in the advocate's armoury for persuasion of the tribunal to his client's cause. Hence the ultimate purpose of and reason for cross-examination is, simply, persuasion.

It is said by the Secretary of State in Circular 15/96[36] that "The parties should be aiming to assist the Inspector . . ." I venture to qualify that statement. A principal object of an inquiry may be to assist the Inspector in reaching the right decision in the public interest, though it is not the sole object, as I have said. But it is not the duty of a barrister appearing at a planning inquiry simply to assist the Inspector; nor therefore should it be his aim or that of any party to an inquiry. His aim is to assist the Inspector to understand his client's case, and his duty, "by all proper and lawful means",[37] is to persuade the Inspector to accept that case. But it should not be his aim, and still less is it his duty, to assist the Inspector to understand the case of a party which is contrary to his client's, let alone to assist the Inspector in accepting that case.

Historically, in England, the role of advocate has been taken by barristers—since about the fourteenth century. I spend no time on the sophisticated distinction between barristers and serjeants. On that timescale the emergence of solicitors as advocates, first before county and magistrates' courts and later still, with members of other professions, before statutory tribunals, is relatively recent. Over that period of some 600 years the Bar imposed on itself, but under the general jurisdiction and control of the judges, an increasingly severe set of rules goverrning its conduct before the courts. They are now enshrined in the Code of Conduct of the Bar of England and Wales. By reason of its definition of a "court", that Code applies to a barrister appearing at a planning inquiry as a "tribunal or any other person or body whether sitting in public or in private before whom a barrister may appear as an advocate".[38]

That Code is extensive but five principles of it[39] are of particular relevance and importance to an understanding of the role of a barrister appearing at a planning inquiry.

(i) He "must . . . be courteous and act promptly conscientiously diligently and with reasonable competence and take all reasonable and practicable steps to avoid unnecessary expense or waste of the Court's time . . ."
(ii) He must not engage in conduct which is "dishonest or otherwise discreditable to a barrister".
(iii) He has "an overriding duty to the Court to ensure in the public interest that the proper and efficient administration of justice is achieved", and "must assist the Court in the administration of justice", and must not "knowingly or recklessly mislead" the Court.
(iv) He "must ensure that the Court is informed of all relevant decisions and legislative provisions of which he is aware, whether the effect is favourable or unfavourable towards the contention for which he argues".
(v) He "must promote and protect fearlessly and by all proper and lawful means his lay client's best interests . . .".

[36] Annex 5 para. 28.
[37] Code of Conduct of the Bar of England and Wales, para. 203(a).
[38] *ibid.* para. 901.
[39] *ibid.* paras 601(a), 201(a), Annex H para. 5.10(c), 203(a) respectively.

I stress the last of these principles. It is of general application and fundamental. Comparable rules now govern the appearance of solicitors as advocates at planning inquiries.[40] There are no comparable procedural rules made by the Secretary of State or the Lord Chancellor which govern inquiries. In short the discipline of the Bar and solicitors at planning inquiries is self-imposed.

When, therefore, the advocate for a party to an inquiry is a barrister or solicitor it is these principles which, under the jurisdiction of the Inspector, govern the advocate's cross-examination and are directed towards securing, so far as it can be assured, the requisite expedition and efficiency of the inquiry. It is difficult, on the third of the rules I have cited, to carry over the concept of the "administration of justice" into a public inquiry, but I have no difficulty in translating that specific duty into a duty to assist in the administration of the inquiry. It is not, however, a duty simply to assist the Inspector.

The particular requirements of a planning inquiry

There is, of course, a clear distinction between the purpose of advocacy and the means by which that purpose can be achieved in a particular case and before a particular tribunal. If, as I have suggested and firmly believe, an advocate's ultimate purpose is to persuade, the means by which he seeks to persuade a particular tribunal in a particular case will depend on the nature of that tribunal and of that case. The distinction, moreover, goes not only to style but also to content. Any one who has observed a good advocate arguing a tax case before the House of Lords and an equally good advocate cross-examining at the Old Bailey will appreciate the distinction. There are some supreme advocates who have the skill and experience to do both well, but they are rare.

The reasons for this distinction are obvious, but too often ignored or not appreciated. First and foremost, what is needed to persuade depends on the personality of the tribunal. Twelve ordinary men and women on a jury in Southwark have little in common with five first class law scholars in the House of Lords. What may persuade the former will usually not persuade the latter. A similar distinction will arise from the presence or absence of specialist knowledge by the tribunal in the subject-matter of the cause before it. One High Court judge may, for example, have a good knowledge of planning law; another may have none. To address the former as if he had no such knowledge, and the latter as if he had, would be a tactical error. It would certainly not help to persuade. Closer to the issues with which this paper is concerned, the advocate must understand that the Planning Inspector is an expert in planning matters, and will usually have a good or even specialist knowledge in a particular field with which the inquiry is concerned—retail impact, acoustics, air quality, highway engineering for example. It will irritate him—it will not persuade him—if, for example, he has frequently quoted to him long passages from PPG 1 or PPG 6, or is addressed as if he had never before heard of a retail impact study.

I dwell upon these elementary points because cross-examination is part of advocacy, a very important part, and what is true of the purpose of advocacy as a whole is true for cross-examination in particular. The advocate at a planning inquiry must remember at all times that his duty is to persuade the Planning Inspector, and that his opportunities to cross-examine should be used to advance his cause. All planning inspectors are open to persuasion; they are human beings. Their duty in law to act fairly in determining appeals, or in reporting to the Secretary of State, requires them to be persuadable; they must approach the evidence and submissions put to them with an open, not with a closed and pre-determined, mind. A good cross-examination may persuade him towards acceptance of the case which the advocate is putting before him. Of course it may not, if the merits are against the advocate's case. Being a human

[40] The Law Society's Code for Advocacy in Annex 21A to the *Guide to the Professional Conduct of Solicitors* (7th ed. 1996), especially at paras 1.2, 2.1, 2.2, 2.3.

being, and burdened as we all are, more or less, with human frailties, an Inspector may also be persuaded, albeit unconsciously, against an advocate's cause by a bad cross-examination. For this reason, amongst others, there is always a strong argument against a cross-examination which is repetitious, discourteous or too long, or takes manifestly bad or irrelevant points—to give but some examples of a bad cross-examination.

There is, in my judgment, nothing more difficult in advocacy than cross-examination. Speeches are difficult, but it is a unilateral exercise and generally no one interrupts. In planning inquiries the opening speech should be very short and can be prepared, and in larger inquiries the closing speech can be put into writing. The skill undoubtedly needed in civil and criminal courts to conduct an examination-in-chief now rarely arises in a planning inquiry. A quite separate skill is needed for guidance of the preparation of written proofs—the enormity of which task in the larger inquiries, in terms of skill, cost and time, I doubt is sufficiently appreciated within the Planning Inspectorate. But nothing is more daunting for an advocate at a planning inquiry, however experienced and able he is, than rising to his feet to face an expert witness. He may be tempted to emulate the apocryphal (and rarely briefed) advocate who confined his cross-examination, and hence his single question, to "Nothing that I ask will cause you to change your mind, will it?". But a question like this will not send his client happily away from the inquiry. Nor will it assist the Inspector who was expecting some probe of the witness's evidence to help him judge the extent to which he should rely on it.

The principles of cross-examination

I suggest seven leading principles which should govern any cross-examination at a planning inquiry and then elaborate upon them:

(i) To probe the witness's evidence-in-chief.
(ii) To ensure that the Inspector understands the case for the advocate's client.
(iii) To understand, so far as possible, the subject-matter on which the cross-examination is to take place.
(iv) To prepare the cross-examination thoroughly.
(v) To give every question an intended purpose.
(vi) To be and remain courteous.
(vii) To be as short as possible.

Probing

Most of the evidence given at a planning inquiry is, more or less, opinion evidence. For brevity I call a witness who gives such evidence an expert witness, whether he is a planning officer giving evidence on breaches of development plan policy or adverse effect on the environment, or a witness with expertise in a specialist field, for example an engineer or chemist.

The principal purpose of a cross-examination of an expert witness lies in this first point—the probing of his evidence. None of us believes that the witness will hold up his hands and change his opinion. But he must be probed on his opinion, the reasoning he gives to support it and the factual basis underlying it. Rarely will an opinion of itself be convincing. It is the reasoning given for that opinion and the factual basis for it which should persuade, or if shown to be faulty or flawed could fail to persuade. The advocate's task is to bring out in cross-examination any difference in reasoning between the witness and his own expert, any claimed omission or flaw in the witness's reasoning, or any claimed error in the factual basis for the witness's opinion. Not all expert witnesses are equally expert. Nor will all expert witnesses have prepared their evidence with the same thoroughness. Hence a fortunate cross-examiner

will sometimes find through cross-examination that the witness's opinion evidence is flawed for one or other of these reasons. The task of the cross-examiner is to bring out this flaw. As often as not, however, it will be his own expert whose evidence is flawed on a particular point. When this becomes apparent the cross-examiner, in the interests of his client's case, should pass over that point or take it as lightly as he can consistently with his duty to put his client's case. Only experience and inherent ability teaches the cross-examiner how to deal with this too frequent problem. It will then be for the opposing advocate in re-examination, or the Inspector at the conclusion of the evidence, if he wants, to pick up this point and carry it through. This is part of the interplay of the adversarial system.

In the adversarial system of planning inquiries, which we have, where the witness knows that he will or may be subject to probing cross-examination, his evidence should be the more carefully prepared because of that knowledge, and in my experience it usually is. The witness will usually, and he certainly should, be careful to assert only that which he is satisfied he can sustain under cross-examination, and that the factual basis for his opinions is comprehensive, thorough and reliable, so that it can withstand challenge. This is particularly true where the witness knows that probing cross-examination will be conducted on the basis of work done by an experienced expert of repute retained by an opposing party. Hence, somewhat paradoxically perhaps, a good deal of the benefit to the Inspector of cross-examination is achieved through anticipation of it. The quality of the evidence before him is measurably better before it is in fact cross-examined.

Having twice referred to the adversarial system, of which the right to cross-examine is an inherent part, I turn aside for a few comments on it. I believe in it, passionately, as the best means of enabling the decision-maker to reach the right decision in all but the most exceptional cases. To judge the case for those who say so much so often about the advantages of an inquisitorial system, one should know exactly what is meant by an adversarial system. I happily adopt a definition recently given[41]: "In an adversarial system of litigation, the courts determine the issues on the evidence which the parties choose to put before them."

Conversely where the inquiry is inquisitorial the tribunal itself looks for the evidence. In England most truly inquisitorial inquiries—into such matters as disasters—have an adversarial flavour about them. Parties are allowed to appear, give evidence and sometimes to cross-examine. But this is at the discretion of the tribunal. It follows that, without a total change in the planning system, planning inquiries must be adversarial in nature. They are intended to afford the parties the opportunity to present their argument and evidence, and the Inspector is not left to find it for himself. The expertise which the Inspector brings to bear on that material and the opportunity he has to ask questions of the parties and their witnesses, does not alter the fundamental adversarial nature of the planning inquiry—no more than does the comparable expertise of an arbitrator and his opportunity to ask questions turn the arbitration into an inquisition.

Much evidence at planning inquiries, and in smaller inquiries most evidence, relates to claimed non-compliance with development plan or PPG policies, or to the effect of a proposed development on the environment, which does not depend on technical analysis—visual effect, erosion of the green belt, detriment to a conservation area or the street scene and the like. Such evidence needs to be probed by cross-examination to test its correctness and weight. But the cross-examiner should refrain from a lengthy debate on what policy means and on matters of subjective judgment. His own witness will have made the necessary points against the opposing party and much of his argument is better suited to submissions. Cross-examination is best confined to establishment of the areas of, and the reasons for, difference of opinion, unless some flaw in the witness's reasoning is apparent and can be demonstrated

[41] "Aspects of the Scott Inquiry's Procedure" at para. 19: Christopher Muttukamaru at Jesus College, Oxford, June 4, 1995.

through cross-examination; for example, reliance on an irrelevant policy, failure to take account of a relevant policy or of a relevant decision on policy, or a clear misunderstanding of policy.

Understanding of the client's case

In a case of any complexity it is a primary responsibility of the advocate to ensure that the Inspector understands his client's case. This is a major purpose of cross-examination. The theology of the Planning Inspectorate is that before the inquiry starts the Inspector will have read all the papers which have been sent to him. In my experience that is not always the case, and an advocate would be ill advised to assume that the Inspector has done so. More importantly, however, is the Inspector's understanding of the case. Where the issues are complex and varied, it is foolhardy to assume that the Inspector has fully understood all that he is to be taken as having read. Part of the purpose of cross-examination is to ensure that he does understand it. The extent to which cross-examination requires for that purpose an extensive, let alone a second, trawl through tables and documents is one of degree and hence for judgment in each case. That which may be necessary in the opening days of a long inquiry may become superfluous in succeeding weeks. But cross-examination, and in particular successive cross-examinations of different witnesses on different subjects throughout a longish inquiry, should leave the Inspector in no doubt as to the case which the advocate is putting. The closing speech should be built on a foundation laid in cross-examination. Good cross-examination will achieve that purpose. Bad cross-examination will cause the Inspector to say to himself, and in more extreme cases openly to the inquiry, that he has heard the point put time without number and does not need again to be reminded of it.

There is a view that cross-examination should identify the issues between the parties arising from the evidence of the witness. I subscribe to that view—in part and with a qualification. It may be helpful as a lead-in to a cross-examination on the points which are in issue. But it should not be unduly lengthy, and the cross-examiner should not be drawn into a protracted exchange of question and answer on what is or is not in issue which loses sight of the real purpose of the cross-examination.

Knowledge of the expert subject

Before cross-examining any witness, and particularly an expert one, the advocate must do his best to understand the limited points which he ventures to put to the witness. Nothing more courts disaster than to plunge into a field in which the advocate is wholly ignorant. Do not, for example, cross-examine a planning witness about planning policy unless you know and understand, not only the policies to which he refers in his proof and exactly where they are to be found, but also any other policies to which that witness might refer in his answers. Do not cross-examine an acoustic witness about road traffic noise unless you understand, at least broadly, the index to which he is referring and have read and understood the authoritative sources. Never launch into cross-examination on a point without having discussed it thoroughly with your own witness and understood exactly from him what you are trying to achieve. The advocate's witness should instruct and advise. The advocate is but the means, with his forensic skill and experience, of giving effect to that instruction and advice through cross-examination.

It follows that no cross-examination is any good unless it has been thoroughly prepared after long sessions of instructions and advice from the advocate's own witnesses. This means, as expert witnesses know but I wonder how many others realise, conference sessions long into the night and hours of preparation by the advocate. In a long inquiry this is physically and mentally demanding. Leaving written proofs unread, save for a brief summary, may shorten inquiries, but it puts a heavy burden on

the advocate to carry out one cross-examination after another with little break between. To cross-examine a biologist in the morning, a noise witness in the afternoon, and a highway engineer next day—and to try and do it all effectively—is hard work in any language.

Some expert witnesses naturally have difficulty in understanding how a lawyer advocate can play a meaningful role in the deployment of expert evidence. He has little or no knowledge in a subject in which the expert has spent many years training and many more years practising. I have no doubt that a good advocate is a humble advocate. He must recognise his own severe limitations and respect the expertise of the witness. He needs in particular to avoid the pretence of expertise. A good cross-examiner of expert witnesses will have sought to widen his knowledge in the subject of the witness sufficiently to support an intelligent cross-examination, limited in scope to what he believes he understands. This, necessarily, puts a premium on experienced advocates. If, in answers to cross-examination, the witness goes into areas which lie outside the advocate's limited knowledge, the advocate should, in my view, move on to another point as quickly and deftly as he may. It is, for example, simply stupid to engage in a lengthy exchange with a professor of chemistry at Cambridge University. The advocate should limit his points to the bare minimum.

Preparation

Above all cross-examination should be thoroughly prepared and fully noted. The advocate should have prepared a logical sequence of subjects and points which is or becomes reasonably apparent to the Inspector. He may not keep to it. The witness's answers may not allow him to keep to it. But he should be better able to return to it after diversions along the way. Hence good preparation enables the advocate to be flexible in his cross-examination, and to change his prepared line of questions according to the answers he gets. Unlike a closing speech, cross-examination is a moving ball game with more than one player.

There is often advantage, and particularly to the Inspector, in the advocate flagging up the particular subject-matter to which a series of questions is intended to be directed, by saying for example that he will start with the sequential approach and then later that he is turning to impact on the town centre.

The advocate should know, and have noted, what point he wants to make, and the sequence of those points. He should note exactly what passages in what documents he will, or may, need to refer to; he should know exactly where those documents are; and they should be easily accessible and identifiable. In a case of any length or complexity there is advantage in the advocate having himself prepared, and kept up to date, a list of documents if one is not produced for the inquiry, and sometimes a chronology of principal events.

The importance of the question

Every question should have a purpose which plays its part in the intended strategy of the cross-examination as a whole. A question may be no more than an introduction to later essential questions—the simplest example may be "Will you please turn to page 9 paragraph 21 of your proof?" But it nonetheless has a purpose. Questions without any particular purpose will dilute the effectiveness of the cross-examination and could lose the interest of the Inspector. That does not mean that the purpose of every question should be immediately apparent: the cross-examiner may be building up to a point which is not yet obvious. The Inspector needs, therefore, to be patient when the purpose of a line of questions is not immediately apparent, but the cross-examiner should not try that patience too much. He should reach his intended point as quickly as possible.

The question should be short and easily understood. It should not be so phrased that in truth it contains

more than one question or one point, otherwise the witness could prevaricate or give an answer which misses the intended point of the question and the Inspector may be unsure what he should conclude from the exchange. Often in planning inquiries it is necessary or helpful to read one or more passages from a proof or a document before coming to the question. In such a case the cross-examiner should make it clear to the witness when he is asking a question. It follows that the witness should know that he is being asked a question and what that question is. The cross-examiner's purpose may simply be to draw the attention of the Inspector to the passage read, but since he is cross-examining and not making a submission, the cross-examiner needs to hang his purpose on a credible question, and he should not do it too often.

It is often said, and in general rightly, that an advocate should never put a question in cross-examination unless he believes he knows the answer. By adhering to this general rule the advocate is better able to control the course of his cross-examination. That does not, however, mean that a question should not be put unless the cross-examiner expects an answer favourable to his client's case. If it were so, cross-examinations would be very short. The expected answer, albeit unfavourable, may take the advocate down a line of cross-examination which methodically probes the witness's evidence or brings out the case for the advocate's client. But the advocate should be astute to minimise the witness's opportunity to repeat his unfavourable evidence.

I have long been of the view that it is often not the answer that matters but the question. The question puts the thought in the mind of the tribunal, and an unfavourable answer may often not much matter. I illustrate this general point by two simple examples. Say the advocate wishes to persuade the tribunal that the witness has not read a passage in a particular document. The question could be: "You never read that passage, did you, before writing your proof?". Ideally for the cross-examiner the witness might answer "No". But if, more realistically, he says that he did, the point is nevertheless put into the mind of the Inspector that he might not have done and the Inspector should know that he must consider, if it be important, whether the witness had read that passage. He knows what the case for the advocate is. A more extreme example, to be used sparingly and with caution, is to put straight to the witness that his conclusion cannot be supported by his reasoning. The witness will disagree, but the Inspector will know the advocate's point and look at the witness's evidence in the light of it.

Courtesy

As in social life, so also at planning inquiries, courtesy oils the machinery. It is an essential part of good advocacy and of good cross-examination in particular. It puts the witness and the Inspector at their ease; it helps the witness to concentrate on his evidence. A rigorous, probing cross-examination does not need to be, and should not be, conducted as if the witness were on trial for the most heinous offences, and from the advocate's point of view it is far more effective and persuasive if conducted courteously and quietly. Some advocates are born courteous. Others have to acquire courtesy, and to keep it at the height of the battle. This can be a hard counsel of perfection, but if advocates at planning inquiries are to continue to enjoy the right to cross-examine given to them on behalf of their clients, they must be at pains not to abuse it.

Brevity

That brings me lastly to the importance of brevity. A good cross-examination is a brief cross-examination. Brevity is, of course, relative. In a one-day inquiry, it may be no more than 30 minutes. In a four-week inquiry it may be half a day. Rarely, in my view, can more than a day be justified. If the Inspector has not been persuaded to the advocate's point by that time, he will rarely be

persuaded by anything longer. On the contrary, an unduly long and hence prolix cross-examination may influence him against the advocate's cause. The good points may be lost in the morass of question and answer; the Inspector's patience may become exhausted and his interest lost.

There is, in my view, a number of cardinal rules which an advocate should follow to achieve necessary brevity in cross-examination:

(i) He does not need to, and should not, "put" the whole of his case to witnesses for the other side, nor challenge those witnesses on every point which is adverse to his case. There is no purpose in such an exhaustive cross-examination. Nor, therefore, should he go into every point on which he thinks he might make some headway. He should choose his best points, and eschew the peripheral.

(ii) The questions should be as short as possible, and so phrased that neither the witness nor the Inspector should have difficulty in understanding it.

(iii) It is often helpful to an Inspector and aids expedition to relate the question to a particular passage in the witness's proof or some other document.

(iv) The cross-examiner should rarely repeat his question more than once, and never more than twice. If the witness will not answer the question, and the Inspector does not intervene, the cross-examiner should say to the witness that he will ask the question again and that if he does not then get an answer he will pass on to another point. If the cross-examiner believes that the witness's failure to answer the question has made a point in the cross-examiner's favour, he will rarely improve on it by repetition of the question in the hope that he will get an answer.

If the question is of sufficient importance that it should be answered, it is, in my view, for the Inspector to intervene to require an answer. If he does not intervene, the cross-examiner could draw one of at least four possible conclusions—the witness really has answered the question and the cross-examiner is wrong in believing that he has not; or the point is not of sufficient importance in the Inspector's view to require intervention; or the Inspector has drawn a sufficiently adverse view of the witness from his failure to answer the question that he does not believe it necessary to require an answer; or the Inspector simply cannot be bothered to intervene. Whichever may be the right conclusion, it is better for the cross-examiner to move on.

(v) If he is the second or subsequent cross-examiner, he should not repeat the cross-examination of his predecessor unless he is satisfied that his predecessor has failed adequately to bring home the point. In my experience one of the biggest causes of wasted time at long inquiries is cross-examination which repeats material already dealt with adequately by earlier cross-examination. Where later cross-examinations are conducted by lay persons or by advocates who are not barristers, or where the cross-examiner has not been present to hear earlier cross-examinations, Inspectors should and will normally be indulgent, but only for a while. Otherwise they should not.

(vi) Where opposing expert witnesses produce different figures or, worse, use different methodologies, cross-examination may often be shorter, simpler and more effective if it can be conducted on the basis of a table which brings together and tries to reconcile the differing figures and methodologies. Use your expert to produce such a table.

(vii) Do not waste time cross-examining on a point which cannot be established by cross-examination, or which could be better or more easily established by other means. Best examples of this point are:

(a) Do not cross-examine on matters of subjective judgment—for example whether an object viewed from a particular location would be visually detrimental. Bandying disagreement in question and answer gets the advocate nowhere. It is enough to establish, if it be not obvious, that the point is one of subjective judgment, or that there is an issue of fact which bears upon the judgment.
(b) Spend little time on whether something does or does not exist or can or could not be seen from a particular view point; the site visit will establish the point one way or the other. It is enough to confirm in cross-examination the significance of the point and that it could be verified on the site visit.
(c) Do not spend much time debating what policy means. Once you have shortly put your contention in cross-examination, leave the detailed argument to your closing speech.
(d) Sometimes it is better first to give the opposing experts the opportunity to discuss a point of disagreement to see if they can reach agreement or at least establish where and why they disagree. Subsequent cross-examination, if still needed, should then be shorter, more effective and more comprehensible to the Inspector.

What makes a good witness?

From the advocate's point of view there are two main obstacles to an effective cross-examination—the witness and the merits. If the witness is good or the merits are on the witness's side—and worst still, both—cross-examination can easily lend weight to the witness's case, not to the advocate's. A good cross-examiner will recognise this and keep his questions to the absolute minimum necessary, having made it clear to his client why he is adopting such tactics. The perspective of the Inspector is different. A good cross-examination and a good witness are what he most needs to reach the right decision.

What makes a good witness? The answer to the question is nearly as long and abstract as the answer to what makes a good cross-examiner. I suggest from experience some cardinal rules:

(i) First, but not necessarily foremost, is the depth of his expertise. But, as we all know, a first rate expert is not necessarily a good witness, and very often an expert of less academic repute but with long experience in giving evidence will make a better witness.
(ii) The witness should stick to his own expertise and not stray into the expertise of others.
(iii) He should not regard cross-examination as some kind of contest with the advocate which he must win. Always be courteous even if, and indeed particularly if, the advocate regrettably is not.
(iv) He should express his opinions generally in moderate language and be sure that he can sustain them if challenged.
(v) He should be sure of his facts.
(vi) He answers the question put and does not use it simply as an opportunity to repeat his argument.
(vii) He keeps his answers short.
(viii) He should speak in language which the Inspector can understand. Never use jargon. Try and avoid unduly technical expressions, but where necessary explain them to the Inspector, who will often be a layman in the expert's subject.
(ix) Last, and above all, the truth. If, therefore, for example the advocate has made a good point, it is best for the witness's credibility, and ultimately for his client's case, that he should be seen to accept it gracefully.

Conclusion

I have said little explicitly, I know, about the benefit of cross-examination. But in truth the benefit is the reciprocal of the purpose. The very existence of the right to cross-examine is itself a major benefit to the person who has that right. The exercise of that right may also benefit him, and it should often benefit the Inspector in helping him to reach the right decision or recommendation, but it would be extravagant to suggest it always will.

In planning inquiries, as in all other forensic hearings, the range and variety of cross-examinations conducted every working day of the year is immense—from the skilled advocate to the layman, from the inexperienced to the mature advocate, from a few questions to a day or even more, from pure fact to an almost impenetrable science, from a disaster to a model. Judgment on the general benefit of cross-examination, to the Inspector as well to the party to the inquiry, should not be founded on the less commendable of these cross-examinations, nor conditioned by the longevity of the few major inquiries. And the benefit of cross-examination as an incident to the individual's right to be heard should never be forgotten. It is paramount.

If a good cross-examiner has a good witness, the lay clients of both should be satisfied that their cases have been fully and fairly put, and the Inspector should be assisted in arriving at the right answer. This is the ultimate benefit of cross-examination. It can be a fascinating spectacle, even for the advocate whose witness is being cross-examined. If there is a good cross-examination of a bad witness, it can be—I know—a very painful experience for the witness's advocate.

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