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Pre-trial cross-examination allowed to ensure progression of case if it is just and proportionate

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In the recent landmark decision in *CMC Holdings Limited & Anor v Forster & Ors*[1], the Royal Court of Jersey held that, in certain circumstances, cross-examination may be ordered at an interlocutory stage.

Introduction

'*Never, never, never, on cross-examination ask a witness a question you don't already know the answer to, was a tenet I absorbed with my baby-food. Do it, and you'll often get an answer you don't want, an answer that might wreck your case*'.[2]

As Scout Finch understood, cross-examination is an important process by which questions are asked of a witness called by the opposing side in litigation. It is often viewed as being integral to enabling the parties to assist the court, in Jersey and in other developed legal systems, to scrutinise evidence brought before it.

Cross-examination outside of trial

Cross-examination is usually understood to be a trial tool. While the Jersey court has wide discretion to order cross-examination at any stage of the proceedings[3], such cross-examination has historically been confined to trial or cases where a witness is to be cross-examined on his affidavit in support of a strike out application[4]. There is no precedent for cross-examination of a witness in the context of wider case management applications. The reason turns on the fact that, at the early, interlocutory stages of a matter, it is generally neither necessary nor considered to be a good use of the court's resources to permit cross-examination. However, the decision in *CMC Holdings Limited & Anor v Forster & Ors* has highlighted that the court's discretion remains broad and that, in appropriate cases, cross-examination may be ordered in relation to appropriate case management applications.

CMC Holdings Limited & Anor v Forster & Ors and the application for cross-examination

CMC Holdings Limited & Anor v Forster & Ors concerns on-going proceedings issued by Kenyan corporate plaintiffs in Jersey against the first defendant, a Kenyan-resident former director of the plaintiffs, and the second and third defendants, two Jersey-resident companies. The plaintiff companies allege that they were the unwitting victims of a fraud perpetrated by some of their own former directors, including the first defendant, over the course of four decades. The plaintiffs assert that the fraud perpetrated involved an

[1] [2018]JRC211.

[2] (To Kill A Mockingbird, Harper Lee, Grand Central Publishing (11 October 1988).

[3] Rule 6/20(4) of the Royal Court Rules 2004 (as amended) provides that: - *'...the Court may at any time order the production of a witness for cross-examination'.*

[4] See, for example, *Arya Holdings Limited v Minories Finance Limited* 1991/159, in which the Court held that it had, *'a wide discretion to order the deponent to attend for cross-examination and to refuse to act on the affidavit where the deponent cannot be cross-examined'.*

over-invoicing scheme, through which complicit vehicle manufacturers and agents agreed with the relevant directors (without the 'knowledge' of the plaintiffs) to (1) issue the plaintiffs with artificially-inflated invoices for a significant number of consignments of vehicles over many years; and (2) direct the surplus received from the plaintiffs on payment of the inflated invoices to offshore entities controlled by the relevant directors. The plaintiffs claim that the second and third defendants, who acted as service providers to the offshore entities, dishonestly and knowingly assisted the directors by setting up and administering the recipient offshore entities.

Following the ordering of general discovery in the proceedings, the plaintiffs issued an application seeking the Royal Court's permission to significantly limit the scope of the search of their hard copy documents. The limitation sought by the plaintiffs was that their search should not exceed a random 'dip-sample' of 10 per cent of documents contained in their storage warehouse in Kenya. At first instance, the Royal Court granted the plaintiffs' application. However, following an appeal by the second and third defendants, the Royal Court's order permitting the 10 per cent 'dip-sample' approach was overturned. The appellate court held that the plaintiffs' proposed approach was not an appropriate means of narrowing discovery because of the risks of missing relevant documents and, accordingly, that such a limitation would not, '*... suffice to meet the justice of this case as it is currently pleaded*.'[5]

Several months after the appeal judgment, the plaintiffs renewed their application for limited discovery on the basis of fresh affidavit evidence obtained from the first defendant (also, of course, a central witness in the proceedings). That evidence stated, amongst other things, that the first defendant did not consider there were any relevant documents to be found in the plaintiffs' warehouse. The plaintiffs relied on this evidence to assert that, in light of the first defendant's evidence, the 'dip-sample' approach remained appropriate, and that the Royal Court should, in effect, re-impose the overturned 'dip-sample' order (or a variation thereof).

The second and third defendants opposed the application. One of the grounds of that opposition concerned the reliability of the first defendant's evidence, and in particular their concerns regarding the circumstances in which the affidavit had been sworn, and the apparent inconsistencies and contradictions in that evidence. Accordingly, the second and third defendants applied for permission to cross-examine the first defendant. The plaintiffs opposed the application, arguing, amongst other things, that it was procedurally irregular to order cross-examination at an interlocutory stage and that delay and additional costs and inconvenience would be caused. The second and third defendants argued that the first defendant's evidence contained a number of inconsistencies and raised a number of questions directly relevant to the existence and location of documentation, all of which could only be adequately explored in cross-examination. Any delay caused by cross-examination would not be significant and was, in any event, outweighed by the importance of ensuring the Royal Court was put in a position to make a proper assessment of the evidence in support of the plaintiffs' renewed application for limited discovery.

Court's decision and reasons

The Royal Court granted the second and third defendants' application to cross-examine the first defendant with respect to a number of matters arising from the first defendant's evidence. The Royal Court held that, to deny the second and third defendants the opportunity of cross-examination in this context, '*...would not be just because the second and third defendants could not then challenge the affidavit of the first defendant at all*.'[6]

In making its order, the Royal Court made several findings of wider application:

- The question of whether or not the court should order cross-examination is now subject to the overriding objective. Therefore in '*case management type applications*', where grounds are advanced for cross-examination, the court must decide whether an order for cross-examination is just and proportionate.
- The decision as to whether cross-examination is just and proportionate is a, '...balancing exercise between on the one hand not shutting out the party seeking cross-examination unjustly and so not

[5] Paragraph 62, [2018]JRC078.

[6] Paragraph 59, [2018]JRC211.

depriving a party of the ability to advance its case on a procedural issue as against ensuring that the request for cross-examination is one that is proportionate'.[7]

- The scope of cross-examination in relation to a case management application would usually be narrowly confined by reference to the issues arising from the witness' evidence, or the application that evidence supports. Accordingly, cross-examination ordered in this context would be closely controlled by the court.
- Ordinarily cross-examination should be ordered in person. However, where cross-examination is to be conducted in respect of discrete areas of evidence, the proportionate and just approach may be to permit cross-examination by video-link.

On the particular facts of this case, the Royal Court was satisfied that a number of the inconsistencies and contradictions in the first defendant's evidence warranted exploration by the second and third defendants through cross-examination. Given the discrete nature of the cross-examination and the fact that the first defendant was physically located in Kenya, cross-examination was ordered to take place by way of video-link between Jersey and Kenya.

Broader implications

This landmark decision represents the first time, outside the context of a strike out application, that the Jersey courts have permitted cross-examination of a witness at an interlocutory stage.

The decision is an important illustration of the wide range of tools available to the Jersey courts, consistent with the overriding objective, to ensure that cases are administered justly and proportionately. The decision means that at any stage of court proceedings, even in the early case management stages, cross-examination of a witness will be considered if ordering it ensures progression of the case in a just and proportionate manner. It also means that the Jersey courts remain well positioned to ensure that the appropriate level of scrutiny is applied to witness evidence where there are, *prima facie*, concerns regarding the reliability of that evidence. The availability of video-link as a means of conducting the cross-examination is aimed at ensuring that cost and delay is minimised.

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[7] Paragraph 58, [2018] JRC211.