Civil Practice & Procedure

Effective use of depositions in English civil proceedings?

by Jonathan Goodliffe

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In civil proceedings in England the general expectation is that a party's witnesses, whether of fact or expert, will give their evidence at the trial, and not before. The position is largely the same in Scotland. Until that point the other party cannot test those witnesses by cross-examination.

POLARISATION OF LOYALTIES

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In the 1970s and 1980s a new procedure developed in the Official Referee's Court. The parties were required to exchange statements of their witnesses of fact in advance of the trial. This practice gradually spread to all civil litigation and is now set out in RSC O. 38, r. 2A. All too often these reports and statements are, however, carefully crafted by the lawyers on each side: they do not necessarily give any definite indication about what the witness will really say when he gets into the box and how well he will say it. On the one hand there is no property in a witness and therefore no reason why the solicitor for the defendant should not approach the plaintiff's witnesses (subject to principle 21.10 of the Law Society's *Guide to Professional Conduct*). On the other hand there will usually be a polarisation of loyalties, so that each party's witnesses will be reluctant to help the opposite party.

RULES OF THE SUPREME COURT

The Rules of the Supreme Court seem, on their literal wording, to allow witnesses to be deposed before trial or to be compelled to produce documents in advance of the trial. RSC O. 39, r. 1(1) provides:

'The Court may, in any cause or matter where it appears necessary for the purposes of justice, make an order ... for the examination on oath before a judge, an officer or examiner of the Court or some other person at any place, of any person.'

RSC O. 38, r. 13(1) provides:

'At any stage in a cause or matter the Court may order any person to attend any proceeding in the cause or matter and produce any document, to be specified or described in the order, the production of which appears to be necessary for the purpose of that proceeding.'

INTERPRETING THE RULES

RSC O. 39, r. 1(1) is similar to Order XXVII rule 4 of the *Rules of Court* 1870. In *Warner v Mosses* (1880) 16 ChD 100, Sir George Jessel MR, with whom James and Cotton LJJ concurred, remarked:

'I do not intend to cut down the generality of its terms but it is confined to cases in which it appears 'necessary for the purposes of justice'. Now it cannot be necessary for the purposes of justice to examine witnesses before the trial who can attend the trial, and accordingly this rule of the Order has been used ... where witnesses are going abroad, or who from age or illness or other infirmity are likely to be unable to attend the trial ...' (at p. 102).

This judgment still dictates the English approach to depositions. A similarly restrictive approach has been adopted towards interrogatories (see *Hall v Selvaco*, *The Times*, 27 March 1996). Witnesses may be examined (on commission if necessary) before trial for oral evidence of fact if they are overseas, or if they are aged or infirm, but not otherwise. An exception to this rule is where the proposed plaintiff is insolvent and applies under, for instance, s. 236 of the *Insolvency Act* 1986.

PRE-TRIAL EXAMINATION

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The Supreme Court Practice, until the 1993 edition, quoted *Straker v Reynolds* (1889) 22 QBD 262, as authority for the proposition that RSC O. 38, r. 13(1) does not enable an order to be made for the inspection of documents in the hands of non-parties. However, the rule was, in effect, sidestepped in *Khanna v Lovell White Durrant* [1995] 1 WLR 121, by allowing a party who had subpoenaed a witness artificially to advance the trial date, in order to get the witness to produce the documents. Since then the old interpretation of the rule has been discarded. In *Canada Trust v Stolzenberg* [1997] 1 WLR 1582, the Court of Appeal held that it allowed third parties to be required to give discovery in aid of a jurisdiction issue, although the documents sought must also be relevant to the substantive issues in the action. Presumably it would allow similar applications in aid of, for instance, *Mareva* injunctions.

Following a *Khanna* type application, the trial will be adjourned to the original date, by which time the parties would have digested the documents produced by the witness. Currently, however, this procedure is only used for the production of documents, not for the taking of oral factual or expert evidence.

HISTORICAL BACKGROUND

Counsel in *Warner v Mosses* (at p. 101) had submitted that under the old Chancery procedure an order for the deposition before trial of witnesses could have been obtained. Under that procedure 'discovery' had a meaning that would now be more readily recognised by North American lawyers, rather than by their colleagues in England. Sir William Holdsworth's *History of English Law* tells us that after close of pleadings in pre-Judicature Act Chancery litigation, the next step was:

'... to prepare interrogatories for the examination of witnesses. On these interrogatories the witnesses were examined in private, none of the parties or their agents being present. As the interrogatories were framed by counsel without knowing what witnesses would be forthcoming, or what answers they would give, it was necessary to frame questions to meet many possible contingencies. It is obvious that, in these circumstances, no effective cross-examination was possible, so that it was seldom resorted to ... The case ... could be delayed by motions to suppress depositions, or to issue another commission to take further evidence.' (Vol. 9, p. 341)

NORTH AMERICAN CONTRAST

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NORTH AMERICAN PROCEDURE

This cumbrous procedure was swept away by the English Courts following the Judicature Acts. By contrast, in North America, the procedure for pre-trial deposition of witnesses adapted to the modern world and continues into the late 20th Century. It gives each side the opportunity to test the other's factual and expert witnesses. At best it can allow one party's lawyer to gauge the strength of his opponent's case in a way not possible before trial in England. This is perhaps best illustrated in the book *A Civil Action* by Jonathan Harr, which gives a vivid description of how depositions were handled in an environmental claim in the 1980s.

At worst, according to the Cronk Task Force Report on the Canadian Systems of Civil Justice:

'The discovery process, and particularly oral examinations for discovery, lengthen the litigation process and add considerably to costs. In our consultations, litigation and business lawyers from across the country ranked the complexity and number of discoveries and scheduling problems in the discovery process as key factors contributing to procedural delay.' (*Report of the Task Force on Systems of Civil Justice,* Canadian Bar Association, 1996, p. 43)

Similar considerations have led to recent reforms of the procedure for taking depositions in US Federal proceedings. Rule 26 of the Federal Rules of Civil Procedure now requires that discovery should be 'relevant to the subject matter involved in the pending action'. Rule 30 requires a party to obtain the leave of the court or the stipulation of the other parties if he wants to depose more than 10 witnesses.

Significantly, however, neither in Canada nor in the USA is it proposed entirely to abolish the system of depositions. Nor will the English Courts generally restrain litigants from applying for US style discovery under s. 1782 of the US Civil Code in aid of English proceedings (*South Carolina Insurance Company v Assurantie Maatschappij* [1978] 1 AC 24; contrast *Bankers Trust v Dharmala* [1996] CLC 25). Clearly, if properly controlled, pre-trial depositions can serve a useful purpose.

THE REFORM OF ENGLISH CIVIL PROCEDURE

'Discovery' in English proceedings usually means discovery of documents although it sometimes also extends to interrogatories as well. Lord Woolf's Final Report (*Access to Justice*, 1996) proposes a narrowing of the basis on which discovery (or 'disclosure' as it will be called under the new regime) of documents may be sought.

Rule 34.2 of the proposed Civil Procedure Rules restates the requirements for the taking of pre-trial depositions as set out in Sir George Jessel MR's judgment in *Warner v Mosses*, although it is also provided that a witness may be examined before trial, if to do so would enable the trial to be held sooner than it would be held if he were not so examined.

One of Lord Woolf's central concerns is that the cost of litigation should be kept in proportion to the amount at stake and that time and effort should not be wasted on unnecessary interlocutory applications. In *Hall v Selvaco*, Sir Thomas Bingham MR articulated this view when he said that interrogatories should not be regarded as a source of ammunition to be routinely discharged as part of an interlocutory bombardment preceding the main battle.

Nevertheless, the result of interlocutory applications can often be to shorten litigation. If depositions are effectively used within the system of case management which Lord Woolf proposes, they need not give rise to the abuses which so often arise in North America.

There are some obvious areas where the examination of witnesses before trial may be an effective procedure which may help the parties and possibly facilitate settlement of the litigation.

THE RELUCTANT WITNESS

It might, for instance, provide a solution to the problem of the reluctant witness who refuses to be interviewed by either party, or to sign a statement. Where a party proposes to compel such a witness to testify at the trial by subpoena, the Court may require him, nevertheless, under RSC O. 38, r. 2A(5), to serve a statement of the evidence intended to be adduced. There are similar provisions in Lord Woolf's draft Civil Procedure Rules (r. 28.10).

INTERLOCUTORY AMMUNITION?

Sir Thomas Bingham MR ... said that interrogatories should not be regarded as a source of ammunition to be routinely discharged as part of an interlocutory bombardment preceding the main battle.

Often, however, it will be to a large degree a matter of guesswork what the witness will say. As things stand, and even under Lord Woolf's proposals, a crucial witness may thus be able to obstruct the process of civil justice by refusing to be interviewed or to sign a statement. Clearly it makes sense to provide for such a witness to be compelled, in appropriate cases, to give evidence in advance of the trial, so that the parties may have some idea as to what he is going to say when he is called as a witness at the trial itself. Such a procedure would perform a purpose similar to that of s. 236 of the *Insolvency*

Act 1986 where the directors or employees of an insolvent company are unwilling to assist its liquidator.

SUMMARY JUDGMENT

Under RSC O. 14, r. 4(4)(b) the court has power, on an application for summary judgment, to order the cross-examination of the defendant. This power is rarely used. It may become more appropriate for witnesses to be cross-examined on their affidavits when Lord Woolf's recommendations come into effect and either party can apply for judgment on the basis that the other has no prospect of success on the claim or defence. Sections 9 and 10 of the *Defamation Act* 1996 which, when they come into force, will give the court power to grant summary judgment in defamation proceedings, expressly contemplate oral evidence being given in appropriate cases.

There are parallels here with the procedure:

- in the Magistrates' Courts (under the *Magistrates' Courts Act* 1980) where examining justices may refuse, where there is no case to answer, to commit a defendant in criminal proceedings to the Crown Court; and
- in the Crown Court where, by s. 6 of the *Criminal Justice Act* 1987, a defendant may apply for dismissal of the charges if the evidence would not be sufficient for a jury to convict him.

OBSTRUCTION BY WITNESS

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OTHER CASES

In most other cases deposing witnesses in advance of the trial may be a pointless exercise. They will only have to testify again at the trial, so that the judge can form his own view of their evidence. In any event, it will only be at the trial that the issues in the action will have been fully formulated to enable the advocate for the opposing party to decide how to conduct his cross-examination.

There will be exceptions however. Civil procedure in 1998 would be almost unrecognisable to Sir George Jessel. It cannot always be right that the answer to the $64,000 question – how are the witnesses going to perform – should invariably not be answered until the trial of the action.

A complex commercial action involving numerous issues and lasting many weeks may nevertheless ultimately turn on the evidence of one witness or a small number of factual or expert witnesses. Judges frequently complain that the statements or reports of such witnesses are carefully crafted by the lawyers. It may serve a useful purpose to give the other side's lawyers access to such witnesses in advance of the trial, so that they can get some idea whether the witnesses will come up to proof, how much scope there is for cross-examination, and how these factors affect the advice they give to their clients as to the continued prosecution of the claim and as to whether attempts at settlement should be made.

There is also much to be said for getting the litigants and their witnesses more involved in interlocutory proceedings which, in England, mostly consist of different ways for lawyers to argue with each other or send each other carefully reprocessed information or documents.

CONCLUSION

Pre-trial depositions will never assume the importance in England that they do in North America. Civil procedure must, however, be as flexible as possible. Lessons should be learned from overseas systems of justice. The fact that a procedure is open to abuse is no reason for it not to be used in appropriate circumstances and when judges, working within a system of case management, are confident that they can restrain excess of enthusiasm on the part of litigants and lawyers.

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on the internet

http://lawlounge.com/topics/public/government/europe/uk/woolf.htm

The full text of the Woolf Report is available on this site.